MAPPING JUDICIAL REACTIONS TO SHAREHOLDER ACTIVISM IN THE UK

SHAREHOLDER activism – defined as dissatisfied investors attempting to initiate change in a company without a change in control – has long been a feature of the US investment landscape. The practice is increasingly being exported abroad as funds search for new opportunities in under-explored markets. The UK is a favoured destination for shareholder activists: approximately 50 shareholder activist campaigns occurred in 2018 (Activist Insight, *Activist Investing in Europe 2018 Report*), and this number is set to increase. It has been suggested that the weak pound, strong shareholder rights and the uncertainty of Brexit have left British listed companies more susceptible. However, most shareholder activism behaviours have yet to be considered by the UK courts. As further discussed below, a particularly important issue is so-called "information leakage" by a shareholder activist-appointed "constituent" director, which, briefly, is when such a director leaks material, non-public information gained from within a company's boardroom to the shareholder activist sponsor. According to commentators, information leakage appears to occur fairly regularly in the US. The UK legal position on information leakage was recently addressed, for the first time ever, by Russen J. in the seminal case of *Stobart Group Ltd. v Tinkler* [2019] EWHC 258 (Comm).

Stobart Group is a FTSE 250 company. At the relevant time, Mr. Tinkler was a significant minority shareholder (7%) and director. In late 2017, Tinkler developed a distaste for the management style and commercial vision of the CEO, Mr. Brady. This later mutated into general discontent with the board and corporate strategy, which Tinkler specifically blamed the chairperson, Mr. Ferguson, for exacerbating. Instead of discussing his "gripes with the remainder of the board" (at [736]), Tinkler set out to foment a shareholder revolt and stage a boardroom coup. First, Tinkler disclosed confidential information in private discussions with key shareholders to express dissatisfaction with the board and corporate strategy. Second, Tinkler shared confidential information concerning the financials of a business venture in which the company had an interest with an outsider, Mr. Day. Third, Tinkler sent public communications containing confidential information to the general body of shareholders. All of this was done in an effort to remove Ferguson and take control of the board. In response, a committee of disinterested directors met in June 2018 and summarily dismissed Tinkler as both an employee and director of the company. In the committee's view, Tinkler's foregoing actions represented "a very significant threat to … corporate governance, which in turn would be likely to lead to instability of the Company" (at [329]). Together with numerous

other contentions, the company brought a claim against Tinkler seeking declarations of fiduciary breach.

The Court held that each instance of Tinkler using confidential information against the board was a separate violation of the directors' fiduciary duty to promote the success of the company under Section 172 of the Companies Act 2006 (at [741], [749], [761]). Tinkler attempted to argue that his unilateral actions were taken as a true "custodian of shareholder value" (at [218]), but in Russen J.'s estimation he was selfishly influenced in large part by what he regarded as a risk to his shareholding. In so concluding, the Court rejected Tinkler's argument that the duty to exercise independent judgment under Section 173 justified his taking of the abovementioned actions. The duty to exercise independent judgment is one that directors must observe in the context of membership in a collective body. This idea does not extend to an entitlement for an individual director to engage in "freelance activity" independently of the board in relation to matters that fall within the realm of managing the company's business (at [414]). The power contained in the company's articles of association are vested collectively in the board, not just in one director, and, therefore, it would not be in the best interests of the company for an individual director to act alone, especially when the aim is to destabilise and subvert the board (*Re Assured Logistics Solutions Ltd.* [2012] BCC 541, at [32]).

Russen J. further held that a director's access to confidential information is only as a member of the board. In this way, any discussion with only certain shareholders or outsiders involving confidential information, especially for the purpose of expressing views upon board matters, must be done in the presence of the whole board, or by way of the individual director securing prior permission. On the latter point, whilst Russen J. entertained the idea that such a course would be legitimate provided that the board agreed to the terms of the individual director's message beforehand, he ultimately doubted whether there would ever be a justification for the sharing of confidential information with only select individuals privately: "The risk of a resulting imbalance of information … especially if communicated orally at private meetings … becomes obvious if that course is adopted. That risk carries with it a real danger that the director will fall foul of his duty to act in the best interests of the company" (at [425]). The "interests" of the company are linked to those of its members – as a whole – without discriminating between the interests of any majority or minority groups that might exist (*Lee Panavision Ltd. v Lee Lighting Ltd.* [1991] 1 BCC 620, 634F; *Re Southern Counties Fresh Foods Ltd.* [2008] EWHC 2810, at [52]). Therefore, revealing confidential information will essentially always require the board to, collectively, present its views at the general meeting.

