

“Mischief, Thou Art Afoot”: Corporate Mischief and Judicial Remedies in Matrimonial Property Disputes

Advanced Matrimonial Property

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“MISCHIEF, THOU ART AFOOT”: CORPORATE MISCHIEF AND JUDICIAL REMEDIES

Shakespeare knew human nature, knew of its failings and of our fascination with them. As he wrote in *Julius Caesar*, “Mischief thou art afoot. Take thou what course thou wilt”, he knew of the endless variety and ingenuity of human deception. The law has grappled with this same human ingenuity in matters of corporate mischief and fraud.

The goal of this paper is to highlight some approaches afforded by statute and equity when corporate interests become interwoven with divorce and matrimonial disputes. It is my experience as a corporate and commercial litigator that matrimonial property remedies are often enhanced by an understanding of corporation obligations and oppressive conduct. The rights of parties, including third parties such as other shareholders, creditors and fellow directors must not be overlooked, yet none of these persons may be parties to the matrimonial property or divorce action.

We will start with an overview of corporate control and minority shareholder rights.

Corporate Control

A key to dealing with corporate holdings, especially in anticipation of times that may be challenging, including in a future matrimonial breakdown, is the Unanimous Shareholders Agreement (“USA”). This will be prepared to anticipate events that must or must not be done, even in the face of majority shareholder or director support to the contrary, subject to the agreement of all shareholders.

For example, a USA may require that a given majority shareholder must always be elected to the board of directors, must be in charge of business development, or have any other right or duty.

As matrimonial property proceedings deal with the division of assets of the couple, and as corporations are separate legal persons from their shareholders, matrimonial property actions normally focus on who should own the shares, or how much they should be valued at if they are ordered to be purchased or sold. The assets of the corporation belong, usually, only to the corporation and are not themselves matrimonial property.

Corporate law holds that as long as creditors are being paid and contracts are being honoured, a stalemate between shareholders that cripples the corporation is permitted, and that the Court will not interfere. A USA that anticipates such a stalemate is the best tool to prevent or resolve it. Those remedies may open up avenues of recovery or escape for one’s investment that may otherwise be trapped within the corporation.