公报文章

Privy Council Emphasizes the Primary Role of the Trial Judge as the Decision-Maker in Shareholders' Disputes – the Scope for Appellate Intervention is Limited

枢密院强调初审法官在股东纠纷案中作为决策者的主要角色 – 上诉庭干预的范围有限

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Summary

In the context of an unfair prejudice claim, the Privy Council recently overturned the decision of the Eastern Caribbean Court of Appeal and restored the decision of Leon J. of the Commercial Court of the British Virgin Islands, in effect ordering a mandatory buy-out, at a price to be determined by the court, of minority shareholdings by the majority shareholder whose acts were found to be oppressive, unfairly discriminatory and unfairly prejudicial to the minority, pursuant to section 184I of the BVI Business Companies Act. The Privy Council (per Lord Briggs) took the view that unless the trial court had taken into account factors that it should not have taken into account, or omitted to consider ones that should have been assessed, the hands of appellate judges are necessarily tied and can only interfere to correct errors of law or an irrational decision. The criticisms against undue appellate activism reinforce that discretionary decisions of trial judges in shareholders disputes will likely be endorsed or upheld in the end, so long as the decision is one that is within the parameters of a just and equitable judicial response to the facts.

Background

These proceedings comprised an unfair prejudice claim. The three Appellants and the Second Respondent ("**Mr Ming**") are siblings who fell out with each other since the 1970s and had a long history of disputes between them in relation to J.F. Ming Inc., the First Respondent, incorporated in the British Virgin Islands by their late grandfather as a holding company for a successful business in property development and leasing. The Appellants are minority shareholders; Mr Ming is a majority shareholder. Since the siblings' long and bitter litigation in Hong Kong concluded in May 2006 with a decision from the Court of Final Appeal made in favour of Mr. Ming, he

概要

在一项不公平损害申索中，枢密院近期推翻了东加勒比上诉法院的决定，并恢复英属维尔京群岛（下称“BVI”）商事法庭 Leon 法官的决定，实际上强制命令大股东必须按法院厘定的价格全面收购小股东的股份。根据《BVI 商业公司法》第 184I 条，大股东的行为被认定为对小股东构成压迫、不公平歧视和造成不公平损害。枢密院 Briggs 法官认为，除非初审法院考虑了不应考虑的因素，或遗漏了应予以评估的因素，否则上诉法官只可出于纠正法律错误或就不合理的决定而进行干预。对于上诉过度积极主义的批评强调，只要初审法官在股东纠纷案件中的酌情决定是对事实作出的公正公平的司法回应，则其决定最终很可能会得到认可或维持。

背景

此案法律程序包含一项不公平损害申索。三名上诉人和第二被告（下称“**明先生**”）是兄弟姐妹，他们自 1970 年代起就互相不和，并就第一被告J.F.Ming Inc. 一事有长期争议。J.F.Ming Inc. 是彼等的已故祖父在 BVI 注册成立的一家控股公司，从事房地产开发和租赁业务。上诉人是小股东，明先生则是大股东。自 2006 年 5 月彼等在香港旷日持久的诉讼结束，终审法院判定明先生胜诉后，明先生作为唯一董事一直控制和掌管 J.F. Ming Inc.。

has been in control of and in charge of J.F. Ming Inc. as its sole director.

J.F. Ming Inc., under the management of Mr Ming, had not provided financial statements to the Appellants for 8 consecutive years since May 2006, despite a requirement under the Articles of the company requiring them to be provided. There were no efforts on the part of the Appellants to obtain financial information during the 8 years. The very first general request for financial information was made casually over dinner by the Second Appellant in November 2013. It was not until March 2014 that one of the Appellants formally requested in writing for the financial statements to be provided pursuant to the Articles, and that request was made in order to negotiate a possible buy-out of her shares. In response to the request, Mr. Ming, using his majority votes, passed a members' resolution in April 2014 to prospectively and retrospectively waive the requirement for production of financial information as stipulated in the Articles (the "**Resolution**"). As a result, the Appellants commenced a claim in the BVI Commercial Court in May 2014 asserting that pursuant to section 184I of the BVI Business Companies Act, the resolution passed was oppressive, unfairly discriminatory and unfairly prejudicial to them as minority members of J.F. Ming Inc.

