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WHITE PAPER

MANAGING DIRECTOR AND SHAREHOLDER DISPUTES IN SMALL COMPANIES

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INTRODUCTION

Small business ventures are terrific vehicles for innovation and the pursuit of individual goals and plans. It is ideal for people with a vision and who want to grow something for themselves without simply being an employee of someone else's vision.

Often times, a number of individuals share the same focus and goals. Small corporate structures are a great way to formalize that shared vision and unify individuals in a clean and formalized structure.

While this structure can prove effective and profitable, it does come with its own unique challenges. We want to look at some of those challenges and discuss ways to avoid or resolve them. This is particularly valuable when director and shareholder disputes arise.

While a company is a separate entity and has a life of its own, it is managed and controlled by individuals and even with the best intentions conflicts can arise.

When faced with such a dispute it is necessary to consider not just the legal issues and the various remedies you might have, but also managing the personality conflicts that often arise and managing costs in this process. As individuals with a passion for a project we can, all too often, be guided by our hearts and not our heads, and our hearts rarely think commercially.

We will start off with a practical review of the likely types of disagreements that can occur between shareholders and directors, the initial considerations to pay attention to and the usual practical outcomes of what can be achieved in these disputes.

As court is often a measure companies need to resort to we will need to consider what are the likely outcomes in an application to court and the risks involved in that process too.

This paper seeks to set out a guide on how to deal with and manage Director and shareholder disputes in small companies with a limited number of shareholders.

PARTICULAR ISSUES WITH SMALL COMPANIES

Director and shareholder disputes of course can occur in companies of all sizes. One of the major differences when dealing with smaller companies is that as a general rule the directors and shareholders will be effectively the same (even if the shareholding is held by other entities controlled by the directors). In a larger company this is unusual and the shareholders would generally be lobbied to try and resolve the director's dispute, or there are mechanisms in place to ensure that, if necessary, they can resign or be removed without impacting upon the ongoing operations of the company.

"One of the major differences when dealing with companies of this size is that as a general rule the directors and shareholders will be effectively the same."

In a smaller company there is no such separation between the directors and the shareholders. This means you have to consider the matter not just at a boardroom level but also at a shareholder level to properly resolve any issues.

