

BRIEFING

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## Minority shareholders settle the score in High Court action

### Introduction

The thorny issue of minority shareholders' rights is back in the spotlight following the handing down on 6 November 2017 of the lengthy judgment of the High Court in the bitter battle between the majority shareholders and a significant minority shareholder in Blackpool Football Club Limited ("Blackpool FC").

The judgment, in *VB Football Assets v Blackpool Football Club (Properties) Limited and others*<sup>1</sup>, is a reminder of the rights of minority shareholders and the remedies that are available to them where those rights are infringed.

### VB Football Assets v Blackpool Football Club (Properties) Limited

#### The shareholders and directors

Blackpool FC, formed in 1887, became a limited company in 1896. Its shares<sup>2</sup>, prior to June 2006, were owned as to 4.64% by 192 individual shareholders and as to 95.36% by Blackpool Football Club (Properties) Limited (formerly Segesta Limited) ("**Segesta**"). The majority (97.2%) of Segesta's shares were owned by Owen Oyston.

In June 2006 VB Football Assets, a Latvian registered company, acquired 7,500 newly issued ordinary shares in Blackpool FC pursuant to an agreement in writing dated 5 June 2006, for a

consideration of £1.8 million. Although the judgment addresses in detail other agreements and alleged agreements, and loans to Segesta totalling £2.7 million, these are not considered in this briefing.

Between June 2006 and December 2013 VB Football Assets was 100% owned by businessman Valeri Belokon, well known as the founder of JSC Baltic International Bank. Since 2013 the shares in VB Football Assets were acquired by AS BFFH, in turn owned by Valeri Belokon and his brother Vilori Belokon equally.

Following the 2006 share subscription, the owners of the shares in Blackpool FC were the minor shareholders (3.71%), Segesta (76.29%) and VB Football Assets (20%)<sup>3</sup>. Blackpool FC's directors were Owen Oyston, Karl Oyston (chairman and son of Owen), Vicki Oyston (wife of Owen, who had an inactive role), and Gavin Steele, who are described in the judgment as "**the Oyston Side**"; and Valeri Belokon, and his employee, Normunds Malnacs ("**the Belokon Side**").

#### Foul play

Relations between the Belokon Side and the Oyston Side in terms of the running of Blackpool FC were essentially harmonious until 2010. Blackpool FC was then in the Championship division of English football, seeking promotion to the top flight Premier League. There is a vast

<sup>1</sup> [2017] EWHC 2767 (Ch)

<sup>2</sup> 30,000 £1 ordinary shares

<sup>3</sup> The judgment considers whether a series of written, unwritten and informal agreements, including loans to Segesta of £2.7 million, meant that Segesta and VB Football Assets' shareholding was, in fact, equal

difference in monetary distributions to clubs in each division. In Blackpool FC's four seasons in the Championship from 2011/12 to 2014/15 it received £3.55 million per annum (plus "parachute" payments), in contrast to its receipt of almost £43 million in its single season (2010/2011) in the Premier League.

The massive influx of money into Blackpool FC was the catalyst for disharmony and substantial disagreement between the Oyston Side and the Belokon Side over how the money received by Blackpool FC should be used.

As described above, Blackpool FC is part of a group of private companies that share a common owner - Owen Oyston - and also common advisors and directors. Whilst that is not uncommon, it can lead to blurring of the distinction between the companies and the duties owed in respect of them.

Chapter 2 of the Companies Act 2006 ("**the Act**") prescribes the general duties that a director owes to his company, including the duty:

- to act within his powers and to exercise those powers for a proper purpose (section 171 of the Act);
- to promote the success of the company for the benefit of its members as a whole (section 172 of the Act);
- to exercise reasonable care, skill and diligence (section 174 of the Act); and
- to avoid placing himself in a position of conflicting personal interests (section 175 of the Act).

In anticipation of the receipt by Blackpool FC of significant sums, Owen Oyston proposed in May 2010, recorded in minutes, that he and Mr Belokon "should each have a facility between £3m and £5m". The Judge found that this proposal, to which Mr Belokon did not agree, was motivated by financial pressure faced by Owen Oyston following a finding of the First-tier Tribunal (Tax)<sup>4</sup> which exposed him to a charge to tax of several million pounds. In spite of Mr Belokon's failure to agree,

the Oyston Side took steps, as found by the Judge, to circumvent it with the aim of "getting money out of Blackpool FC".

Ultimately the disagreement between the two sides led to the claim by VB Football Assets that the affairs of Blackpool FC have been conducted by Segesta and Messrs Oyston in a manner that is unfairly prejudicial to the interests of VB Football Assets as a member of Blackpool FC by reason of:

- the making of substantial payments out of Blackpool FC which were improper, being payments made without the consent of VB Football Assets, and/or were for the personal benefit of Owen Oyston and/or Karl Oyston;
- the failure of Blackpool FC to pay dividends to its shareholders;
- the exclusion of VB Football Assets from management of Blackpool FC, through the withholding of material information from the Belokon Side and the making of decisions outside of board meetings; and
- the adoption by Blackpool FC of new articles of association.

