

Fair play in shareholder disputes

Like partnership disputes, shareholder disputes can be the commercial equivalent of a long, vindictive and very expensive divorce. Without proper consideration of the effect on the very asset that is being fought over parties will threaten petitions to the Court for what is usually referred to as "the appropriate relief".

What is "the appropriate relief"? It is established that wherever possible a Court will try to effect a "clean break" between the warring parties in a way which is most likely to leave the business in a position to survive. The most common, and most obvious, remedy is to require one party to purchase the other's shares at a fair value.

With the Courts now anxious to ensure that parties attempt to resolve their differences without recourse to litigation the "fair offer" letter has become an increasingly used early warning mechanism. This is an open letter sent by one party to the other offering to buy the other party's shares or to sell its shares to the other party at a fair value, setting out the precise mechanism and terms which are proposed and demonstrating that, if the matter proceeds to trial, it is unlikely that a Court could come up with an Order in substantially different terms.

If the recipient of such a fair offer letter continues to threaten or pursue a petition nonetheless he does so at a very real risk of being faced with an application to strike out the petition, together with an Order for Costs. If the recipient is the party against whom the petition is being pursued, failure to take heed of the fair offer letter may well be met with an application for proceedings to be put on hold until a valuation is obtained, again coupled with a request for an Order for Costs.

The Offer Letter

Although the Court will look at each case on its own facts, cases (such as the 1999 case of **O'Neil -v- Phillips**) do give some indication of what it is considered appropriate to include in such a letter:

- An offer to purchase or sell the shares at a fair value (it is suggested that this should usually be on the basis that there is no discount for the fact that it may be a minority shareholding).
- Confirmation that if a fair value cannot be agreed, this should be determined by an appropriate expert.
- Confirmation that each party will provide full and frank disclosure to the expert and not withhold any information even though this might prejudice its own position.
- Where appropriate, provision for the payment of the minority shareholder's costs and the costs of obtaining the expert valuation.

In the context of the letter being seen to be fair it is important to consider potential objections which might be raised and to deal with them at the outset. Examples include, but are not limited to, selection of the expert, instructions to the expert, asking questions of the expert or providing information to him/her, being represented by solicitors and/or accountants and guaranteeing transparency at all times.

No one letter can fit every conceivable circumstance and thought must be given to the specific issues in any particular case. The overriding objective however is to be seen to be playing fair not only by the other side but also by the Court. The risk that a Court is likely to find that you had made a

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Fair play in shareholder disputes (continued)

fair offer is what is most likely to bring the other party to the negotiating table.

This information sheet has been prepared to highlight some key issues relating to shareholding disputes. It is intended to be for general guidance only and is not a substitute for specific advice. It is based upon our understanding of the legal position as at January 2009 and may be affected by subsequent changes in the law.

Should you require any specific legal advice on the issues covered, please contact Kamal K Aggarwal by email at kamal.aggarwal@ts-p.co.uk or call Kamal on 01322 623700.

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