CAREY OLSEN

Bermuda's shareholder oppression remedy

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Section 111 of *Bermuda's Companies Act 1981* (**Act**) sets out the statutory basis for Bermuda's shareholder oppression remedy. The oppression remedy is one of several legal options available to aggrieved shareholders of Bermuda companies under Bermuda law. Section 111 generally allows a shareholder to seek the intervention of the Bermuda Supreme Court where a company is being run in a manner that is "oppressive or prejudicial" to the interests of the petitioning shareholder and/or the interests of some other shareholders of the company.

Section 111 of the Act is based on the now-repealed section 210 of the United Kingdom's *Companies Act* 1948.[1] The Bermuda courts have adopted and retained the high bar imposed by the English oppression test under section 210. The requirements to satisfy the test for oppression under section 111 (as outlined below), together with section 111's close relationship to the winding up remedy available elsewhere in the Act (which has a less stringent test), has made oppression claims a relative rarity in Bermuda's courts.

The difficulty and legal complexity inherent in seeking an oppression remedy in Bermuda means that the parties would be well advised to take due care to recognise and properly understand the many subtle procedural nuances involved with litigating an oppression claim. Ultimately, however, Bermuda's courts will act to protect shareholders from oppressive or prejudicial conduct, and (as explained below) the Act affords the courts significant discretion when remedying oppressive conduct.

Legal test – what is oppression?

Section 111 of the Act requires a petitioning shareholder to prove that they have been subjected to oppressive or prejudicial conduct which is serious enough to make it just and equitable to wind up the company. However, the shareholder must also prove that winding up the company would be unfairly prejudicial in the circumstances, and therefore the courts should grant some other remedy. In other words, section 111 provides the courts with significant discretion both in deciding an oppression claim and, if successful, in fashioning an appropriate remedy.

Once a shareholder satisfies the statutory oppression test, section 111(2) explicitly empowers the courts to "make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company." The usual remedy for oppression is an order that the oppressed shareholder's shares be bought out at fair value (but that is not the only remedy).

What precisely constitutes "oppressive or prejudicial" conduct sufficiently serious to justify the courts granting an oppression remedy is a fact sensitive assessment made on a case-by-case basis. The Bermuda courts have rarely provided binding direction about what constitutes oppression given the difficulty in successfully obtaining an oppression remedy. What is clear, however, is that the Bermuda courts will consider all the relevant circumstances. The courts are not bound to slavishly follow precedent (although precedent is helpful) when considering whether certain behaviour meets the test (taking into account the context of the case).

The Bermuda courts have provided clear guidance about what **does not** constitute oppression. The following general principles can be gleaned from case law:

1. Oppression requires a shareholder to be treated with some element of unfairness.[2] For example, it is generally not oppressive or prejudicial conduct for a party to do something which is authorised by a company's bye-laws or otherwise within the scope of the party's authority.[3]
2. Oppression requires proof that a company's affairs have been conducted with some element of bad faith.[4] It is not enough that there were innocent errors in judgment or poor management decisions which have negatively affected certain shareholders.
3. Oppression requires conduct that has already occurred or is ongoing.[5] An oppression claim cannot be based on mere speculation or proposed or anticipated future conduct.

The Bermuda Supreme Court previously found that a shareholder in a company could bring an oppression claim with respect to past conduct which the then-beneficial shareholder was aware of prior to formally registering shares in its name.[6] However, in distinguishable circumstances, the Bermuda Court of Appeal subsequently held that a shareholder could not purchase new shares in a company with full knowledge of alleged oppressive conduct and then subsequently use those new shares in an attempt to increase its profit from a successful oppression claim.[7]

It is therefore important to recognize that what constitutes oppression is not a set category of conduct. The Bermuda courts may cite existing legal precedent governing oppression claims in Bermuda, but may also adopt foreign legal principles into the Bermuda common law. The Bermuda courts often look to English case law for guidance about what constitutes oppression. The English common law is not binding on the Bermuda courts, but it is highly persuasive.