Bearing this in mind, when a shareholder activist secures (usually minority) board representation in the particular company, it is this foothold into the boardroom that places the constituent director in a position to engage in

the disclosure of material, non-public information to the shareholder activist sponsor (J.C. Coffee, Jr, R.J. Jackson, Jr, J.R. Mitts and R.E. Bishop, "Activist Directors and Agency Costs: What Happens When an Activist Director Goes on the Board?" (2019) 104(2) Cornell L.Rev. 381). Confidential information can be, broadly, categorised as: inside information (concerning finance, strategy or operations); proprietary information (of commercial value to competitors); and sensitive information (regarding internal boardroom dynamics and discussions). There could be various reasons why information leakage might occur. For example, it has been noted in the US commentary that information leakage is a way for the shareholder activist to subsidise the costs of the intervention. Any corresponding increases in the company's share price are distributed pro rata amongst the general body of shareholders, but the opportunities created through information leakage are a benefit that the shareholder activist enjoys privately. Opportunities might include the sharing of leaked information with investment professionals in the context of "informed trading" or passing it onto investor-allies to maintain leverage over the company's board. In Tinkler's case, he leaked confidential information falling into all three subcategories in an attempt to undermine shareholders' confidence in the incumbent directors and assert control in the boardroom.

Stobart clarifies that, absent the board being present or receiving prior approval, a director would not be permitted to share confidential information with only certain shareholders or outsiders without risking fiduciary breach. Here, however, this view must be further qualified since Russen J. doubted whether the sharing of confidential information with only certain individuals could ever be justified and in conformity with section 172. This holding has serious commercial and legal implications for UK-bound shareholder activists seeking to engage in information leakage. This is because, under the de facto US corporate law of Delaware, it is not clear whether information leakage constitutes a fiduciary breach (*Kalisman v Friedman*, C.A. No. 8447-VCL (Del. Ch. Apr. 17, 2013)). More specifically, aside from being labelled as a horizontal agency cost forced upon a company's general body of shareholders (that may lead to market distortions in some circumstances), it has not generated much controversy. If constrained at all, the suggested US approach to regulating information leakage currently involves a mixture of bylaw amendments, board confidentiality policies and other contractual arrangements.

It is commonplace for shareholder activists in the US to criticise a company's board and its strategy in public (as well as in private discussions with other shareholders). *Stobart* strongly suggests that UK corporate law takes a very different approach to information leakage used for this purpose. Russen J. characterised Tinkler's actions as "guerrilla tactics" and "sniping at the Board from the outside", even though he sought to paint himself as a "victim of some boardroom wrangle over the direction of the Company"

who was acting in the best interests of the general body of shareholders (at [754], [757]). This is a device with which all shareholder activists will be familiar. Therefore, in practical terms, if a constituent director takes the view that a company's board is managing the business in a way that is not consistent with the shareholder activist's agenda, and has not secured permission to "brief" the shareholder activist sponsor, then she may express dissent at a relevant board meeting, ventilate her views at the general meeting and then resign, in that order (at [419]–[422]). Given that shareholder activist campaigns are predicted to increase in the UK, *Stobart* signals a range of future possibilities: increased litigation due to a clash of legal cultures, a change in shareholder activists' behaviours or, now that the legal expectations placed upon a constituent director are more settled, a proliferation in boardroom activism.

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SEARCH ENGINES, GLOBAL INTERNET PUBLICATION AND EUROPEAN DATA PROTECTION: A NEW *VIA MEDIA*?

THE ruling in *Google Spain* (Case C-131/12 (EU:C:2014:317)), which was handed down over five years ago, was undoubtedly a landmark decision on the interface between European data protection and online publication. However, even as regards determination of the duties of Internet search engines to de-index personal data on request, this Grand Chamber judgment only provided the beginnings of the necessary analysis. More recently, in Case C-507/17, *Google v Commission nationale de l'informatique et des libertés* (EU:C:2019:772), another Grand Chamber decision addressed one core issue which immediately arose, namely, specifying within which geographical services a global operator such as Google was mandated to accede to an otherwise valid claim by an individual to de-indexing or, in other words, to the removal of specified personal data from at least name-based searches. This reference arose from Google's appeal against the decision of the French Data Protection Authority (DPA) to fine this company for its failure to ensure such de-indexing on a global basis in all cases, an appeal which was ultimately heard by the French Conseil d'État. Although this DPA intervention was grounded in the former Data Protection Directive (DPD) 95/46/EC (OJ 1995 L 281/31), the Court of Justice ultimately gave even more attention to the current General Data Protection Regulation (GDPR) 2016/679 (OJ 2016 L 119/1). It held that this legislation required Google to adopt measures which had "the effect of preventing or, at the very least seriously discouraging internet users in