尽管公司章程细则有规定，但由明先生管理的 J.F. Ming Inc. 自 2006 年 5 月以来已连续八年未有向上诉人提供财务报表。在这八年中，上诉人并没有努力获取财务资料。第二上诉人于2013 年 11 月在用餐期间就索取财务资料非正式地提出了初次一般性请求。直到 2014 年 3 月，其中一名上诉人才正式以书面形式请求明先生根据公司章程细则提供财务报表，而该请求的目的是为了就可能全面收购其股份进行商议。针对该请求，明先生的回应是利用其大股东的投票权于 2014 年 4 月通过股东决议（下称"**决议**"），以事先及追溯性取消了公司章程细则中有关提供财务资料的要求。 因此，上诉人于 2014 年 5 月于 BVI 商事法庭展开申索，声称根据《BVI 商业公司法》第 184I 条，所通过的决议对其作为 J.F. Ming Inc. 的小股东构成压迫、不公平歧视和造成不公平损害。

The cornerstone of the Appellants' case was the non-provision of financial information since May 2006, but their case extended to the way how Mr. Ming conducted the affairs of J.F. Ming Inc., including assertions that no dividends were declared, as well as other matters ranging from old to recent.

上诉方的主要观点为自 2006 年 5 月以来从来没有提供财务资料，但其立场已扩展至明先生如何处理 J.F.Ming Inc. 的事务，包括声称没有宣派股息，以及其他新旧事项。

Initially, the relief sought by the Appellants was for financial information to be provided. The claim was amended very belatedly, shortly before trial started, to include, as a primary remedy, the extended relief of a buy-out of their minority shares in J.F. Ming Inc. Mr. Ming's position was that a Court-ordered buyout would be disproportionate and that even if unfair prejudice were to be found, an order for provision of financial information would be the appropriate relief, being the relief originally sought by the Appellants in this litigation.

最初，上诉人寻求的救济是提供财务资料。直到审讯开始前不久才过晚地修改申索，添加救济请求，要求明先生全面收购其在 J.F.Ming Inc.的少数股份，并将此列为主要救济。明先生的立场是，如果法院判令全面收购股份是不适当的，即使认定存在不公平损害，判令提供财务资料才是适当的救济，而这也是上诉人在此诉讼中原本寻求的救济。

Decision of Trial Judge at the BVI Commercial Court

BVI 商事法庭初审法官的判决

The trial on liability and the form of remedy took place over seven days from 2015 to 2016, following which the trial judge, Leon J., found that the minority have made out their unfair prejudice claim. He showed significant sympathy towards the minority for their delay in demanding the financial information: *"It seems understandable that following the years of bitter litigation in Hong Kong, and the animosity between [them], [they] did not actively seek the financial information when [Mr. Ming] failed to provide them… In light of the bitter history, the Claimants cannot be faulted for not pressing for Financial Statements after [Mr. Ming] became the sole director in May 2006".* Leon J. rejected by submissions by Mr. Ming's counsel that the

关于法律责任和救济方式的审讯于 2015 年至 2016 年持续进行了七天，其后初审法官 Leon 裁断小股东提起的不公平损害申索胜诉。他对小股东迟迟未要求提供财务资料的情况表示十分理解：*"考虑到双方在香港历时多年的激烈诉讼和彼此之间的嫌隙，[他们]在[明先生]未提供财务资料的情况下没有积极要求获取这些资料似乎可以理解……鉴于过往的紧张局面，申索人在[明先生]于 2006 年 5 月成为唯一董事后没有敦促其提供财务报表不能被认定为具有过错。"* Leon 法官拒绝采纳明先生的律师所作的陈词，即没要求便等同于放弃彼等获取财务信息的权利，且 Leon 法官认为，未有提供财务信息是对作为公司股东的每一位上诉

inaction amounted to a waiver of their rights to financial information; and held that the failure to provide financial information was oppressive, unfairly discriminatory and unfairly prejudicial to each of the Appellants in their capacities as members of the company.