Procedure for an oppression claim

Section 111 of the Act requires that an oppression claim be commenced by petition and heard by Bermuda's Commercial Court. However, unlike the more common petition for the winding up of a company, oppression claims generally require fulsome evidentiary procedures and take longer to be determined by the courts.

Since oppression claims are commenced by petition, evidence is primarily presented through sworn affidavits. Oppression claims may require further document discovery and an opportunity to cross-examine affiants about their evidence. That is because oppression claims tend to involve serious and fact sensitive allegations of deliberate wrongdoing and bad faith, which require enhanced scrutiny by the courts.

Expert evidence is also usually necessary in an oppression claim. That is because the determination of what constitutes the fair value of the petitioning shareholder's interest in the company is often critical element of the litigation. For example, in addition to the fair value of the petitioner's shares underpinning the usual oppression remedy granted by the courts, it is also a full defence to an oppression claim for a company to make a standing offer to buy out the petitioner's shares at a fair value.[8] Expert evidence will usually be necessary in both of those situations.

Additionally, it is important to note that oppression litigation involves certain procedural nuances which may not be immediately obvious given the relative rarity of oppression claims in Bermuda. For example, only a registered shareholder of a company can bring an oppression petition.[9] That means only a shareholder with shares registered in their own name can bring an oppression claim (except in certain extraordinary circumstances). Beneficial and equitable shareholders do not have standing to bring a claim. Whether nominees and trustees have standing to bring an oppression claim on behalf of beneficial shareholders is still an unsettled point of law in Bermuda.

It is also important to note that seeking an oppression remedy pursuant to section 111 of the Act is unlikely to trigger certain important procedural requirements in *Bermuda's Companies (Winding-Up) Rules 1982*. For example, if a petition only seeks an oppression remedy, the petitioner is not required to swear an affidavit verifying the petition or publicly advertise the petition prior to its first scheduled court hearing.[10] Those procedural requirements are, however, likely to apply if a petition seeks the winding up of the company in addition to an oppression remedy.

Interplay between oppression and winding up remedies

Section 161(g) of the Act allows a shareholder to petition for the winding up of a company on just and equitable grounds. Oppression can constitute just and equitable grounds for winding up a company. That is evident from the fact that section 111 explicitly requires a shareholder to prove that it would be just and equitable to wind up the company as part of the oppression test. However, it can also be just and equitable to wind up a company under section 161(g) on grounds other than oppression.

For example the Bermuda courts have found it to be just and equitable to wind up a company because of a *loss of substratum*, which means the company has lost or fully achieved its intended purposes and therefore no longer has a reason to exist. It is arguably less onerous for a shareholder to make a claim for the winding up of a company on just and equitable grounds than it is to satisfy the more difficult test for an oppression remedy.[11]

The close connection between the remedies in sections 111 and 161(g) of the Act is why section 111 is titled, "Alternative remedy to winding up in cases of oppressive or prejudicial conduct." That is, the old English oppression remedy adopted into Bermuda law was intended to be relied upon as an alternative to the just and equitable winding up remedy.[12] A shareholder can therefore only obtain an oppression remedy if, among other things, it would be unfairly prejudicial to wind up the company in the circumstances.

The interplay between sections 111 and 161(g) of the Act has resulted in shareholders often bringing a petition seeking both an oppression remedy as well as the winding up of the company on just and equitable grounds. However, seeking both remedies at the same time can create various procedural issues for both the shareholder and the company.

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The Bermuda courts discourage seeking a winding up remedy as an alternative to the oppression remedy.[13] That is because it takes a relatively long time for the courts to determine and subsequently grant an oppression remedy. Conversely, the alternative winding up remedy, even if granted months after the petition is originally filed, would be deemed to be effective as of the date that the petition was originally presented. Subject to the intervention of the courts, which can result in the automatic voiding of any disposition of the company's property or transfer of shares between the date the petition was presented and the date the winding up remedy was eventually granted. In other words, a company can effectively become paralysed until a final determination is made on the winding up remedy sought in the petition.