#### The law of unfair prejudice

Section 994 of the Companies Act 2006 provides:

*"(1) A member of a company may apply to the court by petition for an order under this Part on the ground-*

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

*(1A) For the purposes of subsection (1)(a), a removal of the company's auditor from office-*

<sup>4</sup> Segesta Limited v The Commissioners for Her Majesty's Revenue and Customs [2010] UKFTT 235 (TC)

- (a) *on grounds of divergence of opinions on accounting treatments or audit procedures, or*
- (b) *on any other improper grounds, shall be treated as being unfairly prejudicial to the interests of some of the company's members."*

For VB Football Assets' claim to succeed, it therefore had to demonstrate: (i) that it is a member/shareholder of Blackpool FC; (ii) that the acts or omissions of which it complains consist of the management of the affairs of Blackpool FC; (iii) that the conduct of those affairs has caused prejudice to its interests as a member of Blackpool FC; and (iv) that the prejudice is unfair.

Having met the member threshold, the court had to consider whether the matters complained of amount to acts/omissions concerning the affairs of the company within the meaning of section 994. The judgment records that the law is clear that all three terms – "acts", "omissions" and "affairs" – are to be widely and liberally construed.<sup>5</sup> The judgment makes clear that the conduct must be "prejudicial" and "unfair"<sup>6</sup> to the interests of the company's members generally or some part of its members.

The requirement of "prejudice" is to be liberally construed. In *O'Neill v Phillips*<sup>7</sup>, Lord Hoffmann said that *"the requirement that prejudice must be suffered as a member should not be too narrowly or technically construed"*.

As to "fairness", the Honourable Mr. Justice Marcus Smith states: *"Fairness is obviously a flexible concept, but it must "be applied judicially and the content which it is given by the courts must be based on rational principle"*<sup>8</sup>. The court found that the interests of a member are not limited to his strict legal rights under either the constitution of the company or under collateral agreements. *"The use of word 'unfairly' ...enables*

<sup>5</sup> See *Re Unisoft Group Limited (No. 3)* [1994] BCLC 609 at 611 and *Re Neath Rugby Limited (No. 2)* [2009] EWCA Civ 291, [2009] 2 BCLC 427 at [50]

<sup>6</sup> Neill L.J in *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 31: *"The conduct must be both prejudicial in the sense of causing prejudice or harm to the relevant interest) and also unfairly so; conduct may be unfair without being prejudicial or prejudicial without being unfair, and it is not sufficient if the conduct satisfies only one of those tests..."*

<sup>7</sup> [1999] 1 BCLC 1 at 15

<sup>8</sup> Per Lord Hoffmann in *O'Neill v Phillips* [1999] 2 BCLC 1 at 7

*the court to have regard to wider equitable considerations..."*<sup>9</sup>.

Having found that (i) the making of substantial payments, (ii) the failure to pay dividends, (iii) the exclusion of VB Football Assets from the management of Blackpool FC, and (iv) the adoption of new articles of association would constitute acts/omissions within the meaning of section 994, and, further, that they relate to the conduct of Blackpool FC's "affairs" within the meaning of section 994, it then fell to the court to consider the specific allegations and make findings of fact. The judgment addresses in great detail the oral and documentary evidence concerning these issues, and although they reveal startling details of an increasingly acrimonious relationship between the Belokon Side and the Oyston Side, for the purposes of this briefing note only the Judge's findings of fact are relevant.

#### The payments

In relation to the complaint that substantial payments were made out of Blackpool FC which were improper, the court made the following findings.

A series of irregular and undocumented payments were made, totalling £2.5 million which were unjustifiable in that they were not made for the benefit of Blackpool FC, but were for the benefit of the Oyston Side.

On 17 September 2010 a payment of £4,200,604 was made out of Blackpool FC to Segesta without the consent of the Belokon Side. That payment was in respect of a debt owed to Protoplan Limited ("**Protoplan**"), a construction company that the court inferred was substantially owned and controlled by Owen Oyston. Although Protoplan carried out work on the Blackpool FC stadium, the stadium was itself owned by Segesta and Blackpool FC was under no obligation to make the payment and derived no benefit from it.

