



Shareholder Spats

The recent approach of the English Court to minority discounts and offers to purchase shares in unfair prejudice petitions

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Introduction

- 1 Offers to Purchase a Minority's Shares: A question of Substance, Form or Circumstance?
- 2 Minority Discounts: When will the court order a share purchase with a minority discount?



Unfair Prejudice: Re-Cap

“unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith” (O’Neill v Phillips [1999] 1 WLR 1092 at 1099)



Unfair Prejudice: Re-Cap

Hallmarks of Quasi-Partnership / when equitable considerations apply:

1. Association on basis of personal relationship
2. Agreement / understanding that members participate in conduct of business
3. Restriction on transferability of shares

(Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 at 379)



Offers

*“the unfairness **does not lie in the exclusion alone but in exclusion without a reasonable offer.** If the respondent to a petition has plainly made a reasonable offer, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out” (O’Neill p.1107C)*



Offers

Lord Hoffmann's guidelines on a reasonable offer (O'Neill p.1107D-H):

1. Offer to purchase shares at a fair value: usually without a discount
2. Value, if not agreed, to be determined by expert
3. Expert to act "*as expert*"
4. Equality of arms re information
5. Costs



Offers

Points to note:

1. Obiter
2. Context: strike out application
3. Guidelines: Harborne Road Nominees v Karvaski [2012] 2 BCLC 420
4. Possibility of other relief



Offers

Re Sprintroom [2019] EWCA Civ 932 (Court of Appeal)

Minority petitioner argued offer not fair because:

1. Fixed price
2. “Subject to Contract”
3. Pre-dated unfair prejudice relied on



Offers

Re Sprintroom [130]:

“No one feature of an offer which will automatically make it either a reasonable or unreasonable offer”

“dominant characteristic of the unfair prejudice remedy is its adaptability, enabling the court to produce a just remedy”

“The case law in this area has consistently declined to introduce “bright lines” and the assessment of an offer to purchase is no exception to this flexible approach”



Offers

Fixed Price Offer:

- Not in itself unfair
- But Petitioner must be able to satisfy himself offer is reasonable – (e.g. access to documents / information)
- Fairness may be linked to other allegations:

*“disputes between the parties over matters which materially affect the valuation of the company may be relevant to the reasonableness of the offer **even where ultimately the court decides the dispute against the minority shareholder**” [133] and [142]*



Offers

“Subject to Contract”

- Not in itself unfair
- But: reasonableness of offer and response may be affected by *“how likely it appeared at the time that the majority shareholder would follow through”* [134]



Offers

Offer as a cure for future unfair prejudice?

- No strict principle that offer cannot render subsequent prejudicial conduct fair (if otherwise unfair) [136]
- But: timing of offer may well be significant depending on the nature of the prejudicial conduct alleged
- Proximity is relevant



Offers

Two further points:

1. Split Trial: Question of whether an offer is fair should be determined at liability stage, even if it involves expert evidence as to value [138]
2. Effect of an Offer: “four courses” [139]
 - Dismiss Petition: “Entirely reasonable” and “petitioner acted unreasonably in rejecting it”
 - Petitioner succeeds: Buy out on terms of offer (subject to adjustments)
 - Only relevant to costs
 - Not relevant to liability, relief or costs



Offers

Conclusion:

- Not simply a matter of substance or form
- Surrounding circumstances highly relevant
- *“No Bright Lines”*
- But does flexibility come at a cost?



Minority Discount

- Minority Discount: Discount applied to reflect lack of control
- To be distinguished from Discount for Lack of Marketability



Minority Discount

Quasi-Partnership:

- presumption **no discount**
- Shares valued pro rata

(Re Bird Precision Bellows [1984] Ch 419, 430E-F)

Underlying rationale: CVC/Opportunity Equity Partners v Demarco Almeida [2002] 2 BCLC 108 [41]-[42]



Minority Discount

Non Quasi-Partnership:

“It is difficult to conceive of circumstances in which a non-discounted basis of valuation would be appropriate where there was unfair prejudice... but [a quasi-partnership] did not exist”

Strahan v Wilcock [2006] 2 BCLC 555 [17] Arden LJ (obiter)



Minority Discount

*“A minority shareholding ... is to be **valued for what it is**, a minority shareholding, unless there is some good reason to attribute to it a pro rata share of the overall value of the company. Short of a quasi-partnership or some other exceptional circumstances there is no reason to accord to it a quality which it lacks”*

Irvine v Irvine (No 2) [2007] 1 BCLC 445, [11] (Blackburne J)

(But see: Re Sunrise Radio [2010] 1 BCLC 367)



Minority Discount

Re Blue Index Limited [2014] EWHC 2680 (Ch):

- Type of company is not the distinguishing feature
- Even where there was no quasi-partnership, the general rule is no minority discount:

“it would substantially defeat the purpose of the new remedy if the oppressing majority were routinely rewarded by the application of a discount for a minority shareholding” [26]



Minority Discount

Re Bird (1st instance) 2 types of case:

