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Fiduciary Duties of Dissenting Directors and their Boards – Stobart v Tinkler

18 April 2019

In Stobart v Tinkler [2019] EWHC 258 (Comm), the high court has taken an extremely restricted view of the freedom of a dissident director to take his case outside the boardroom. At the same time, the court largely endorsed the freedom of the board to silence that director with respect to public statements.

Background

Mr Andrew Tinkler, who was a founder and a large (7%) shareholder of public company Stobart Group Limited (the "Company"), stepped down as CEO of the Company in June 2017 but remained an executive director.

In the months leading up to the Company's 2018 AGM, the relationship broke down between Mr Tinkler and the independent chair of the board, Mr Ferguson. The Company's board sided with Mr Ferguson. Both Mr Tinkler and Mr Ferguson sought to have the other removed prior to the AGM. Both were re-elected at the AGM, but the following day the other directors removed Mr Tinkler as director by board action.

Findings

The relevant fiduciary duty law was that of Guernsey, but it was accepted that those duties are "fundamentally the same" as those established by the English common law (as codified in England by the Companies Act 2006).

The court found Mr Tinkler breached his fiduciary duties in a number of ways:

- *Private Discussions with Shareholders*. In conversations that the board thought were to sound out large shareholders on his plans to resign from the board, Mr Tinkler aired his various grievances against the board and chairman in particular. The court found Mr Tinkler's actions in "briefing against the board" by holding unauthorized private conversations with a subset of shareholders breached his fiduciary duty to act in the best interests of the Company.

- *Public Communication with Shareholders*. Mr Tinkler wrote a "misleading" and "disgraceful" open letter to shareholders that described his own view of the board. The Company accepted that Mr Tinkler was entitled as a shareholder to write to other shareholders, but his letter was written in his capacity as "Executive Director" as well as shareholder. In particular, the court disapproved of the director going "straight to shareholders" with what he said were corporate governance concerns, rather than raising them with the board, and considered this further "briefing against the board" a breach of his duty of loyalty.
- *Public Communication with Employees; Organizing Employee Action*. Mr Tinkler distributed that letter to the Company's employees and, it was held, orchestrated additional executive support for his cause. As the employees had no vote at the AGM, the court found these actions to have been done "to undermine the workforce's confidence in their management" and to constitute a breach of a director's duty of loyalty.
- *Sharing Confidential Information*. Mr Tinkler shared confidential budget information about a Company project with a third party who was a friend, potential investor/buyer for the project and potential replacement non-executive chairman for the Company. In addition to a breach of his service agreement, the court found this was a breach of his duty to act in good faith and in the best interests of the Company.

Mr Tinkler generally failed to show breach of duty against the majority directors in undertaking their defensive action against him. Notably:

- *Formation of a Board Committee to deal with Dissent*. The Board established a sub-committee to discuss and deal with the conduct of Mr Tinkler. It included neither Mr Tinkler nor Mr Ferguson, but did include the other continuing directors. As it happened this meant the full board delegated its power on this matter to a subcommittee comprised entirely of directors on Mr Ferguson's "side". This committee determined to fire Mr Tinkler and remove him from the board. The court found the committee was properly constituted and entitled to take these actions. It found no breach of duty, and notably no conflict of interest, on the basis that a director holding a view on a matter did not mean that he was conflicted as to that matter.
- *Public Communication with Shareholders*. The majority Board made two public shareholder communications, the first minimal and factual, the second more argumentative and "inflammatory". The court found the second disclosure "unwise and inappropriate" and, it seems, potentially misleading given the characterization of some of the events it referred to, but nonetheless found it was not a breach of fiduciary duty because (i) each of the majority directors genuinely believed it was in the best interests of the Company and (ii) the disclosure was not such that "no reasonable director would have agreed to it".
- *Transferring Treasury Shares to the EBT prior to a crucial AGM vote*. The Board authorized two transfers of treasury shares to an Employee Benefit Trust. Mr Tinkler claimed these transfers were a breach of the directors' duty to use their powers for a proper purpose. The directors acknowledged they had two purposes in mind, one being to ensure the EBT could satisfy share awards and the other being to increase the likelihood of Mr Ferguson being re-

elected, on the assumption that the trustee would follow the majority board (and ISS) recommendation. The finding of the court was that the first transfer, slightly larger than necessary to satisfy upcoming vesting of share awards, was done with the "primary purpose" of ensuring the EBT could satisfy those awards, and that transfer was therefore consistent with their duty. The second transfer, however, satisfied no immediate need for shares and the court found the primary purpose was to affect the shareholder vote on the election of the chairman, and this action was therefore in breach of the duty to use powers for a proper purpose. It was irrelevant to that decision that they complied with the separate (and subjective) duty to act in the Company's best interest.

- *Using Directors' Power to Remove Mr Tinkler as Director, the day after his election by the AGM*. The court found no breach of duty in immediately overriding the decision of the shareholders, and removing Mr Tinkler as a director under board powers in the articles of the Company. In reaching the conclusion this was no breach of duty the court noted that "their duties were owed to the Company, not to the 51.44% of shareholders who had voted in favour of Mr Tinkler's election". The court noted that the directors "just could not understand" the views of a particular large shareholder (a significant proportion of the majority), and it may be that the court considered the shareholders' decision was on the basis of misinformation received. This point was not developed, however, and the decision on the issue was that the board could use the power in the articles to remove a director as they believed it to be in the best interests of the Company, notwithstanding the shareholder support expressed the previous day.

Takeaways

The decision in Stobart v Tinkler is relevant to the directors of public and private companies incorporated in England and Wales as well as those incorporated in Guernsey.

- A dissident director who is also a shareholder must be careful in public communications to make clear that he is writing as a shareholder and not a director.
- A director should not disclose confidential information without express permission from the Board.
- A dissident director should refrain from taking any steps that can subsequently be considered as damaging the company.
- A dissident director running for re-election should demand that the company disclose whether it will abide by the shareholder vote or ignore it and remove the director. Alternatively, the dissident should solicit shareholders to amend the relevant documents to prohibit the action taken by the Board in this case.

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If you have any questions, please feel free to contact any of the following Cadwalader attorneys.

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