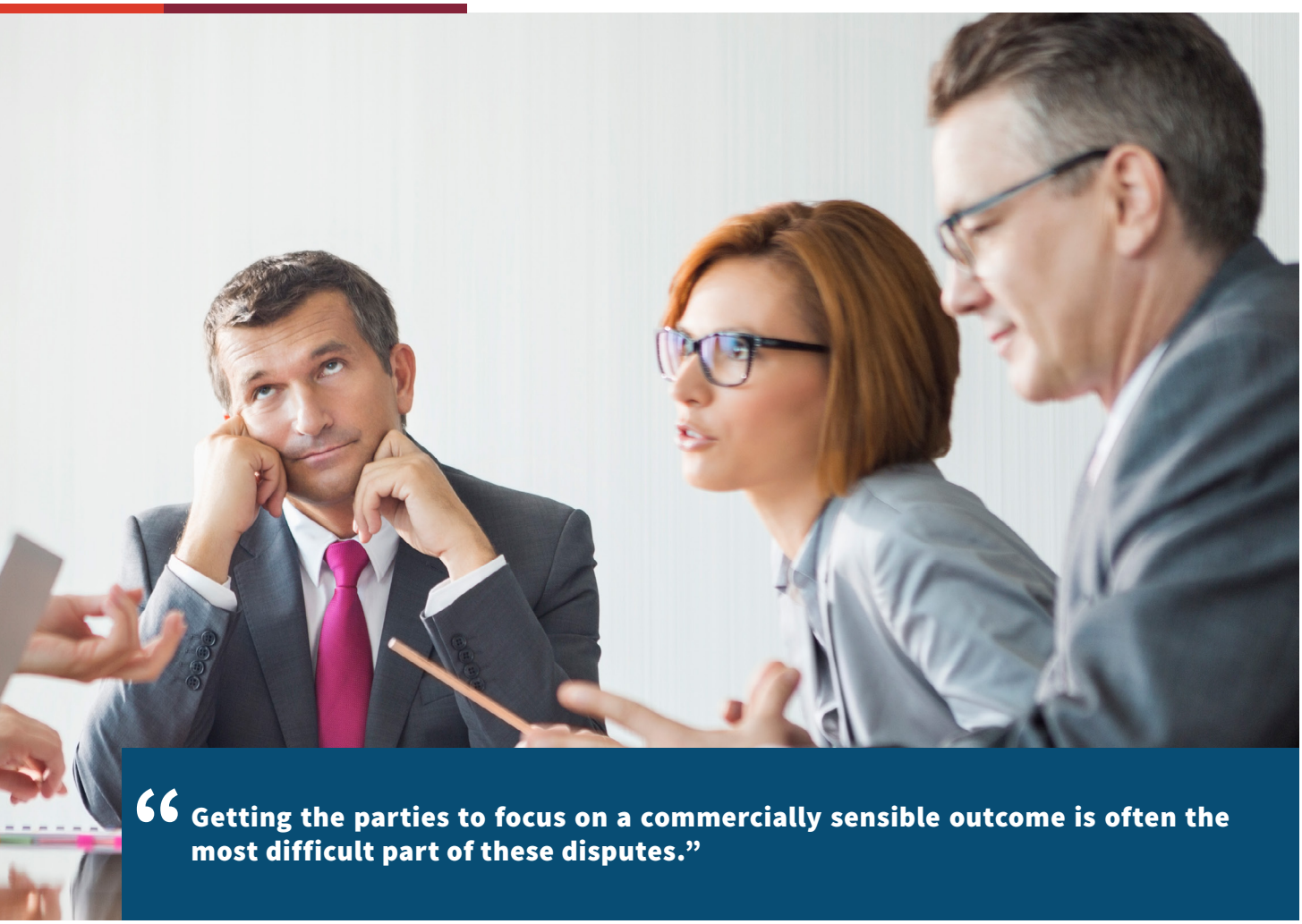
Often the parties will have a significant financial interest in the company, which will be the major personal asset of the shareholders and directors as well as their major source of income.

One of the big hurdles in business disputes is valuing both the business and the contributions of the individuals involved. More goes into a small business than just each person cash. So much time and effort goes into making a small business both work and grow in value.

The problem is when the roles are not identical or the time invested is different. When this is the case people, inevitably value their contribution higher than another party will.

This "sweat equity" is always hard to put a figure on and is often a major source of small company disputes.

PARTICULAR ISSUES WITH SMALL COMPANIES



> **“Getting the parties to focus on a commercially sensible outcome is often the most difficult part of these disputes.”**

Another major hurdle to face (almost inevitably) when a dispute arises is that the personal dynamics between the shareholders/directors is often close to, or at breaking point before any one chooses to seek legal or independant advice. In our experience the common sense and business judgement that would routinely be applied by such directors/ shareholders in every other facet of running their business often goes completely out the window in these disputes.

It is, a relationship breakdown between the parties, more often than not, which has led to this dispute. Getting the parties to focus on a commercially sensible outcome is often the most difficult part of these disputes and if this cannot be done then the outcome is usually very similar to a messy divorce where both parties have refused to listen to reason. In the worst cases the business goes under with nothing left to fight over after the company has been liquidated and a number of legal bills still to be paid by the individuals.

TYPES OF DISPUTES

There are as many kinds of company disagreements as there are companies, but they can usually be grouped in to certain types of disagreements.

WRONGDOING

There are disagreements which involve a claim of actual wrongdoing. These types of claims can involve theft, fake invoices, improper use of company resources, diverting business opportunities to other entities or other types of, what would be called, fraudulent or deceptive conduct by an ordinary person.

This is particularly the case where one individual manages the books and records and excludes other directors, or where other directors want to focus more on operational aspects of the business rather than the books and accounts.

OPERATIONAL DISPUTES

There are general business disagreements over the direction of the company, what it should be investing and spending its resources on, what contracts to enter into, on what terms, use of suppliers and staffing issues.

