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BRIEFING
OCTOBER 2014

Shareholder rights to access company information: Lost in Nottingham Forest

Against a backdrop of increasing concern about (or, depending on one's perspective, enthusiasm for) shareholder activism, several clients have been asking us what rights shareholders have to obtain confidential or privileged information from a company. The uncertainty may stem from the High Court's decision in *CAS (Nominees) Ltd v Nottingham Forest FC Plc*.[1] In this note, we clarify the implications of the *Nottingham Forest* decision and offer some concluding remarks about litigation as a strategy for shareholder activism.

Nottingham Forest involved an unfair prejudice petition brought by a shareholder. During the disclosure phase of the proceedings, the shareholder requested copies of legal advice obtained by the board not in respect of the unfair prejudice petition itself, but in respect of the particular transaction that gave the shareholder reason to complain. The shareholder based its disclosure request on a line of cases establishing that a company cannot claim privilege against its own shareholders in respect of legal advice, unless the advice was taken in contemplation of hostile litigation with that shareholder (the so-called "*Woodhouse* rule").[2] The court rejected the company's argument that the rule did not apply to public companies, and ordered the documents to be disclosed. The shareholder's claim at trial was ultimately unsuccessful.

The *Woodhouse* rule does not, however, establish an unconstrained, free-standing inspection right for shareholders. All of the cases, both before and after *Nottingham Forest*, and whether extending or confining the rule, involved litigation by the shareholder against the company or its officers, or governance disputes between shareholders. These include unfair prejudice petitions, petitions to wind up the company on the "just and equitable" ground, derivative actions (where the shareholders sue a third party or corporate officer on the company's behalf) and disputes about the meaning of the articles of association. It is notable that even *directors* must exercise their inspection rights only for a proper purpose, and that a shareholder's statutory right to inspect the register of members is similarly subject to a proper purpose requirement.[3]

Even in the context of litigation, the *Woodhouse* rule is subject to important caveats. Not only would the documents have to be relevant to the matter being litigated, but until the documents enter the public domain, the Civil Procedure Rules will protect against further disclosure or use for any purpose other than the litigation, unless the company agrees. These constraints limit a shareholder's ability to use the company's privileged or confidential documents for any collateral purpose. In certain circumstances, the court may also make an order restricting or prohibiting the use of a disclosed document, even where the document has entered the public domain by being used in open court.

In truth, the *Woodhouse* rule is simply a narrow exception to the general principle that privileged documents are protected from disclosure in the course of litigation. It does nothing to undermine two fundamental precepts of corporate law: that the company is an entity distinct from its shareholders, having rights of its own in respect of confidential and privileged information, and that the company is to be managed by and under the authority of its board of directors and not its shareholders. Statute, regulation and the company's articles of association set out exhaustively the limited circumstances in which shareholders are normally entitled to receive or access information. The articles of association of most companies explicitly deny shareholders the right to inspect company documents, except where ordered by a court, permitted by the board, or authorised by a shareholder resolution.

Shareholder activists seeking to influence corporate strategy are able to use existing channels, both formal and informal, to persuade the board to change course. Informally, and as they have always done, they can initiate dialogue with the board. Shareholder engagement and "responsible stewardship" are increasingly in vogue. Time will tell whether efforts to encourage institutional investors to act consensually through "Engagement Action Groups" will be fruitful, and whether foreign activists used to waging more hostile campaigns will adapt to, or rather leave their bruising imprint on, the U.K.'s more restrained and consensual approach.[4] Formally, shareholders can threaten to vote against the annual re-election of the board. With sufficient support, they can propose additional shareholder resolutions or even requisition their own shareholder meetings at the company's expense. More moderately, they can signal their displeasure by voting against the directors' remuneration policy. Both sides will use the media as their mouthpiece.

In the U.K., litigation is the shareholder activist's last resort. Courts will not come to the aid of activists espousing alternative views on corporate strategy or financial policy; and the "loser pays" rule, as well as procedural and substantive bars to unfair prejudice petitions and derivative actions, deter speculative claims. Law, regulation and corporate governance norms put the ultimate levers of power in the hands of shareholders in any event. The circumstances in which litigation would achieve anything for the activist that, if it could be achieved at all, could not be achieved by less arduous means, are difficult to imagine.

Even so, *Nottingham Forest* serves as a reminder that boards are not immune from challenge where they exceed their powers or breach their fiduciary duties. In litigation with a shareholder, the *Woodhouse* rule means that legal professional privilege may not be sufficient to prevent disclosure of relevant documents for the purpose of that litigation. Outside this very specific context, however, shareholders have no right to inspect a company's confidential or privileged information.

1 *CAS (Nominees) Ltd v Nottingham Forest FC Plc (Application for Disclosure)* [2001] 1 All E.R. 954.

2 The rule made the leap from trust law to corporate law in *Woodhouse and Co Ltd v Woodhouse* (1914) 30 TLR 559. In trust law, it had long been established that a trustee cannot claim privilege against a beneficiary in respect of legal advice taken by the trustee concerning the administration of the trust. In *Woodhouse*, the exception was applied to companies and their shareholders, by analogy.

3 *Oxford Legal Group Ltd v Sibbasbridge Services Plc* [2008] EWCA Civ 387 (directors); *Re Burry & Knight Ltd* [2014] EWCA Civ 604 (shareholders).

4 In 2013, the Collective Engagement Working Group (supported by the Investment Management Association, National Association of Pension Funds and Association of British Insurers) published its first report calling for the formation of Collective Engagement Groups (http://www.investmentuk.org/current-topics-of-interest/investor-forum).

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