Seeking relief under both sections 111 and 161(g) of the Act is also likely to trigger the aforementioned procedural requirements found in the *Companies (Winding-Up) Rules 1982*. For example, section 163(1)(a) of the Act will apply and require a registered shareholder to have held shares in its name for six months prior to seeking the equitable winding up of a company.[14] That six-month waiting period will prevent a beneficial shareholder from immediately bringing a petition after registering shares in its own name. The waiting period does not apply if a shareholder brings a petition seeking only an oppression remedy.

Additionally, depending on the type of company involved as well as the structure of its corporate constitution, seeking relief under both sections 111 and 161(g) of the Act may create certain preliminary regulatory hurdles which the petitioner must overcome. For example, the winding up of an insurance company will engage various regulatory requirements pursuant to *Bermuda's Insurance Act 1978* which are not applicable to an oppression remedy.

Companies can also be formed pursuant to private legislation which applies only to that company. Private legislation may contain special procedural requirements governing when and how petitioners may seek the winding up of the company. Those special requirements are unlikely to apply if a shareholder is seeking only an oppression remedy pursuant to section 111 of the Act.

Conclusion

Bermuda law provides aggrieved shareholders with several options for seeking relief from the courts in response to corporate governance issues. The oppression remedy set out in section 111 of the Act is one of the more well known but relatively rare options available to shareholders. Oppression claims are rare in Bermuda because section 111 imposes a difficult legal test for proving oppression, which must be satisfied using strong factual and expert evidence. The relative rarity of oppression claims also means that oppression litigation often involves procedural nuances which may not be immediately obvious to litigants.

The difficulty and complexity inherent in litigating an oppression claim in Bermuda means that the parties should seek legal guidance as soon as possible. An experienced legal advisor is key to ensuring that unanticipated issues do not arise early in the litigation and compromise a party's position. Those early issues can doom a party's chances even before the oppression claim is formally commenced.

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1 Raswant v Centaur Ventures Ltd, [2020] Bda LR 31 at paras 13-14 (SC)
2 De Shaw Oculus Portfolios LLC v Orient-Express Hotels Ltd, [2010] Bda LR 32 at para 87 (SC)
3 Thomas and Swan v Fort Knox Bermuda Ltd and Others, [2014] Bda LR 14 at para 69 (SC)
4 Re Kingboard Copper Foil Holdings Ltd, [2015] Bda LR 97 at para 17 (SC), rev'd on other grounds BM 2017 CA 6
5 Gold Seal Holding Ltd and Others v Paladin Ltd and Others, [2014] Bda LR 81 at paras 32-34 (SC)
6 Re Full Apex (Holdings) Ltd, [2012] Bda LR 9 at paras 17-20 (SC)
7 Kingboard Chemical Holdings et Al v Annuity & Life Reassurance Ltd et al, BM 2017 CA 6 at paras 91-93
8 Raswant v Centaur Ventures Ltd, [2020] Bda LR 31 at paras 41-47, 89 (SC)
9 Re Full Apex (Holdings) Ltd, [2012] Bda LR 9 at para 15 (SC)
10 Re Kingboard Copper Foil Holdings Ltd, [2015] Bda LR 97 at paras 36-44 (SC), rev'd on other grounds BM 2017 CA 6
11 Raswant v Centaur Ventures Ltd, [2020] Bda LR 31 at para 12 (SC)
12 Raswant v Centaur Ventures Ltd, [2020] Bda LR 31 at paras 13-14 (SC)
13 Raswant v Centaur Ventures Ltd, [2020] Bda LR 31 at para 12 (SC)
14 Re Full Apex (Holdings) Ltd, [2012] Bda LR 9 at paras 6-14 (SC)

FIND US

Carey Olsen Bermuda Limited
Rosebank Centre 5th Floor
11 Bermudiana Road
Pembroke HM 08
Bermuda

T +1 441 542 4500
E bermuda@careyolsen.com

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