Small companies involve individual ideas and everyone has a different take on how to best achieve goals. If an agreed structure and process is not in place individuals can be left to try and assert their notions of 'best practice' which will often differ from other directors or shareholders ideas.

MAJOR BUSINESS DECISION DISPUTES

There are specific business disagreements on major decisions, such as proposed mergers, possible sales of the business or a part of the business, the valuation of the business, if one shareholder has exercised their right to exit the business or other fundamental company decisions.

INSOLVENCY DISPUTES

There can also be fundamental disagreements over the viability of the company. In those cases, the issue of concern is where one party considers the company should be liquidated to avoid any further liabilities accruing to the directors, in terms of insolvent trading or Director penalty notices from the ATO for example, but the other party refuses to agree to such a liquidation because they believe the company can be turned around.

PERSONALITY DISPUTES

Then there are the personality disagreements. Often these have no specific cause but rather are the accumulation of many little irritations between the parties while they have operated the company, which have resulted in what can only be described as irreconcilable differences.

It is always important to keep in mind that running a business is stressful, even a successful and profitable business has its stressors: accounting and tax requirements, dealing with clients/customers, dealing with contractors and suppliers, dealing with banks and landlords and some people handle these stresses better than others.

Financial strain is one of the most common catalysts for personality disputes, as so many punters go into business assuming the business will be profitable straight out of the box and be able to pay all of its debts from trading capital. That is rarely the case and it takes business sometimes years to really be self-sustaining and profitable. We often see people failing to account for a slow start and make sure they have enough cash to keep them going through the early days. This will always lead to stress and conflict.

POSSIBLE OPTIONS

Drilling down and being honest with yourself to determine what type of disagreement you are really dealing with is essential to determining the most efficient course of action needed to provide the best outcome for all parties.

Disagreements over valuations for example can often be dealt with through a process of negotiation and the exchange of expert reports, while the business is properly conducted by all parties in a spirit of cooperation while this process plays out.

If it is clear that the company is insolvent then a director can of course take action under the Corporations Act ("CA") to wind the company up in insolvency which should not be a difficult task if the accounts are in order.

If you are dealing with a claim of actual wrongdoing then there is little point in trying to get the parties to work out their differences and the practitioner can assume that any resolution will involve the parties parting ways in one form or another.

Keep in mind that regardless of the legal process used they can only ever be a limited number of ways in which such a dispute can be resolved. These are:

- The parties resolve their businesses and continue to run the company (generally an unlikely scenario if one party has gone to the trouble of engaging lawyers); Making up
- One party buys out the other through some sort of agreed process; Buy out
- The parties agree to split the business of the company in some form of agreed manner; Business Split
- The business is sold to an unrelated party and the affairs of the company are wound down with a payout of any creditors and a distribution of the remaining balance to shareholders; Business Sale
- An application is bought to have the company wound up or a receiver appointed or a provisional liquidator appointed to run the business, sell the business and then liquidate the assets; Liquidation
- Legal proceedings are bought against one of the directors (which can occur in conjunction with a liquidation of the company or not). Legal proceedings.

TYPE OF BUSINESS YOU'RE DEALING WITH

Another issue that must be considered is simply the type of business the company actually runs. These issues include questions like:

