

## **Alert** | UK Civil Fraud & Business Disputes



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### **Unfair Prejudice Petitions in the UK: Conduct of the Affairs of the Company is King**

**This GT Alert covers the following:**

- Minority Shareholders
- Unfair Prejudice Petitions
- Personal conduct must be causally connected to the conduct of the affairs of the company

The Court of Appeal has clarified that to succeed on an unfair prejudice petition, the petitioner must demonstrate the unfair prejudice results from the conduct of the affairs of the company (*Primekings Holding Limited and others v Anthony King, James King and Susan King [2021] EWCA Civ 1943*). Any allegations relating to the respondent's personal conduct will succeed only if that conduct can be shown to be causally connected to the conduct of the affairs of the company. A mere link between the two will not suffice.

#### **Unfair Prejudice Petitions: A Remedy for the Minority Shareholder**

Unfair prejudice petitions are a useful tool for the aggrieved minority shareholder. Under section 994 of the Companies Act 2006, a shareholder may bring an unfair prejudice petition if:

- (a) the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of the shareholders generally or some of them (including at least the petitioner), or
- (b) an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

If the court is satisfied that the petition is well-founded, it has a wide discretion to make such order as it thinks fit. This includes an order to:

1. regulate the conduct of the company's affairs;
2. require the company-
  - a. to refrain from doing or continuing an act complained of, or
  - b. to do an act that the petitioner has complained it has omitted to do;
3. authorise civil proceedings to be brought in the name and on behalf of the company by such person(s) on such terms as the court may direct;
4. require the company not to make any, or any specified, alterations in its articles without the leave of the court;
5. provide for the purchase of the petitioner's shares by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.

Unfair prejudice petitions often are brought for prejudice caused by breaches of fiduciary duty, the misuse or misappropriation of company assets, the procurement of an allotment of shares to dilute a minority shareholder's interests, the failure to pay dividends (in certain circumstances) and exclusion of the petitioner from management.

When deciding whether to grant relief, the court will consider the interests of creditors and other relevant third parties and, in the case of an order for the purchase of shares by the company, the implications of diminishing the company's assets or increasing its indebtedness. The court will also have regard to the petitioner's own conduct and the conduct which has occurred since the petition was presented.

The key considerations are: (i) the act or omission complained of must consist of the conduct of the affairs of the company, and (ii) the conduct of those affairs must have caused unfair prejudice to the interests of the petitioner as shareholder.

A respondent to an unfair prejudice petition may be able to rely on one or more of the following bars to relief by way of defence or in support of an application to strike out the petition:

- 1) refusal by the petitioner of a fair offer to purchase his shares;
- 2) express provision for an exit route in the company's articles of association or in a shareholder agreement which the petition seeks to circumvent;

- 3) petitioner misconduct such that the prejudicial acts or omissions complained of are not regarded as unfair; and
- 4) delay in presenting the petition or acquiescence in the alleged unfairly prejudicial conduct.

Although the court has a wide discretion to make whatever order it considers appropriate, the most common remedy is an order requiring the wrongdoing shareholder(s) to purchase the minority shareholding of the petitioner. The valuation of the petitioner's shares is normally determined on the basis of expert evidence adduced by the petitioner and respondent, with regard to industry-specific considerations.

Once a market value is arrived at, it may be subject to various adjustments including:

- (1) any reduction in the value of the shareholding caused by the unfairly prejudicial conduct will be ignored, and the purchase price may be increased to take account of the unfairly prejudicial conduct;
- (2) adding back in excessive remuneration, accounting for unpaid dividends and restoring misappropriated assets;
- (3) the possible application of a discount to reflect a petitioner's minority interest.

### ***Primekings Holding Limited and others v King and others - Background***

The Kings (the Petitioners and Respondents to the Appeal) were minority shareholders in Primekings Holding Limited (the "Company" and, together with the Company directors, the "Appellants"). The Kings alleged that the Appellants had conducted the affairs of the Company in a manner which was unfairly prejudicial to the Kings' interests. Specifically the Kings argued that the Appellants' conduct formed part of a campaign to deprive the Kings of their shares, to exclude them from the business of the Company and to deprive them of their ability to vindicate their legal rights. The Kings sought an order for the buy-out of their shares on a pro rata basis without any discount for their minority interests. The Points of Claim in support of their petition also included various allegations of personal conduct by the Company directors relating to the conduct of distinct costs proceedings against the Kings connected to a discontinued misrepresentation claim brought by the Kings relating to a transaction in December 2013. The Company and its directors sought to strike out those parts of the Points of Claim on the basis that those allegations could not amount to conduct of the affairs of the Company. Their application was refused at first instance. The Company and its directors appealed.

### **The Appeal**

The main issue in the appeal was whether, and if so, in what circumstances, it is permissible to include allegations of personal conduct by the respondents to the petition which are not, of themselves, within the scope of conduct of the affairs of the company under section 994 of the Companies Act 2006. Applying *Graham v Every* [2015] 1 BCLC 41, the Court of Appeal found that a causal connection must be present between the personal actions of the respondent (in this case the Company's directors) and some other act or omission constituting conduct of the company's affairs within section 994 of the Companies Act 2006. The Court of Appeal found no justification for allowing other allegations of personal conduct of the respondents which are not causally connected to an act or omission of the company or not causally connected to conduct of the affairs of the company to be included in the statement of case. Whilst the Judge at first instance had correctly analysed the law in *Graham v Every*, he erred in his application of it

to the disputed allegations in the Points of Claim by reformulating the requirement in *Graham v Every* as a requirement for the petitioners to show “a clear link **or** causal connection” [emphasis added] between the personal actions of the directors and the conduct of the affairs of the Company.

The Court of Appeal also emphasised the need for careful identification of what can properly be included in a petition or statement of case under section 994. The Court of Appeal criticised the Points of Claim for being extensive (rather than concise), repetitive and drafted in a narrative and at times hyperbolic style “more reminiscent of an advocacy piece for the opening of a trial”. Moreover, the Court found that the Points of Claim frequently did not differentiate between the essential elements of a petition under section 994 and contained an “inappropriate” general assertion that the matters set out constituted unfairly prejudicial conduct of the affairs of the Company.

## Conclusion

Unfair prejudice petitions are notoriously fact-heavy and can contain a host of allegations spanning several years. When an individual feels aggrieved at the way they have been treated, it is easy to lose sight of the specific issues in dispute and seek to introduce all manner of complaints. This is particularly the case where parties are also accusing each other of wrongdoing and/or fraud in parallel proceedings. The result can lead to acrimonious proceedings and a costly, lengthy and uncertain trial. The decision provides a welcome reminder of the proper scope of the unfair prejudice jurisdiction under section 994 and gives greater clarity for directors and shareholders faced with a range of broad allegations against them – not all of which may be causally connected to the conduct of the affairs of the company. Points of Claim which include allegations of personal conduct (rather than conduct of the affairs of the company or conduct which is causally connected to it) risk distracting from what may otherwise be a good claim. Such points may in turn be at risk of being struck out and could also result in adverse costs consequences.

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