ALERT MEMORANDUM

UK Shareholder Activism and Battles for Corporate Control: Briefing Against the Board and Improper Disclosure of Confidential Information

May 7, 2019

The modus operandi of shareholder activism is to agitate for change, often involving campaigns to convince other shareholders to support proposals to change the composition of the board and the company's strategy.

Under UK law a shareholder activist, in its capacity as shareholder, can attack the board and its strategy in the press and in discussions with other shareholders free from the constraints of corporate law duties. However, in a recent UK High Court decision, *Stobart Group v Tinkler*[1], the High Court considered a number of issues which are pertinent to the criticism of boards by shareholder activists who have nominated a director to the board. This case is a clear warning of the risks to board nominees of shareholder activists who in furtherance of an activist campaign brief against the board in discussions with other shareholders and misuse the company's confidential information.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following author

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[1] 2019 EWHC 258

Background

A shareholder activist in a UK company does not, in its capacity as shareholder, generally owe corporate law duties, fiduciary or otherwise, which it must comply with in connection with its actions in respect of the company including in making public statements and in communicating with other shareholders[2].

The members of a board of a UK company are in a markedly different and more constrained position. A director of a UK company must comply with his or her general duties in communicating publicly and with shareholders including most notably:

1. The core duty of loyalty, which in the UK is the duty to act in good faith in a manner which he or she considers would be most likely to promote the success of the company for the benefit of its shareholders;
2. The duty to exercise independent judgement;
3. The duty to maintain the confidentiality of the company's confidential information; and
4. The duty to provide shareholders with sufficient information to enable them to make an informed decision as to how to vote when directors seek shareholder approval.

The duties referred to in 1 to 3 above are owed by directors to the company (not to shareholders directly). The duty referred to in 4 is an equitable duty owed by directors to shareholders directly (not to the company).

Stobart Group v Tinkler

This case involved Stobart Group ("**Stobart**"), a Guernsey company listed on the London Stock Exchange[3]. Tinker is a former CEO of Stobart and, at the time of the contested actions, was both a significant shareholder in, and a director of, Stobart.

Tinkler claimed that he had become frustrated with Stobart's strategy and a battle for control arose between Tinkler and Stobart's board. Tinkler and certain other Stobart shareholders ultimately proposed a resolution at a shareholder meeting of Stobart to remove the Chairman.

In connection with this battle, Stobart alleged that Tinkler had breached his duties as a director in "*briefing against the Board*" in his discussions with certain Stobart shareholders. Stobart alleged in particular that Tinkler had breached his duties as a director by:

— failing to put before the board the matters relating to board composition and strategy on which he disagreed; and

— undermining the board by taking those matters directly to certain major shareholders of Stobart.

Tinkler claimed in response that he had an obligation, by virtue of his duty as a director of Stobart to exercise independent judgement, to reach his own independent decision on matters arising for the board's consideration and was entitled in discussions with Stobart's major shareholders to disclose his views particularly if those views were directly solicited by shareholders.

The High Court however held that Tinkler had committed serious breaches of his directors' duties, in particular a breach of the core duty of loyalty to Stobart by:

— speaking to certain of Stobart's significant shareholders and, when doing so, criticizing the board's management and agitating for the removal of the Chairman of Stobart. Tinkler did this without having raised his concerns and criticisms with the board before speaking to those shareholders;

— emailing certain of Stobart's major shareholders and employees without prior approval of the board. It appears that the High Court would have accepted that, in his capacity as a shareholder, Tinkler was entitled to write to the other shareholders. However, the emails were written in

[2] This is in distinction to the position in certain other jurisdictions, where controlling shareholders are subject to fiduciary or similar duties.

[3] This case considered Guernsey law directors duties although it was accepted by the parties to this proceeding that the directors duties under English law were substantially similar in practice.

his capacity as "*Executive Director and Shareholder of Stobart Group Limited*" and they referred to matters which could only have been based upon knowledge acquired by him in his capacity as a director. In addition, the letters were seriously misleading; and

— disclosing certain confidential Stobart budgetary information to certain Stobart shareholders.

Notably, the High Court also held in its decision that:

1. The duty to exercise independent judgment does not give individual directors a licence to take unilateral decisions, independently of the board, in relation to matters that fall within the board's remit of management of the business; and
2. It is only as a member of the board that directors are entrusted with information about management matters such as company strategy. Therefore, any discussion by directors of those matters with shareholders should either be in the presence of the rest of the board or with the prior approval of the board.

Implications

This decision clearly highlights the risks to board nominees of shareholder activists of becoming involved in briefing against the board in discussions with shareholders in furtherance of an activist campaign. To comply with their directors' duties, those nominees would, to the extent the discussions relate to management matters, either need to have those discussions in the presence of the rest of the board or seek the board's prior approval.

The decision also highlights the risks to board nominees of shareholder activists of disclosing confidential management information to shareholders in furtherance of an activist campaign. Companies are often concerned that information disclosed to board nominees of shareholder activists will be disclosed to the appointing shareholder, other shareholders and ultimately 'leaked' into the wider investment community. To comply with their duties, those nominees would need to seek board approval for any such disclosures to shareholders relating to confidential management matters in furtherance of an activist campaign.

As an anecdotal matter, it seems that some of the duties the subject of this decision are more honoured in the breach than in the observance in activist campaigns. It remains to be seen whether practice in the UK market will change in light of this decision.

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