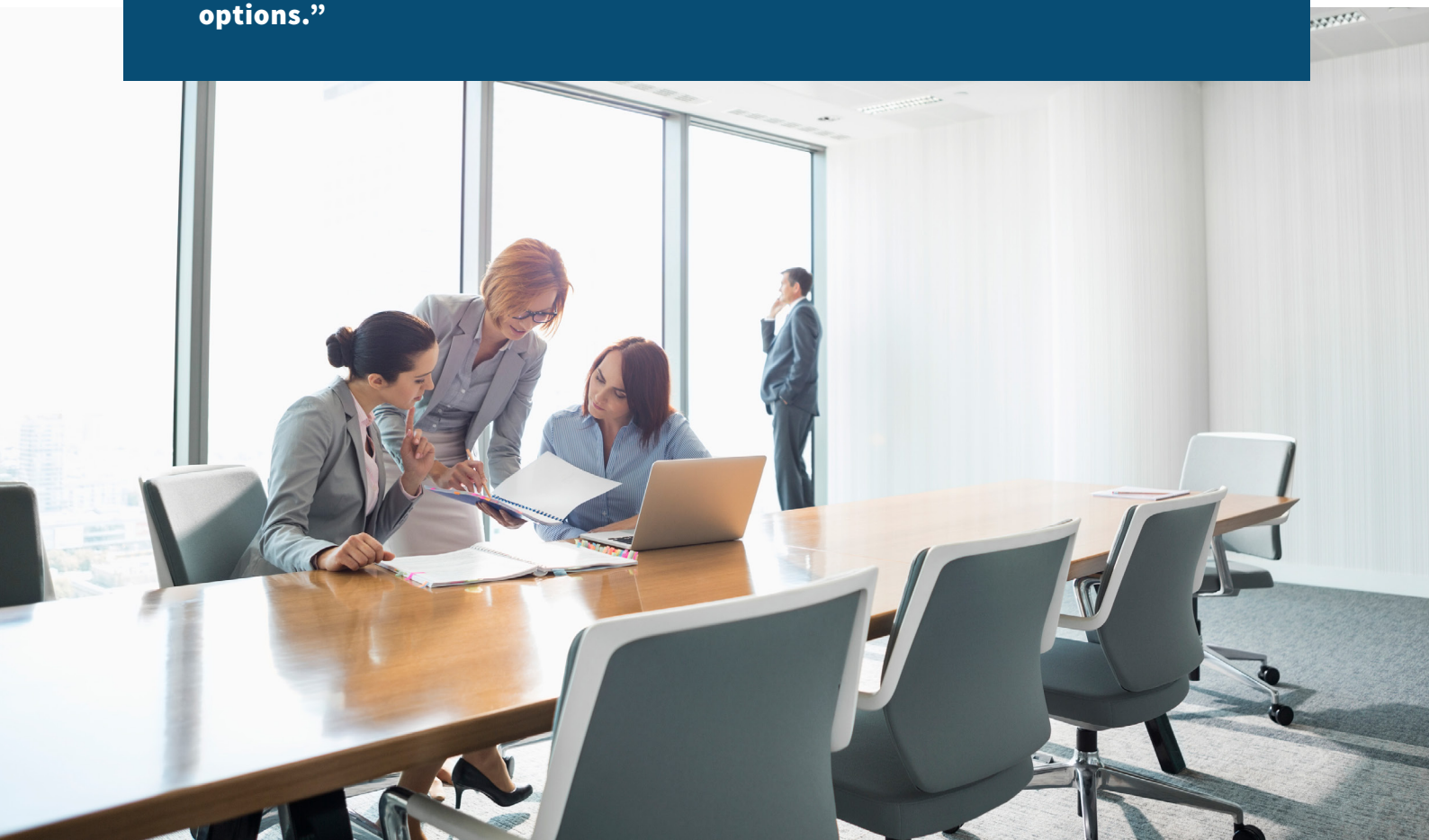
- Does it have significant physical assets or is it a services firm?
- Does it have an established track record or is it still in the process of developing its products like a start-up software company?
- Are there substantial liabilities associated with the company?
- Have the directors or shareholders guaranteed any of these liabilities such as supplier accounts and leases?
- Is the major asset of the company a franchise agreement, a distribution agreement or a license agreement with an overseas company or Australian company that is liable to be terminated if an application is made to wind the company up?

Having a clear understanding of the business and the finances of the business you are dealing with is essential before you can consider your legal and commercial options.

For example, it is a risky move to bring an application to wind the company up on just and equitable grounds if the lease of the premises is for a substantial amount of rent each month, has several years to run and is guaranteed by you personally.

Also, if the business is a manufacturing entity that operates from one premises and sells a limited number of products it's clearly impractical to try and split the business. If it's a professional services firm however where the parties each have their own main clients, then separating the business to the parties can go their own separate ways is a viable option to explore.

