Directors, Dissent and Duty: Lessons from Saxon

Sooner or later, every business reaches a point where its decision-makers disagree. The challenge is rarely the disagreement itself, but how that disagreement is managed once a decision has to be made. The Supreme Court's decision in Saxon offers a timely case study in that challenge: what happens when one decision-maker believes they know what is best for the business, but the business has chosen a different path?

The Facts

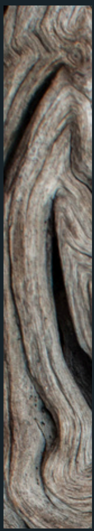
The Underlying Dispute

Spring Media Investments Limited, the Eighth Respondent (the "**Company**"), is an English holding company for a group which provides creative services to existing businesses in the fashion, beauty and luxury brand sectors.

The shareholders of the Company, including Saxon Woods Investment Ltd ("**Saxon Woods**") had agreed upon an investment period during which time they would *"work together in good faith towards an Exit no later than 31 December 2019*." It was envisaged that the "Exit Process" would include the sale of all or substantially all of the issued share capital of the Company, or the business or assets of the Company, at arm's length.

The Appellant, Mr Costa (who was the Chairman of the Company's board and an investor in the Company), had been entrusted with managing the sale. Notwithstanding the strategy set out in a shareholders agreement, which had been signed by the Company, he did not personally agree with the timetable for the sale. Mr Costa believed that delaying the sale beyond December 2019 would deliver more value. Rather than implementing the agreed Exit Process, Mr Costa took steps to delay the sale while concealing his true intentions from the rest of the board. The trial judge summarised his state of mind as: "*they wouldn't like it now if they knew, but they will thank me in the long run*". Unfortunately for Mr Costa, the Company and its shareholders, events did not unfold as anticipated. Any prospect of a beneficial Exit was ultimately extinguished by the Covid-19 pandemic.

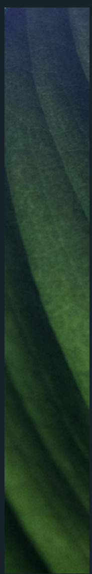
Procedural Background



First Instance Proceedings

Saxon Woods presented a minority shareholders' petition against the Appellant for relief from unfair prejudice under sections 994-996 of the Companies Act 2006 ("**CA 06**"). Saxon Woods argued that Mr Costa's actions had prevented the Company from following the agreed Exit Process, and had caused the shareholders to lose the value they would otherwise have achieved.

At first instance, the Judge held that the case on unfair prejudice had been made out, but did not accept that Mr Costa's conduct amounted to a breach of his fiduciary duty under s.172 of the CA 06, or involved dishonesty on his part. This decision impacted the terms of the buy-out order.



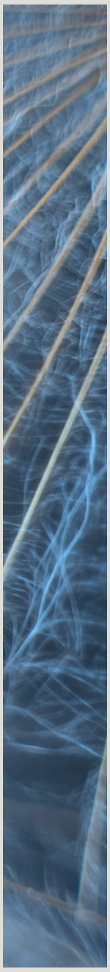
The Court of Appeal

Both Saxon Woods and Mr Costa appealed to the Court of Appeal, although only Saxon Woods's appeal was allowed.

On the facts, the Court of Appeal concluded that there was a breach of the fiduciary duty under s.172 of the CA 06. Mr Costa had knowingly deceived the board and, applying the modern test of dishonesty set out in *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2017] UKSC 67; [2018] AC 391, the Court accepted Mr Costa's dishonesty as evidence that he had breached the fiduciary duty incumbent on him as a director. Accordingly, the Court of Appeal held that the appropriate remedy was to replace the First Instance Judge's order with an immediate buy-out order, which it did.

When Does Good Judgement Become Overreach?

The difficulty was not that Mr Costa held a different commercial view from the board or the shareholders. Nor was it suggested that he intended to harm the Company. Quite the opposite: he seemed to genuinely believe that delaying the sale would produce a better outcome for everyone involved. The issue in this case was whether a director who holds that genuine belief can pursue their objective covertly and without informing his fellow board members. This was the matter before the Supreme Court.



The Supreme Court decision

Section 172 of the CA 2006 states: “*(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole...*”

Looking at the construction of s.172, the Supreme Court accepted that “*the requirement for good faith extends not merely to the director’s thinking but also to his conduct in pursuit of achieving what he believes is the best course for the company to take*” (see [52]). In other words, good faith is judged not only by what a director subjectively believes, but how they objectively seek to give effect to that belief.

It was simply not open to Mr Costa to undermine the collective decision of the board, who had agreed to follow the Exit Process. Further, his actions intentionally subverted the rights of his fellow directors to manage the Company in accordance with their constitutional rights. As Lord Briggs explains, permitting directors to pursue their own preferred strategy behind the backs of their colleagues would be "*a recipe for chaos and paralysis in corporate governance*" [60].

Accordingly, the Supreme Court upheld the order of the Court of Appeal.

Conclusion

The Court was careful not to suggest that directors must always adhere to an agreed strategy, regardless of changing circumstances. On the contrary, it recognised that there may be situations where a company's interests are better served by departing from a previously agreed course, even if doing so would amount to a breach of contract (at [64]).

Saxon reminds us there is an expectation of collegiality between a board as a whole and this is an expectation all stakeholders in a limited company are entitled to expect. Boards exist to exercise business judgment, and that necessarily includes the ability to revisit and revise earlier decisions.

Saxon is therefore not a warning against disagreement. Healthy businesses depend upon disagreement and the exercise of business judgment. The warning is against something else: allowing individual decision-makers to replace collective governance with their own private strategy. For individuals sitting on a board of directors, the message from the Supreme Court is very clear – honesty is the best policy. The value of dissent lies in improving collective decisions — not in bypassing them.

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