The New Breed of Activist Shareholders

Since the dawn of modern English company law in the nineteenth century, shareholders have often had a tough time, particularly when one compares the treatment of shareholders under to general law in this country to the very different regime that has long existed in the United States. Nothing stands still and some legal commentators suggest that more change is afoot, particularly in the realm of what Americans call “securities” or “investor protection” disputes.

As a general rule, the circumstances in which a shareholder can sue the company in which he holds shares are fairly limited. Under English law, when a wrong is done to a company, it is for the company itself and only the company to sue, as opposed to any individual shareholder or group of shareholders. By virtue of statute, derivative actions, the common law on the oppression of minority shareholders and contractual rights under shareholders’ agreements there are often a variety of options for aggrieved shareholders but what we do not have is anything akin to the legislation in the United States that for nearly ninety years has given shareholders a full-blooded right to sue under statute in a very wide range of circumstances.

On the other side of the Atlantic there exists a long history and a vast body of case law under which shareholders with a grievance have sued the company, primarily when a public company suffers a dramatic fall in its share price as a result of fraud or wrongdoing. No such regime exists here and there unlikely to be a call for an American-style approach in the near future.

Following the case of *Morrison v. National Australia Bank*, 561 U.S. 247 the United States decided that it would no longer play host to cases involving foreign securities that have little or no connection with their home patch. This proved to be a catalyst for change, with investors looking beyond the shores of the United States for other countries offering alternatives to what was once almost viewed as an American monopoly. In this country two very distinct avenues for recourse were created by Sections 90 and 90A of the Financial Services and Markets Act 2000 which gave rise to statutory causes of action that extend quite considerable the well-established (but somewhat limited) common law possibilities. In short, Section 90 makes a company who is responsible for listing particulars and prospectuses, liable to compensate a person who has acquired shares to which the listing particulars or prospectus apply; and has suffered loss as a result of either: any untrue or misleading statement or omission. No reliance by the claimant needs to be proven, as it would in, for example, a common law misrepresentation case. Section 90A creates a cause of action for persons who have suffered loss as a result of a dishonest misleading statement or omission in a wide range of published information relating to shares, or a dishonest delay in publishing such information but in this instance the claimant must prove reliance. Statutory defences exist, including a “reasonable belief” defence.

Despite the fact that this has been active for nearly two decades there have not been rafts of shareholder claims being brought in England. Why not?

First, prospectuses and similar publications and public statements are generally subjected to extreme scrutiny for accuracy and reliability. It is not too often that a relevant set of facts arises and thus gives rise to a claim.

Secondly, there is nothing in England akin to an opt-out American style class action system which makes the framework of a shareholder action very difficult if there are disparate claimant shareholders;

Thirdly, mounting a complex and substantial claim is expensive, time-consuming and all-consuming.

Fourthly the risk of adverse costs in the event of defeat deters many prospective claimants albeit that there are ways to mitigate this risk.
Finally, whereas the United States system actively encourages litigation with jury trials, limited adverse costs and mega-damages, ours does the very opposite.

Notwithstanding these considerations, there are many commentators who believe that we are witnessing a new era for investor protection litigation in England and there are strong signs of new cases emerging. There would seem to be many reasons for this. First, there is a developing hardening of attitudes by large institutional investors, some of whom have decided that they have a duty at least to consider possible claims. Secondly, new funding and after-the-event insurance models and the permissibility of contingent fee arrangements have made feasible claims that perhaps once would not have been. Thirdly, there is new awareness of investor protection generally. The *Morrison* case has forced institutions who historically limited their sights on the United States to look elsewhere. The English courts are well-respected and a stable forum for litigation coupled with a discovery regime which, although it is not as extensive and probative as that administered in the American courts, does make England a better place than continental Europe where reliance discovery tends to prevail.

The next few years should be interesting. Without a crystal ball it is hard to see if a new brand of English securities cases will flourish but as with so many things, what starts in the United States, all too often ends up here too. Watch this space.

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