"Having a clear understanding of the business and the finances of the business you are dealing with is essential before you can advise a client on their legal options."



TYPE OF STRUCTURE

Another general point that you should obtain specific legal advice on, is the type of structure business and company operates under.

While we are talking about small closely held companies, it's important to consider whether or not the company is trading as a trustee or a company. Different types of legal remedies need to be considered where there is a trust structure.

You also need to consider whether there are any other interests of yours that might be affected. For example it is not uncommon that the directors or shareholders superannuation funds might jointly own the property from which the business trades. Consideration needs to be given as to how that aspect of the arrangement is dealt with in any resolution or legal proceedings.

> **"You also need to consider whether or not there are any other interests of yours that might be affected."**

PREVENTION IS BETTER THAN CURE

So now that we have looked at the types of small company structures and the kinds of disputes that can arise let's discuss how we might avoid them.

PREPARATION, HONESTY, FRANKNESS

It seems obvious to say but before any money is invested or any time spent individuals wanting to get into a business with partners through ha company structure should always have very honest and frank conversations and planning meetings.

It is vital to get excited about the goal and vision, but first understand the devil is in the details. Discuss what each person expects the business to realistically achieve and in what sort of time frame. People may have idealistic or realistic time frames in mind and they might not match other investor's ideas. Discuss why you have that goal and timeline in place. Is that what you genuinely think the business can achieve in that time? If so why?

Have you set that time frame because of some other reason? For instance, do you need the business to achieve that level in that time frame because of some external factor like a desire to retire at that time, or financial pressures. Let other investors know what the true state of play and your timelines are, so everyone can focus on achieving that goal together.

PREVENTION IS BETTER THAN CURE

In your meetings, have the hard conversations about money, what is your budget, how much do you need the business to achieve and by when.

What do you see everyone's roles in the business to be? Tell each other what you expect to contribute to the business in money, time, effort and skills. Be honest about how much you value that contribution and what you think in real terms what that is worth to the business. One party may be spending 12 hours a day operating a business, but another individual may be handling the more stressful or skill-based aspects that they consider is worth as much or more than just time.

> **If you cannot be honest about how you value your roles and contributions at this early stage and reach an agreement, resentment and disagreements will arise down the track.**

It seems harsh to ask, but does anyone actually know how to run a business? Has anyone taken time to learn the in's and out's of bookkeeping, record keeping, taxes, stock control and document management. If not do you know a great bookkeeper willing to be hired and can the business afford that? If not is someone willing to engage in further education to learn these skills to then bring to the business?

Finally, to discuss in these very early meetings, can everyone survive at least 12 months or possibly more without any real income from the business? Again, it is very rare that a business will start to turn a profit within the first 12 to even 24 months and a huge number of businesses fail in this time because people just can't afford to live that long without a solid income. Be frank and be honest with each other about this, things invariably go awry when one party in a business is struggling financially and not telling the other. Desperate people can do desperate things but there can be accommodations if one party is hurting, in the form of company loans or financial facilities that can get people by as long as everyone knows the score and documents the issue.

While we are talking about documenting issues, some should always take minutes of these meetings, write down everyone's comments and answers to these issues and make sure everyone signs those minutes to confirm everyone agrees with what was said and the representations made. Memories fade or warp over time but written and signed minutes last forever. Email the signed minutes to everyone so you have them recorded with a time stamp!

PREVENTION IS BETTER THAN CURE

GET GOOD ADVICE AND GET EVEN BETTER DOCUMENTS

Now that the hard conversations are out of the way, we need to get our structures set up and documented properly. There are some great online services that will help you set up a generic company for under $1,000, but understand these a template structures with generic constitution documents that may not account for your individual business needs.

It may seem like a lot of money to outlay when you are 'certain' the business will succeed and the individual relationships are strong, but trust us when we say investing a few thousand dollars up front has the potential to save ten's or even hundreds of thousands of dollars at the end.

No one goes into a business expecting it will fail or relationships will breakdown, but again these are not the only reasons a business relationship will come to an end. It's possible one party's interest or focus changes (for any number of reasons) and wants to sell out or change roles. Sometimes the business becomes so successful another business or entity may want to buy your business.

