Proper or improper

Consultant John Heaton clarifies what company secretaries and their legal advisers need to know about access requests to the register which may be for an improper purpose.

When the Companies Act 2006 came into force, section 117 made changes to section 356 of the previous Act, requiring those seeking to inspect or obtain copies of the share register (known as an 'access request') to disclose the purpose for which the information was to be used. If the company thinks that this purpose is improper, it can apply to the court for a 'no access order'. However, the new Act did not define a proper or improper purpose, which was left to the courts to decide.
The Institute of Chartered Secretaries and Administrators (ICSA) issued a guidance note in January 2009, to which Equiniti and a number of our clients contributed, giving examples of proper and improper purposes.
However, this remained untested in the courts. Consultant John Heaton has also recently looked at a Court of Appeal judgement by Mr Registrar Baister in the High Court, Chancery Division (the Registrar), which endorsed the ICSA guidance note, and provides considerable clarification on how the law will be applied and what company secretaries and their legal advisers will need to consider if they receive an access request which they believe might be for an improper purpose.

The key points from John's article are:

■ ' Proper purpose' applies equally to members and non-shareholders seeking access to the register.
■ The court has wide powers to interpret the term but the onus is on the company to demonstrate to the court that it should be satisfied on a balance of probabilities that the request is for an improper purpose.
■ If a member, the request should relate to the shareholder's interest and/or the exercise of shareholder rights.
■ If access by any party is sought for a combination of proper and improper purposes, the former should be allowed, subject to appropriate safeguards.
■ It should be remembered that speed of response is paramount as the company has only five days from receipt of the request to go to court.

The case is *Burry & Knight Limited & anr and Martin John Murless Knight [2014] EWCA Civ 601*. Due to the wide discretion of the court and the relevance of the specific facts and circumstances which were taken into account, some background information is relevant for interpreting the judgement in this case.

It related to two long-standing, profitable companies whose directors and shareholders came predominantly from two families. One of the directors, Dr Knight held the position from 1987 until 2000. Around the time he ceased to be a director, Dr Knight raised concerns about alleged financial improprieties, which he then pursued for about two years. In 2002, he asked for a copy of the register, but he did not subsequently pursue this. He let the allegations lie until 2009 when he wrote a long letter to the companies' auditors. For nearly three years, he did not write again but in January 2012, he renewed the request for a copy of the register of members. He alleged that the Chairman had acted dishonestly and was a liar

and a bully, stating that he wished to raise his ‘concern to the shareholders, the professional bodies of the company auditors and solicitors, the Charities Commission, the Lord Lieutenant of Hampshire, my MP and other parties likely to be interested’.

It was in this very particular context that the request was found to contain an improper purpose. The strong feelings expressed and the companies’ efforts over time to investigate the allegations were material in both the Registrar and the Court of Appeal coming to the conclusion they did. This reinforces the need for companies to assess the specific circumstances before considering going to court to seek a ‘no access’ order.

The Court of Appeal noted that it was paradoxical that the first case under the new section 117 should not be about access to the share register by a member of the public but instead, by a member of the company seeking access for the purpose of communicating with other shareholders on company business. It recalled the ‘mischief’ at which the changes had been directed: ‘the abuses of the right to inspect the share register by, for instance, bounty hunters or people who sought to use the names and addresses for advertising purposes.’

The Court also noted that Parliament has not identified any purposes as improper, unlike the Australian Corporations Law and contrary to the recommendations of the Company Law Steering Group before the final draft of the Companies Act 2006 was tabled. It agreed with the Registrar’s judgement that Parliament has left the words ‘proper purpose’ for the courts to work out, not to limit or define it, and that the words ‘proper purpose’ should be given their ‘ordinary natural meaning’.

Furthermore the Registrar held, and the Court of Appeal agreed, that in the case of a member of a company, proper purpose should relate to the member’s interest and/or the exercise of shareholder rights, and that the onus is on the company to demonstrate to the court that it should be satisfied on a balance of probabilities that the request is for an improper purpose. The judgement went on to say that ‘there is a strong presumption in favour of shareholder democracy and a policy of upholding principles of corporate transparency and good governance’. The value of the information, which the member wishes to circulate to others, is not a question that the courts should decide, though in this case the fact that the communication for which access was sought was demonstrably of no value was a factor that was taken into account; nor should the court rule out access on discretionary grounds, e.g. that the company may be embarrassed, only if access is sought for an improper purpose.

The judgement states that ‘it is not possible to provide an exhaustive description of what is a proper purpose’ but that ‘a court might have regard to a guidance note issued by the ICSA when deciding what constitutes a proper purpose but such guidance is non-binding and non-exhaustive’. In the judgement, one of the purposes stated in the access request was ‘to raise concerns about the proposed method of valuation of the shares’ which was considered to be a proper purpose. The Court of Appeal added an instance of improper purpose outside those quoted in the ICSA guidance note; Dr Knight sought access to the register to pursue long-standing (and stale) allegations and the fact that he wanted to study the register could only be for the improper purpose of obtaining support for such a proposal. Both of the other two Court of Appeal judges considered that court could have regarded the motivation of bad faith or dishonesty behind the request, from the documentary evidence produced without cross-examination, though this will be done reluctantly and not lightly.

The Registrar found, and the Court of Appeal agreed, that two of the purposes for which a copy of the register of members was sought were improper and one was a proper purpose. The proper purpose was not 'tainted' by the others; 'in such cases, the court would have to make a no-access provision if any one of the purposes was improper.' It continued: 'faced with the problem of multiple purposes – some good, some bad – the Registrar held that the companies were not bound to comply with the request, provided they gave undertakings to the court to circulate to shareholders a letter about the (proper) share valuation purpose.'

In other words, quoting *Pelling v Family Need Fathers Limited [2002] BCLC 645* under the Companies Act 1985, section 356(6), it was open to the court to make an order which enabled a party to communicate with shareholders but at the same time permitted the company to keep the details of the shareholders on the register private. The Registrar decided that direct contact would not be allowed, but the court directed that a letter should be drafted by Dr Knight's solicitors, approved by the companies' solicitors or the court, and then sent to shareholders by the companies and forward on any reply after omitting the shareholders' contact details. He also stated that the companies could add their own letter if they wished to do so.

The Court of Appeal added 'that there would be other ways of achieving the same end, such as by the court accepting an undertaking from the person making the request for access as to the purpose for which he would use the information obtained. Any such undertaking would be backed up by the criminal sanction on misuse of that information in section 119'.

In Equiniti's experience, in the seven years since the new provisions came into force, companies are very unlikely to face an access request which is for an improper purpose; there are very few we are aware of which have resulted in push-back by the company.

Equiniti has clear procedures to escalate internally or externally any request it receives immediately. In the first instance, companies may seek to get the request withdrawn voluntarily while they enter discussions with the person making the request. The difficulty is that, if that approach fails, the clock starts ticking the moment the request is received and the company has a maximum of five working days to either comply with the request or apply to the court, so it has very limited time to assess the situation and respond accordingly.

If you would like more information on this topic please contact your relationship manager.

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