人所受的压迫、不公平歧视和不公平损害。

Leon J. ordered Mr. Ming to provide the financial statements from the year 2006 onwards and for each year thereafter, but he considered that this being an order regulating future conduct of the company's affairs would be insufficient to remedy the unfair prejudice, or deal fairly with the situation which has occurred. In his words, *"neither the Court nor the parties have unlimited resources to deal with the inevitable disputes that will arise".* Given there is a complete breakdown of relationship and a long history of unfair prejudice, and the minority's lack of trust and confidence in Mr. Ming's future management of the company, he held the fairest and most sensible resolution must include a Court-ordered buy-out of the minority's shareholding so that there is a reasonably clean break. The further ordered the Resolution be set aside, and part of the Articles to be deleted to remove the possibility of any future waiver by Mr. Ming to provide financial information to the minority.

Leon 法官命令明先生提供 2006 年及其后每年的财务报表，但他认为这作为规管公司日后事务处理的法庭命令，其尚不足以补救已发生的不公平损害或不足以公平地处理已形成的局面。他表示："*无论是法院还是各当事方，都没有无限的资源去处理将会出现的不可避免的纠纷*"。鉴于双方之间的关系完全破裂和长期以来的不公平损害，以及小股东对明先生未来管理公司缺乏信任和信心，Leon 法官判定最公平和最明智的解决方式必须包括法院命令，要求明先生全面收购小股东股权，从而合理地划清双方关系。Leon 法官进一步命令撤销决议及删除部分公司章程细则，以消除明先生日后再度取消向小股东提供财务资料这规定的可能性。

Decision of the Eastern Caribbean Court of Appeal

东加勒比上诉法院的判决

The major issue raised in the appeal was whether the trial judge exercised his discretion properly in ordering the buy-out as the main remedy.

上诉中的主要争论点是，初审法官下令以全面收购作为主要救济是否妥当行使了其酌情决定权。

The Court of Appeal took the view that a claim in unfair prejudice could not have been properly founded until the minority specifically requested that financial information be provided. Further, the Justices considered that the trial judge failed to take into account two aspects: firstly, the Appellants' prolonged failure to request information during 2006 to 2013; and secondly, their financial misconduct while briefly in control of the company, as material factors in his determination of the appropriate remedy. The Court of Appeal considered that the justice of the case did not warrant the making of a mandatory buy-out order; and the buy-out order was draconian and disproportionate to the wrongs committed. Since the trial court committed an error of principle, the Court of Appeal exercised the discretion afresh taking into account the totality of the circumstances, and held that an order requiring Mr. Ming to provide financial information was more appropriate and proportional.

上诉法院认为，在小股东明确要求提供财务资料前，不应成立不公平损害申索。此外，法官认为初审法官在决定适当的救济时，未考虑两方面的重大因素：一是上诉人自 2006 年至 2013 年期间迟迟未要求提供资料；二是上诉人在短暂控制公司期间的财务不当行为。上诉法院认为，基于案件的公正性，并无必要发出强制性全面收购命令，且全面收购命令过于严苛，与所犯的错误不合比例。鉴于初审法院犯了原则性错误，上诉法院在考虑整体情况后，重新行使了酌情决定权，判定要求明先生提供财务资料的法庭命令更为适当和合乎比例。

The Privy Council's decision – To buy-out, or not to buy-out?

枢密院的判决 – 要或不要发出全面收购命令？

At the outset, the Privy Council defined the short question that is decisive of the appeal as this: whether the trial judge indeed made the errors identified by the Court of Appeal. If not, then the discretion as to remedy simply ought not be re-exercised.