Basic, generic constitutions will rarely provide any real guidance for these situations. What is needed, is a solid and robust shareholders agreement.

A proper Shareholders Agreement can include a great deal of detail, guidance and structure on:

- Each individual's roles, responsibilities and agreed value brought to a business;
- The proper and agreed methodology to value a business should one party want to sell out, or another party want to buy the other/s out;
- "Drag along/ Tag along" clauses and "Rights of First Refusal" which outlines how the shareholders are to deal with offers to buy the business, particularly where one party wants to sell and the other does not.

With these key issues, which can often be the cause of conflict, properly and fully documented and with everyone knowing how these issues are being dealt with and how everyone's contribution is being valued, conflicts are either much less likely to occur, or much easier and cheaper to resolve.

Another key document to look into is a procedures manual. One key ingredient in any successful business is tight, efficient and well documented procedures. When procedures are well devised, well document and well understood a business will always run more efficiently than one where procedures are approached on an ad hoc basis.

There must always be room to evolve and adapt procedures for growth and changing needs in a business, but if procedures are well constructed and documented and everyone knows their roles and how to achieve them the business will operate at its maximum efficiency and where inefficiency = waste, particularly in early stages, this is a vital consideration. So put some effort into operating procedures before you kick off and make sure you have a clear and collegiate method for changing and adapting procedures and methodologies. Everyone needs to be onboard and aware!

With these preliminary documents and steps taken the business has the very best chance of operating with minimal conflict and clear and straight forward methodologies to resolve conflict.

DEALING WITH CONFLICT

Even the most well set up, documented and planned business may experience conflicts that cannot be resolved by the parties themselves.

At these times, sadly the parties must look to external intervention to sort the issues out. We will now look at a number of different methods of external intervention.

PRE INTERVENTION STEPS TO BE CONSIDERED

One other essential step that needs to be carried out is for the shareholders agreement (if there is one) to be reviewed along with any Constitution. If the company is trading through some other structure such as a unit trust then there should also be a unit holders agreement which should be reviewed as well.

There can be any number of surprises in these documents and they can have significant implications on any court action you may be considering.

One of the most common ones of course is for a dispute procedure to be mandated before court proceedings can be commenced. Outside of 'wrongdoing disputes' or 'insolvency disputes' these clauses will often be enforced by a court if they have been properly prepared.

There may also be restrictions on the ability of the parties to sell the business or shareholding without unanimous or special majority approval. An issue which as discussed in the Prevention Section above can be avoided with the right Shareholders' Agreement

Before applying to court or taking any major action these issues need to be considered and addressed. Spending a substantial amount of money to get to court only to be told it can't proceed because you haven't complied with the shareholders agreement is obviously something that should be avoided. Properly reviewing these issues first will ensure that this doesn't happen.

There can be any number of surprises in these documents and they can have significant implications on any court action you may be considering.

WHICH OPTIONS ARE AVAILABLE TO YOU

MEDIATION/ARBITRATION

As discussed above, when dealing with individuals on a personal project like a small business, feeling and emotion always have the capacity to infect the way people approach differences of opinion and points of view.

When a dispute does not involve obvious misconduct/ wrongdoing or insolvency, a great first step is to try a mediation or agree to arbitration.

The involvement of an independent, dispassionate third party, especially one with legal qualifications can help to put issues in perspective and give, at least a bit of an indication of how a dispute may play out in formal court proceedings. A good mediator can help the parties find the right compromise without the cost, stress and uncertainty of court proceedings.

A mediator will act as an impartial observer, guiding parties in expressing their issues, facilitating negotiations and providing some insight into what may happen if the dispute goes beyond a mediation.

The mediator does not make any findings or bind the parties to any conclusion, merely assists in helping the parties settle the dispute between them.

An arbitrator on the other hand, if the parties agree or are contractually bound to the process, does act more as an informal judge. They will hear the parties' position and will make a decision, or finding, which the parties are bound to.

