

Shareholders behaving badly in s.994 petitions



When does a petitioner's conduct in shareholder litigation merit a penalty in terms of legal costs? The case of *Re Tradeouts Ltd* (2018) provides some answers.

This was a successful defence of an unfair prejudice petition by the respondent. As is usual, the petitioner, as the unsuccessful party, was ordered to pay the legal costs of the successful party, the respondent.

The first point to note is that those costs were stated to be in the region of £1.8 million, illustrating the potential legal spend that can be required in bringing or defending this type of litigation.

The respondent applied to the court that these costs should be paid on an indemnity basis on the grounds of the petitioner's behaviour. This would mean that the respondent would recover a higher proportion of their costs. The behaviour alleged was that the petitioner had conducted the case in an unreasonable way including:

- Failing to engage in appropriate pre-action conduct
- Pursuing litigation with a view to exerting commercial pressure
- Advancing claims that were not consistent with contemporaneous documents
- Using hostile cross-examination

The court considered these arguments but concluded that overall it had not been a case that had been brought in bad faith. It accepted that unfair prejudice petitions were by their nature hostile and the petitioner's actions did not take the case out of the norm. On that basis an award of indemnity costs was declined.

The petitioner had cross-applied for the respondent's costs award to be reduced on the basis that the respondent had refused to mediate. There is a line of cases where the court has penalised parties who have



declined to engage in mediation. However, the court concluded that on the facts of this case the failure to mediate did not justify the respondent being penalised. It is likely that the petitioner's behaviour in the litigation had some bearing on this decision.

The upshot was that the respondent's costs would need to be assessed by the court on the standard basis and the petitioner was ordered to pay £1.2 million on account.

The lesson from this case is that s.994 petitions are hostile by nature and correspondingly expensive. Behaviour that might attract censure in other litigation may be more tolerated in this arena but what is sauce for the goose is sauce for the gander. If you go in all guns blazing and your opponent fires back then expect little sympathy in terms of costs if you lose.



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