

## BERMUDA

### SUPREME COURT

#### ***Annuity & Life -v- Kingboard [2015] (Bda) LR 97***

#### COMPANY LAW - SHAREHOLDERS - TEST FOR UNFAIR PREJUDICE - APPLICATION TO PUBLIC COMPANIES

Shareholders who believe that they are being treated unfairly have several remedies. One of the most effective can be an unfair prejudice petition. Such petitions were historically rare in Bermuda, not least because the hurdle is a high one. A petitioner must not only show that its interests (as shareholder) have been unfairly prejudiced. It must also show that the prejudice is so bad that it would justify the winding up of the company on just and equitable grounds.

In *Annuity & Life -v- Kingboard [2015] (Bda) LR 97*, Kawaley CJ found that this test had been met. What makes the case particularly notable is that Kingboard is a company publically listed on the Singapore Stock Exchange.

The shareholder's allegations in Kingboard were two-fold. The first allegation was that Kingboard had intentionally depressed its own profitability. The Claim was that Kingboard, which produced copper foil and sold it to affiliated companies, had been selling its copper foil at an under-value. Shareholders in Kingboard, it was claimed, suffered at the expense of shareholders in the affiliated companies. The second allegation was that, when minority shareholders raised these allegations and blocked Kingboard's ability to sell its copper foil to affiliates, as they had the power to do, Kingboard's reaction had been unreasonable. (Kingboard's reaction had been to cease producing copper foil altogether, instead licensing its production facilities to a third party. The third party then proceeded to supply copper foil to the same affiliates).

Much of the trial was taken up with the allegations of transfer pricing and allegations as to whether or not the licensing arrangement was a sham. Ultimately, Kawaley CJ rejected the transfer pricing allegations in their entirety and also rejected the Claim that the license arrangement was a form of sham. He did,

however, find that Kingboard's reaction (ceasing all production of copper foil) to the minority shareholders' concerns about transfer pricing had been unreasonable and "a visible departure from the standards of fair dealing". He concluded that the test for unfair prejudice had been met and that the remedy was for the majority shareholders to purchase the petitioner's shares at a price to be assessed.

Both sides are appealing the Judgment and any appeal will likely not be heard until 2017. However, the Kingboard decision shows the power of the unfair prejudice petition and that it applies equally to publicly listed companies as to private.

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