The process has the advantage of being conclusive, but the parties have to be confident in the arbitrator. So, while it has certainty it does lack the flexibility of a mediation.

While a mediation has the flexibility, it does come with the risk of there being no resolution at the end and a need for further steps to be taken to resolve the conflict, where an arbitration lacks flexibility, the parties are more assured of bringing the dispute to an end.

If the parties cannot agree on an arbitration, mediation or a mediation does not resolve they will need to explore more drastic steps, like formal court proceedings

RISKS IN COURT APPLICATIONS

It should be noted that even with a detailed knowledge of the legal principles in these areas the practical application of these principles is not easy.

This can be seen in the fact that some of these cases that have gone on to appeal in the Courts of Appeal and the High Court have involved numerous different orders being made and proposed by a number of very well-respected commercial judges facing the same factual circumstances. So in short there is always risk in litigation of any kind.

This simply demonstrates the difficulty facing practitioners and judges when you have difficult personal and business issues to resolve when determining what is just and equitable for the people involved in a small company.

Obviously it's necessary to understand the legal principles the courts look at in these circumstances, but you also need to appreciate that in this area a judge's initial view of the matter can vary greatly depending upon the judge and the evidence presented.

Some judges adhere much more closely to the view that in these smaller closely held companies once there is an irretrievable breakdown in the relationship the appropriate order the Court should make is to wind the company up if there is no alternatives. This has happened even where the party complaining of the conduct of the other party does not want this to occur, as once it was before the court the judge could see no viable way for the company to continue given the attitude of the parties.

Other judges appear much more reluctant to make these types of orders and are more likely to focus on other possible remedies, such as mediation or some other form of resolution.

"As with any area of law clients need to be advised of the potential risks in making these sorts of court applications and the possible outcomes."

RISKS IN COURT APPLICATIONS

It can be disheartening to spend a substantial amount of time effort and cost preparing all necessary material to oppose an oppression winding up only to have a judge state at the outset that given the circumstances of 2 brothers having a falling out even though one was a 70% shareholder a just and equitable winding up appeared to be the only solution.

It can be just as disheartening to prepare substantial material demonstrating what appears to be a clear-cut case of one Director acting against the interests of the other shareholders to obtain a winding up order so the matter can be fully investigated and them have a judge decide the damage done to the company isn't significant and seek to look at alternative options.

One major difference with a closely held company is that once the courts are involved the most common form of remedy that is sought is to wind the company up, either on the just and equitable ground (s461(k) of the Corporations Act) or under the oppression ground(s 232).

In the closely held companies there is a pragmatic line of thinking that comes through when the courts are looking at such applications. This is a different approach than when dealing with larger companies with a wider range of shareholders.

It's very important to realise that an essential distinction is that in a closely held company it will often be held to be just and equitable to wind up such a company there is a complete breakdown in relations between shareholders involving demonstrated inability to communicate.

This is something that might occur in larger companies but the directors are able to continue running the business in those circumstances as they generally don't require the active participation of the shareholders in the business. The shareholders simply have a passive interest in the company generally and are free to sell their shares if they disagree with the director of the company.

In small companies the issue is found in the fact that shareholders have great investments locked into a company and if the directors can't function together and as shareholders they can't resolve who the directors should be the company goes into lock down and people can't get out of their investment, all the while creditors are mounting and staff wages and entitlements are growing. So the most humane way to deal with this situation is to take the company out to pasture, release the parties from their investments and stem the bleeding to creditors by winding up the company.

The need for the court to intervene in this situation is where one party sees the writing on the wall, but the other simply can't let go and simply cannot see that there is a difference between the company and their own interests. People often forget they are not the company and the company is not them. The company has its own rights and interests that just happens to be guided by its directors and shareholders.

Courts will rarely accept that one party can tie up the investments of another individual in a company that is deadlocked, or even where a minority shareholder is being dragged along by the whims of one director or majority shareholders who either won't let them out, or there is no reasonable mechanism in place to allow them out.

So let's look at the types of applications brought in Court, what the court is looking and what the likely outcomes will be.

