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Supreme Court takes alternate approach to shareholder disputes

Background

Many small to medium sized businesses face disputes between shareholders, who can often be family members. These shareholder disputes can be very expensive to resolve and typically take the form of "oppression" claims commenced in the Supreme Court of Victoria, under the provisions of s 233 of the *Corporations Act 2001* (Cth). Although individual disputes differ, they all have in common allegations that the affairs of a company have been conducted in an oppressive manner.

Oppression claims are commonly instituted by minority shareholders where they believe:

- they have been "shut out" of the company's decision making process; and/or
- the majority shareholders have been making decisions for the benefit of some, rather than all of the shareholders.

Examples of specific conduct giving rise to a potential oppression claim include:

- the misuse of company funds;
- payment of excessive remuneration to directors or their associates;
- exclusion from management and meetings;
- refusing to allow access to company information; and
- the issue of additional shares for the purpose of diluting a shareholding.

Oppression claims are particularly common in family companies, where decisions are often made with both personal and commercial objectives.

Oppression claims are commenced by way of originating process. Previously, a plaintiff wishing to file an oppression claim was required to submit a detailed affidavit outlining the facts of the alleged oppressive conduct, and exhibiting a suite of supporting materials. These affidavits can be extremely lengthy and expensive to prepare. The time and cost associated with instituting and defending oppression claims can place considerable strain on shareholders, and the resulting uncertainty can have an adverse effect on any business undertaken by the company.

Pilot Programme

On 1 October 2014, the Supreme Court of Victoria introduced a "pilot programme" to deal with oppression cases.

Under this programme, the plaintiff is only required to submit a single affidavit (limited to three page in length) to summarise their claim, without the need to file substantial materials with this original application. Once the application is filed, the parties and their lawyers will attend an initial conference before an Associate Justice to determine if the dispute can be resolved before the parties incur substantial legal costs.

If the dispute cannot be resolved at this initial conference, orders will be made by the Associate Justice, including:

- permitting the plaintiff access to the company's books;
- a valuation of the company be conducted (if necessary); and
- for a mediation to be held.

Analysis

The program defers the majority of the work in preparing and reviewing substantial affidavit material until after mediation has occurred, instead of appointing an independent 'referee' to try to facilitate a commercial resolution. If the dispute can be resolved at either the initial conference or subsequent mediation, the associated cost and time savings may be substantial. Furthermore, Associate Justices can order valuations, further discovery and other interlocutory steps to keep a mediation going. Such powers are unavailable to private, non-court appointed mediators and this may result in settlement negotiations breaking down.

In our view, the pilot programme is a positive step and is likely to reduce the costs to both parties involved an oppression claim.

The programme is scheduled to be reviewed in six months.

For more information about this case or shareholder disputes, please contact:

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