On 24 February 2011 and 30 August 2011 two payments totalling £8,125,023 were made out of Blackpool FC to Segesta in the face of opposition from the Belokon Side. These payments were in respect of a Travelodge hotel near to the Blackpool FC stadium, also owned by Segesta,

<sup>9</sup> *Re A Company (No. 00477 of 1986)* [1986] BCLC 376 at 378-379

which enabled Segesta to discharge the secured commercial loan over the property. Although the payment was structured as a loan from Blackpool FC to Segesta that provided for payment of interest and repayment of capital, the repayment was expressly at Segesta's absolute discretion, a provision that would render it uncommercial. Even assuming that Segesta did repay the loan, the arrangement (the replacement of secured commercial lending with the Blackpool FC loan) meant that Owen Oyston received rent from the Travelodge's tenant of £451,448 per annum, while having to pay interest to Blackpool FC of only £250,000 per annum.

On 30 August 2011 a payment of £944,652 was made out of Blackpool FC to Segesta in respect of a debt owed by Segesta to Zabaxe Limited ("**Zabaxe**"), a service company in the Oyston group of companies owned 100% by Owen Oyston.

On 21 February 2012 a payment of £11 million was made out of Blackpool FC to Zabaxe. This was originally described as "director's remuneration" due to Owen Oyston for "past services" but following an intervention by HMRC was described as an indemnification of Zabaxe in relation to past costs incurred by it on behalf of Blackpool FC. The payment was made in spite of vigorous opposition on the Belokon Side. The court found that the above payments, totalling approximately £26.77 million, were hidden or disguised dividends to the Oyston Side and were unfairly prejudicial to the interests of VB Football Assets within section 994 of the Act.

#### The failure to pay dividends

The judgment recognises that the declaration of dividends is a matter within the discretion of the directors of a company and that a court should be slow to substitute its decision for that of the directors. Although the court found that the payments described above were disguised or hidden dividends, it recognised that those payments amounted to unfairly prejudicial conduct because no dividend was paid to the Belokon side or to the minor shareholders. The method by which the Oyston Side made the payments had the effect of enriching itself, prejudicing Blackpool FC and behaving in a discriminatory manner towards the other members.

#### Exclusion from the company

The court found, for reasons not explored in this briefing note, that VB Football Assets had a legitimate expectation that it was entitled to be treated as an equal partner in the governance of Blackpool FC. Until May 2010, the Belokon Side may have been so treated, but when it became clear to the Oyston Side that the Belokon Side was not going to agree to using the Premier League money that Blackpool FC was to receive, for non-football related purposes, the Belokon Side was actively excluded from decisions where the Oyston Side anticipated that the Belokon Side would not agree with their proposals.

The Judge found that this amounted to conduct that was unfairly prejudicial to the interests of VB Football Assets.

#### The alteration of the Articles of Association

Karl Oyston, using his casting vote as chairman of Blackpool FC, approved the circulation of a special resolution to shareholders seeking the approval of the adoption of draft New Articles of Association, which the Belokon Side were opposed to, because in their view they "favoured the majority shareholder and treated minority shareholders unfairly". On 9 July 2014 the New Articles were adopted with the passing of a written special resolution. It transpired that the packs containing the written special resolution were sent to shareholders on 8 July 2014, but the pack intended for VB Football Assets was not received, having been sent to an incorrect address. The Judge concluded that the changes made by the New Articles of Association cannot be said to be so clearly unfair to VB Football Assets as to constitute unfairly prejudicial conduct to the detriment of the interests of VB Football Assets in Blackpool FC. This is a reminder of the high threshold to be met.

#### Relief granted to VB Football Assets – the Oyston own goal

Having found that VB Football Assets' petition was well-founded, the court had to determine the relief to be granted. Section 994 of the Act provides:

*"(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it*

*thinks fit for giving relief in respect of the matters complained of.*

*(2) Without prejudice to the generality of subsection (1), the court's order may-*

- (a) regulate the conduct of the company's affairs in future;*
- (b) require the company-
  - (i) to refrain from doing or continuing an act complained of, or*
  - (ii) to do an act that the petitioner has complained it has omitted to do;**
- (c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;*
- (d) require the company not to make any, or any specified, alterations in its articles without the leave of the court*
- (e) provide for the purchase of the shares of any members of the company 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."*

This provision confers on the court a very wide discretion.

In this case, the court considered that the appropriate order for relief was an order that Segesta and Messrs Oyston buy out VB Football Assets' interest in Blackpool FC, at a price of £31.27 million, a figure which reflected the quantum of the disguised dividend payments of £26.77 million and a repayment of the £4.5 million paid by VB Football Assets to acquire its shareholding.

### **Conclusion**

This judgment is a reminder to directors to act in accordance with their duties enshrined in the Act. Acts or omissions concerning the affairs of the company which are prejudicial and unfair to the interests of the company's members generally or some part of its members may become the subject

of an unfair prejudice petition in which the court has wide discretion to level the playing field, with costly consequences.

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