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Case Comment

United Kingdom: power of court to order company meetings under Companies Act 2006 approved: Wheeler v Ross

David Gibbs

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Case: Wheeler v Ross [2011] EWHC 2527 (Ch) (Ch D)

I.C.C.L.R. N5 This item highlights the purpose of a s.306 application for the court to order a company meeting in light of *Wheeler v Ross* [2011] EWHC 2527 (ch). The case demonstrates that s.306 is a procedural mechanism designed to overcome practical difficulties normally caused by quoracy requirements and not designed to interfere with company or shareholder rights.

Facts

The Companies Act 2006 s.306 gives a court the power to order a meeting of a company in situations where it is:

"[I]mpracticable (a) to call a meeting of the company in any manner which meetings of that company may be called; (b) to conduct that meeting in the manner prescribed by the company's articles or this Act".

Furthermore, s.306(4) adds that:

"[S]uch directions may include a direction that one member of the company present at the meeting be deemed to constitute a quorum".

Wheeler is the second court approved company meeting under the new section. (The first was *Hussain v Wycombe Islamic Mission and Mosque Trust Ltd* [2011] EWHC 971 (Ch). This power has been available under previous Companies Acts: 1985 s.371; 1948 s.135; and 1929 s.115.) In the instance of *Wheeler* the company was deadlocked. The applicant (W) was the majority shareholder and one of the company's two directors. W had accused the respondent's (R) husband (X), who handled the company finances, of withdrawing money from the company without authorisation. X's daughter (Y) was also employed by the company and R was the company's other director, albeit having no active role, and minority shareholder. The relationship deteriorated and W dismissed X and Y for removing company property, among other matters. However, they continued to be active in the company and W served notice on the company and R of an extraordinary general meeting to ratify X and Y's dismissal and R's replacement as director. R did not respond as to whether they would attend, meaning the meeting would be inquorate under the company's articles. As a result W made the instant application under s.306.

Comment

Both cases of *Wheeler* and *Hussain* have offered a broad interpretation of the provisions under s.306. (See also *Re El Sombrero* [1958] Ch. 900 at 902 citing *Edinburgh Workmen's Houses Improvement Co Ltd* 1935 S.C. 56--impracticable is not synonymous with impossible.) In *Hussain,* at [63], the court found that there was:

I.C.C.L.R. N6 "No doubt that the purpose of the provisions contained in section 306 is to enable the court to give directions to overcome practical difficulties so that a company's affairs can be conducted where they might otherwise by stymied, and in my view the provisions can be interpreted broadly for that purpose."

Although R claimed that a court order approving a meeting would leave the control of the company in one person's hands, *Wheeler* took a similar approach, holding that:

“The purpose of the s306 order was to allow W to enforce his rights as majority shareholder by overcoming the deficiency in him holding an inquorate extraordinary general meeting; the order was merely one of the steps necessary to put the governance of the company in to a viable state.”

It is seen that in granting the s.306 order its purpose was to put the company's governance in order and by not doing so “the company's objectives could not be achieved unless it was placed under one party's control”. Although the result of ordering the meeting would effectively place the control of the company with W, R was reminded that she still had her rights and remedies as a minority shareholder under s.994 in relation to any misfeasance. *Wheeler* highlights the purpose of s.306 as a procedural section that ensures that the majority rule cannot be frustrated by quoracy requirements and the company can continue to function. Because a court orders a meeting it does not necessarily follow that a director will be removed, for example. The order allows the company to bring company governance into order. If the result of that meeting causes unfairly prejudicial conduct, a minority is protected under s.994. This approach and interpretation acknowledges the courts' reluctance to involve themselves with company decision-making. The court order effectively overcomes an internal irregularity of the company and such an order was not given to hold inquorate meetings in the future (see for example *Grant v United Kingdom Switchback Railways Co* (1889) L.R. 40 Ch. D. 135 CA at 138).

Despite the court's broad powers to authorise meetings, they must still be cautious in balancing the majority rule against the intentions of the parties when creating terms under the articles. Professor Davies has noted that on occasion it may be the intention of the parties to adopt quorum requirements in specific situations to create a deadlock (see P. Davies, *Gower and Davies' Principles of Modern Company Law,* 8th edn (London: Thomson/Sweet & Maxwell, 2008), p.444). Therefore the courts must be mindful of the parties' intentions which are “a matter of construction of the articles … so as to provide a context for an understanding of the quorum provisions” (Davies, *Gower and Davies' Principles of Modern Company Law,* p.444). However, in situations where there is an unequal shareholding and the majority rule is being frustrated by quoracy requirements, the order is likely to be available. In *El Sombrero* there was a similar situation to *Wheeler* where a shareholder with 900 of 1,000 shares wished to remove the two directors who owned the remaining 100. The directors refused to attend and the court ordered a one person meeting that should be considered quorate (see also *Ross v Telford* [1997] B.C.C. 945 (CA (Civ Div)) at 949; *Sticky Fingers Restaurant Ltd* [1991] B.C.C. 754 Ch D).

Limitations on the court's discretion seem to be currently limited to altering the balance of power (see *Ross v Telford*) and affecting substantive class rights (see *Harman v BML Group Ltd* [1994] B.C.C. 502 CA (Civ Div); *Alvona Developments Ltd v The Manhattan Loft Corp (AC) Ltd* [2006] B.C.C. 119 Ch D). Being able to avoid class rights through s.306 would negate valuable protection afforded to minorities (see Companies Act s.630; *Cumbrian Newspapers Group Ltd v Cumberland and Westmorland Herald Co Ltd* [1987] Ch. 1 Ch D).

I.C.C.L.R. N7 It must be remembered though, that the court's power is discretionary and fact sensitive. In *Wheeler,* for example, the court gave a variety of reasons for breaking the deadlock including: allowing the company to pursue its objectives, and that it was putting a valuable contract at risk. It may be foreseeable that even where a deadlock is purposely created this may be overcome by the majority claiming it is preventing company objectives being pursued. Whether commercial considerations should be a factor for a court to consider are central to many company law debates but are beyond the scope of this comment (see for example S. Bainbridge, “Independent Directors and the ALI Corporate Governance Project” (1992-93) 61 *George Washington Law Review* 1034). However, the rationale for the section and the crux of approving applications appears to be majority rule (see for example *Union Music Ltd v Watson* [2003] 1 B.C.L.C. 453 CA (Civ Div)).

What is apparent is that the court will take a broad approach to the provisions under s.306 where they feel the provisions under the articles are being exploited. This will enable the company to overcome practical difficulties created by either the articles, shareholder agreements or the Act.

David Gibbs

Research Student and Associate Tutor, UEA Law School, University of East Anglia

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