最初，枢密院将上诉的关键问题简要概括为：初审法官是否真的犯了上诉法院所指的错误。若没有，则不应重新行使有关救济的酌情决定权。

In the end, the Lordships exercised appellate restraint and

最后，大法官们行使了对上诉庭的限制和约束，认为上诉法

constraint. They considered that the Court of Appeal's criticisms of Leon J's reasoning in his exercise of discretion did not withstand analysis. At the remedy stage, the Court is entitled to have regard to any aspect of the facts as found, whether pleaded or unpleaded, about the history of the company, the relationship between the shareholders and directors, the realities and practicalities of the overall situation etc. Nothing is off-limits, subject only to the twin tests of relevance and weight. The Privy Council confirmed the prospective nature of the trial judge's jurisdiction by acknowledging that the trial court is entitled to look not only to the past, but also to what is likely to happen in the future.

院对 Leon 法官行使酌情决定时的根据之批评站不住脚。在审理救济阶段，初审法院有权考虑所涉及事实的任何方面（不论是否已包括在申索书和答辩书内），包括公司的历史、股东与董事的关系、案件整体的实际情况等。只要符合相关性和重要性的双重标准，便无其他限制。枢密院肯定了初审法官司法管辖权本质上是有前瞻性的，承认初审法院不仅有权审视过去，亦有权考虑未来可能发生的事。

Paragraph 20 of the dictum of Lord Briggs, which endorses the colorful metaphors in Lord Justice Lewison's dictum in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29, is worth quoting in full:

枢密院Briggs 法官的判决报告书第 20 段（对 Lewison 大法官在 *Fage UK Ltd 诉 Chobani UK Ltd*［2014］EWCA Civ 5；［2014］FSR 29 一案的判决书中的精彩比喻表示赞同）值得全文引用：

"It is necessary at this point to bear in mind the well-settled constraints upon the appellate jurisdiction, when asked to re-exercise a discretion conferred upon the first instance judge. These constraints form part of a package, developed over many years, which ensure that the benefit of finality which should normally follow from the judicial determination of the parties' dispute is not rendered ineffective by undue appellate activism… The reasons for this approach are many. They include:

"当被要求重新行使授予原讼法庭法官的酌情决定权时，有必要牢记对上诉司法管辖权的既定限制。这些限制多年来形成整体规则的一部分，可确保对当事方纠纷作出的司法裁决通常应享有的终局性利益不会因上诉过度积极主义而失效…这样做的原因有很多，其中包括：

i) *The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those fats are if they are disputed.*

i) *初审法官的专业职能是决定哪些事实与待决的法律问题有关，以及若这些事实存在争议，那事实究竟是什么。*

ii) *The trial is not a dress rehearsal. It is the first and last night of the show.*

ii) *审判并非彩排，成败在此一举。*

iii) *Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court, and will seldom lead to a different outcome in an individual case.*

iii) *在上诉过程中重复初审法官的角色是对上诉法院有限资源的过度使用，在个案中很少会得出不同的结果。*

iv) *In making his decisions the trial judge will have regard to the whole sea of evidence presented to him, whereas an appellate court will only be island hopping.*

iv) *初审法官在作出决定时，会全盘考虑呈交予他的海量证据，而上诉法院只能选择性的作跳岛巡游。*

v) *The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*

v) *任何情况下法庭的气氛无法透过参考文件（包括盘问的腾本）来重现。*

vi) *Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done."*

vi) *因此，即使有可能重复初审法官的角色，但实际上也做不到。"*

The Privy Council's remark on the importance of the warring shareholders' conduct is particularly noteworthy: *"the conduct of the applicant is in any particular case a factor of infinitely variable weight, on a scale from it being decisive at one end to being of no weight at all at the other. The question where it lies on that scale is a matter for the judge".*