APPLICATIONS TO COURT

Under the Corporations Act a court can wind a company up for a number of reasons. The primary reason that everyone knows about is where the company is insolvent, which means it can no longer pay its debts as they become owing and debts are growing beyond the company's means to pay. In that instance a court will step and kill the company to stop any more creditors falling into the trap of wasting time and money on a company that is unlikely will be able to pay them back.

But as discussed above the court can also wind a company up where it seems to the court it is the just and equitable thing to do. Sometimes the shareholders can acknowledge the company is in trouble and by special resolution at a meeting agree to apply to the court to wind it up.

Sadly, the more common application to court is where not all the shareholders agree to wind the company up. So, a number of situations a court will look at are:

- Where the court believes that one director is acting in his own interests to the detriment of company. These are situations usually where a director is using the company and its assets as if they are their own. For example, courts have wound companies up where:
    - a director has been taking money out of the accounts without accounting for it or being entitled to it;
    - selling assets of the business to themselves at undervalue or no value at all; or
    - using the company or its assets to guarantee personal loans or act as surety;

- Where a company has gone into a deadlock, where even numbers of directors can't agree on how to run the company and even shareholders can't effectively vote to break the deadlock and there appears to be no other mechanism to break the deadlock;
- Where the court sees that a minority shareholder is being oppressed by the majority shareholders, that is decisions are being made without any regarded for the rights or interest of a minority shareholder, or worse still deliberately to oppress or hurt a minority shareholder. It would be unjust to see someone who has legitimately invested in a business get locked in and oppressed.

The line of thinking is basically that people should not belocked into companies and parties should not be allowed to treat the investments of other parties as their own to do with as they please, even against their wishes without any real ability to leave or have input.

So once the court orders a company to be wound up, a liquidator is then appointed to the company who manages and controls the process of winding the company down, including:

- Taking account of all of the assets of the company and getting control of them all;
- Communicating with directors to get an understanding of the financial position of the company;
- Tallying up all of the company's debts, who they are owed to, how much and whether any of the those debts are secured by charges or mortgages;
- Looking into any related party, shareholder or director loans and determining if they are legitimate and owing or not;
- Determining any leases on premises or equipment;
- Selling off any assets of the company;
- Investigating any claims the company might have against related parties or directors for improper or voidable transactions;
- Paying out creditors as much as possible;
- Distributing whatever is left in the company to the shareholders and deregistering the company.

No one should go into an application to wind a company up and believe it will be a quick and easy resolution of all of the problems. It is expensive, it carries its own risks and it can be stressful, but when there is no option left sometimes ripping the band-aid off is the only way.

If you are involved in a small company and see issues arising, get advice early to understand the nature of the dispute, the possible impacts and whether it can be dealt with, without the need for winding up proceedings.

Or better still if you are getting into business get advice on setting up properly right at the start to avoid conflict or at least provide more options to address those issues before the drastic step of court proceedings.

CONCLUSIONS

Small company disputes can be incredibly destructive, stressful and expensive. The very best ways to avoid the fights are:

- Have the hard conversations with partners up front. Know what everyone's expectations are and be honest.
- Get advice on your structures, not just from your accountant but find a good lawyer as well
- Document everyone's position before every starting the business, get a good Shareholder's Agreement in place that clearly sets out everyone's obligations and the way in which the company will deal with deadlocks, buyouts and separations;
- Understand your role in the company and what it actually means to be a director and shareholder of a company. You as an individual are not one and the same with the Company. It is a living breathing entity in its own right that has interests, rights and obligations separate from you. Do some homework on what those rights and obligations are before you agree to sign on as director or shareholder;
- Every personal guarantee you sing up to for the Company, make sure you keep a register. Just because you leave the Company, doesn't mean your guarantee ends, make sure you know who to contact if you leave
- At the first hint of a dispute, seek advice early. Problems can be headed off at the pass with independent advice and small problems can be kept small without things blowing out.

ABOUT BENNETT & PHILP

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Contact us today and talk to us about how we can assist you in achieving your business goals and objectives. We can come and visit you, or you can meet us at our centrally located Brisbane CBD office.