1. Shares acquired on allotment at incorporation (commonly QP)
2. Shares acquired by transfer at a discounted price:
“irrespective of whether the company was a quasi-partnership”



Minority Discount

- Type 1 case: QP - Shares acquired on allotment: Re Bird
p.430E:

*“On the assumption that the unfair prejudice has made it no longer tolerable for him to retain his interest in the company.... In that kind of case it seems to me that it would not merely not be fair, but most unfair, that he should be bought out on the fictional basis applicable to a free election to sell his shares... Or on any other basis which involved a discounted price. In my judgment **the correct course would be to fix the price pro rata according to the value of the shares as a whole and without any discount”***



Minority Discount

- Type 2 case: shares acquired by transfer at a discounted price: either type of company: Re Bird p.431 C-E:

*“In the case of the shareholder **who acquires shares from another at a price which is discounted** because they represent a minority it is to my mind self-evident that **there cannot be any universal or even a general rule that he should be bought out on a more favourable basis, even in a case where his predecessor has been a quasi-partner in a quasi-partnership**”*



Minority Discount

- Re Blue Index: the distinction Nourse J was making in Re Bird was:
 - “based on the question whether the petitioner had acquired his shares on a discounted basis, rather than one based on the existence of a quasi-partnership” [33]
- Concluded no minority discount applied, unless petitioner acquired shares at a minority discount [51]
- Re Sprintroom [2018] EWHC 1924 (Ch) [410]: rejected argument that minority discount should apply simply where petitioner acquired shares at price less than market value (upheld on appeal [2019] EWCA Civ 932 [90])



Minority Discount

NB. Petitioner who deserves exclusion arguably should be bought out on basis which would have been applicable had they made a free election to sell shares (i.e. at a discount):

“A shareholder who deserves his exclusion has, if you like, made a constructive election to sever his connection with the company and thus to sell his shares” (Re Bird p.431B)

NB. Is this anomalous? If Petitioner deserved exclusion, is it unfair? But c.f. Re Lloyds Autobody



Minority Discount

Non-Quasi-Partnerships: 2 lines of authority:

- 1. Discount Applies:** Strahan v Wilcock; Irvine v Irvine; Fowler v Gruber [2010] 1 BCLC 563 (Scotland); Re CF Booth Ltd [2017] EWHC 457 (Ch) (Blue Index not cited);
- 2. No Discount:** Re Blue Index; Re Addbins [2015] EWHC 3161 (Ch);

(See also Thio Syn Kym Wendy v Thio Syn Pyn [2018] SGHC 54 for approach of Singaporean High Court to Re Blue Index)



Minority Discount

Re Edwardian Group [2018] EWHC 1715(Ch): authorities “*do not speak with one voice*” – no presumption in favour of pro-rata valuation in non-quasi-partnership.

Re Lloyds Autobody Ringway [2018] EWHC 2336: Not a QP, found was a presumption in favour of pro-rata valuation, but share purchase ordered at a discount as (i) petitioner deserved exclusion; (ii) had no prospect of securing J&E winding up; (iii) should be treated as a willing seller; (iv) it would not unjustifiably reward unfairly prejudicial conduct; (v) petitioner had not invested more than nominal value of shares; (vi) Business connections and expertise all provided by respondent.



Minority Discount

Re AMT Coffee [2019] EWHC 46 (Ch) Not necessary to express concluded view. Weight of authority is that there is a discretion to be exercised. Held no discount (no longer QP).

Dinglis v Dinglis [2019] EWHC 1664 (Ch): Not a QP, petitioner deserved exclusion, minority discount applied.

“Broad point illustrated by Re Blue Index is really whether applying a discount to reflect a commercial market value is fair” [364(a)] [367]

“Broad point” correct but assumed as a working hypothesis that in non-QP cases it will be an unusual case which calls for no discount to be applied.



Minority Discount: Non Quasi-Partnership

Arguments Against Discount

- > Petitioner should be treated as unwilling seller
- > In reality, minority holding may not be worth much on open market
- > Whole purpose of s.994 to give remedy minority would not otherwise have
- > Applying a discount rewards respondent for unfairly prejudicial conduct / gives respondent a windfall
- > Petitioner shouldn't be in a worse position than J&E winding up (if would be entitled)

Arguments For Discount

- > Petitioner may not in fact be an unwilling seller
- > Rationale for pro-rata value (analogy with partnership) is not present
- > Should be “*valued for what it is*” (Irvine)
- > “windfall to respondent” argument assumes respondent wants to and is able to sell
- > In fact gives windfall to Petitioner – relief goes beyond compensation / allows Petitioner to profit.



Minority Discount

*“the whole framework of the section...is to confer on the court **a very wide discretion** to do what is considered fair and equitable in all the circumstances of the case, in order to **put right and cure for the future** the unfair prejudice which the petitioner has suffered at the hands of the other shareholders”*

Re Bird Precision Bellows [1986] 1 Ch 658, 669D-E, Oliver LJ



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