枢密院对关于不和股东之间的行为有何重要性的论述尤其值得一提：*"在任何个案中，申请人的行为都是一个无限可变的因素，可能介于天秤一端的具有决定性的意义到天秤另一端的毫无分量。至于它究竟处在天秤的哪个位置，这是法官要考虑的问题。"*

The Privy Council further noted that even if the appellate court disagrees with the challenged decision of the trial

枢密院进一步指出，即使上诉法院不同意初审法官的决定，

judge, they will be constrained to conclude that, even though they would have reached a different conclusion, they cannot interfere. The Privy Council endorsed the trial judge's view that there was a clear case for ordering a buy-out. Accordingly, the buy-out order was restored.

Practical Implications

The decision of the Privy Council confirms the importance of finality and certainty of decisions made within the reasonable parameters of a trial judge's discretion. This will likely discourage warring shareholders' in dispute from protracted appellate proceedings, and may encourage them to focus more of their resources and attention on the trial itself, being "the first and last night of the show". At the same time, shareholders disappointed by the outcome of trial proceedings may wish to devote more time to explore different options for settlement with their opponents before commencing appeal proceedings. It will likely be an uphill battle for litigants of shareholders' disputes to convince an appellate court to depart from a discretion reached by a trial judge.

The authors of this article, Richard Evans and Emily So of Conyers Dill & Pearman represented the Second Respondent, Ming Shui Sum, throughout the proceedings, including before the Privy Council.

If you are interested in understanding more about this legal development, please feel free to contact your usual contact at Conyers or the below authors.

*The authors are both members of Conyers' **Asia Disputes & Restructuring Group (ADRG)** which is tasked to provide sophisticated Bermuda, British Virgin Islands and Cayman Islands litigation advice to clients connected to our multi-lingual (Cantonese, English and Mandarin speaking) team based in Asia. The ADRG integrates the most experienced and highest rated partner-led litigation teams in Asia, Bermuda, the British Virgin Islands and Cayman Islands providing seamless and comprehensive services across jurisdictions round the clock. Our advocates in these jurisdictions are leaders in their fields, recognised by all leading independent directories and our greater depth and range of expertise in the region distinguishes us from our competition and ensures that our clients receive comprehensive, reliable and thorough advice.*

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也必须承认，即使上诉法院有可能得出不同的结论，其也不能进行干预。枢密院认可初审法官的观点，即有明确的理由命令全面收购。因此，全面收购的法庭命令得以恢复。

实际意义

枢密院的判决肯定了初审法官在其酌情权限合理范围内所作决定之终局性和确定性都是重要的。这可能会令争执不休的股东放弃旷日持久的上诉程序，并可能鼓励他们将更多的资源和精力投入在初审过程中，视其为"成败在此一举"的背水一战。同时，对审判程序的结果感到失望的股东或会希望在启动上诉程序开始之前投入更多的时间与对方当事人探讨其他解决方案。这样，对于股东纠纷案中的诉讼当事人来说，要说服上诉法院背离初审法官出具的酌情判决可能会是颇艰难的一战。

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若阁下有兴趣了解关于这一法律发展的更多信息，请随时联络您在康德明的一般联络人或下列作者。

*作者均为康德明**亚洲纠纷与重组团队 (ADRG)**的成员，该团队旨在为与我们位于亚洲的多语种（粤语、英语和普通话）团队相关的客户提供专业的百慕大、英属维尔京群岛和开曼群岛诉讼法律意见。ADRG 集合了亚洲、百慕大、英属维尔京群岛和开曼群岛最富经验和最高评级的合伙人领导的诉讼团队，全天候为各司法管辖区的客户提供综合服务。本所在该等司法管辖区的讼辩律师均为其各自领域的领军人物，受到所有主要独立名录的认可。本所于区内更深入和更广泛的专业知识使我们在竞争对手中脱颖而出，并确保我们的客户可获得全面、可靠及深入的法律意见。*

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