



Shareholders and Directors' Disputes – A way forward Author: Lesly Ann Cho

Disputes between shareholders and directors are common place and can take shapes of varying degrees and scope. They often involve disagreements with respect to control over the direction, management or operation of a business, access to the company's books and records, declaring dividends and breaches of fiduciary duties, just to name a few.

Depending on the circumstances and the overall commercial objectives of the shareholders and directors involved, there are various ways to address and resolve shareholders and directors' disputes. These include:

- through the terms of a Shareholders' Agreement;
- bringing oppression proceedings;
- bringing a derivative action; and
- other redress under the *Corporations Act 2001* ("Corporations Act").

Shareholders' Agreements

A Shareholders' Agreement is a legally binding document between the shareholders of a company and outlines their respective rights, responsibilities and obligations with respect to each other and the relevant company.

A Shareholders' Agreement typically contains provisions as to:

- the ownership and shareholding of each shareholder;
- the rights and privileges of shareholders, such as voting rights, right to information, dividend preferences;
- the management of the company and the decision-making processes and procedures;
- the conditions and restrictions for the sale or transfer of shares;
- exit strategies, including the sale of the company and buyout of shareholders;
- dispute resolution procedures that often need to be complied with before going to Court; and
- the processes and procedures to follow in the event of a dead-lock.

As such, a Shareholders' Agreement can be a one-stop shop to resolve shareholders and directors' disputes; it often identifies the source of a dispute (e.g. a breach of an express or implied obligation), and the steps that can then be taken in order to resolve it. For example, a Shareholders' Agreement can allow for a forced buy-out of a shareholder in the event that that shareholder has acted in a way that has caused damage to the company or has brought it into disrepute.

Oppression proceedings

Oppression proceedings provide a legal remedy for shareholders whose interests have been unfairly prejudiced, discriminated or oppressed through the conduct of a company's affairs, an act or omission by the company, or from any past or proposed resolution of its members. Central to an oppression claim is demonstrating commercial unfairness towards a particular shareholder.

Oppressive conduct commonly complained of includes:

- exclusion from the management of the company;
- restricting or prohibiting access to company information;
- improperly diverting business opportunities away from the company;
- paying excessive remuneration to a director;
- unfairly restricting dividends;
- diluting shareholdings; or
- misappropriating company funds.

Who can bring a claim?

Shareholders of a company can bring a claim for oppression against another shareholder/director of a company. Former shareholders can also bring a claim if the conduct complained of relates to the circumstances in which they ceased to be a shareholder. For example, a person who was removed from the register of members can bring a claim if the complaint relates to that person's removal due to a selective reduction in the issued share capital of the company.

Oppression claims are not limited to minority shareholdings. For example, a majority shareholder may bring an oppression claim where the control and management of the company is in the hands of a minority shareholder.

What relief is available from the Court?

Section 233 of the Corporations Act grants the Court a wide discretion to make certain orders where oppression is made out. The orders made are typically aimed at remedying the unfair prejudice or oppression suffered by the relevant shareholder and can include any of the following:

- the sale or buyout of shares – the Court can make an order for the company, another shareholder, or a third-party to purchase the aggrieved shareholders' shares. The price for the shares may also be determined by the Court, and is usually assessed at market value;
- regulate the company's affairs – the Court may make an order to regulate the conduct of the company's affairs in the future, and can require a person to do a specific act or restrain a person from engaging in a specific conduct or doing a specific act;
- modify or repeal a company's constitution;
- appoint a receiver over the company's property;
- allow a shareholder to bring a derivative action; or
- wind up the company – this relief is used as a last resort; a Court will be reluctant to wind up an otherwise solvent company.

Derivative Action

A derivative action is available to existing and former shareholders and directors where the conduct complained of is not oppressive, but has otherwise caused harm to a company (e.g. through financial loss or diverting business opportunities).

A derivative action is where a shareholder steps into the shoes of the company in order to bring a claim against the offending director and/or shareholder for conduct that results to damages suffered by a company. In those circumstances, the proper plaintiff to bring such a claim is the company, as the shareholder would not have suffered the relevant loss directly. To this end, section 236 of the Corporations Act permits a shareholder or a director of a company to bring proceedings on behalf of a company, or intervene in any proceedings to which the company is a party, for the purpose of taking responsibility for those proceedings on behalf of the company.

In order to bring a derivative action, the person proposing to bring the claim must satisfy the Court that:

- it is probable that the company itself will not bring the proceedings or properly take responsibility for them;
- the applicant is acting in good faith and that it is in the best interest of the company to bring the claim;
- it is probable that they would be entitled to the relief claimed if the matter proceeded to trial based on the known factual circumstances at the time; and
- the company was given at least 14 days' written notice of the intention of, and reasons for bringing the derivative claim proposed.

Request for information under the Corporations Act

If the conduct complained of relates to the provision of company information, then there are several provisions under the Corporations Act that entitles existing and former shareholders or directors the right to access them. For example:

- section 198F allows a director to inspect the company's books (other than its financial records) for the purposes of legal proceedings. This right to access continues for 7 years after the person has ceased to be a director of the company.
- section 247A allows the Court to authorise a shareholder to inspect the company's books in circumstances where that shareholder is acting in good faith and that the proposed inspection is to be made for a proper purpose, which includes bringing a derivative action on behalf of the company.
- section 290 provides a director of a company personal access to the financial records of a company at all reasonable times.

A combined approach

A combination of the above approaches is often traversed when navigating through shareholders and directors' disputes. Depending on the circumstances, oppression proceedings can be brought at the same time as bringing an application for a derivative action and/or access to company records. More often than not, such Court action becomes necessary following an irreconcilable dispute with respect to the interpretation or enforcement of the terms of a Shareholders' Agreement. Ultimately, the strategy employed is dependent on the circumstances of each case and the overall objectives of the parties involved.

If you would like further information or require assistance with respect to any existing or pending director and shareholder disputes, please contact [Lesly Ann Cho](#), Partner, or your usual ClarkeKann contact.