Shareholder activism in the sports sector

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Introduction

The sports sector is relatively unregulated when compared with other sectors, such as financial services or manufacturing. Given the high returns in the sector and relatively low entry barriers, this regulatory position makes it an attractive asset class for investment. However, the sector’s relatively laissez faire character also makes it ripe for disputes, especially those involving the control of sporting brands and major events, the operation of joint ventures and the breakdown of shareholder relationships more broadly. Other sports-specific circumstances giving rise to disputes include fan-led campaigns to hinder M&A transactions, while shareholder rights are also sometimes used to resolve perceived problems at a sports club.

In this article, we consider some recent trends in corporate disputes within the sports sector, looking at the phenomenon of shareholder activism, the pros and cons of corporate ownership and some of the rights and powers available to shareholders in the event of a dispute. We also suggest some measures that could be adopted by shareholders in order to help prevent disputes from arising in the first place.

The pros and cons of corporate ownership

The increase in corporate ownership of sports clubs (which, historically, has been either partially or fully owned by fans as the majority shareholder, or through an unincorporated association structure), has nevertheless helped to drive the growth, professionalization and elite character of major sports. It has also proved a non-pecuniary gift to many fans. In the Premier League, within three years of Roman Abramovich taking control at Chelsea FC in 2003, the Blues won the league title two years in a row, alongside the FA Cup and League Cup. Likewise, Malcolm Glazer’s Manchester United FC proceeded to win the Premier League in 0607, 0708, 0809, 3 in a row following takeover, while Manchester City FC, after a long period in Manchester United’s shadow, have won the Premier League three times following Sheikh Mansour bin Zayed Al Nahyan’s acquisition in 2008.

Outside football, the acquisitions of the NBA’s Golden State Warriors by Peter Guber and Joe Loeb, and the Aviva Rugby Premiership’s Saracens by Nigel Wray has seen both teams develop into sporting and commercial powerhouses. Anyone who has viewed the recent Amazon show All or Nothing, a documentary series that goes behind the scenes at the likes of the Dallas Cowboys and Manchester City, will quickly appreciate how fully engaged corporate ownership can strengthen clubs to unprecedented levels.

Yet the arrival of new investment has left some fans and historical minority shareholders feeling disenfranchised and disenchanted with the price of “success” as their ownership is diluted by corporate acquisitions, often backed by high-net-worth individuals, global entertainment groups or private equity. As a result, minority shareholder actions are becoming increasingly common in the sports sector as the legal means by which hostile shareholders or “traditional” supporters express their discontent with the governance of “their” clubs.
Shareholder rights and powers

The essential tools that shareholders might wish to deploy have not changed significantly in recent years. Under English company law, any shareholder or group of shareholders that control a total of 75 percent of a company’s allotted share capital can vote on and pass special resolutions and, therefore, do not require the consent of the minority shareholders for decisions to be made. However, minority shareholders do have certain statutory rights, including:

- The right to ask a court to call a general meeting
- The right to vote at that meeting
- The right to inspect minutes of previous general meetings as well as the register of members, and
- The right not to be unfairly prejudiced

Minority shareholder rights

Where grievances escalate into full blown disputes between the majority shareholder, the board and minority shareholders, those minority shareholders may rely on certain rights to protect those interests and, in some circumstances, provide relief. These options include:

- **Petition for unfair prejudice** (section 994 Companies Act 2006) – whereby a shareholder may petition a court for an order on the grounds that the company’s affairs are, or have been, conducted in a manner that is unfairly prejudicial to the interests of members, or that an act or omission of the company is or would be prejudicial.
- If the petition is successful, the court may make any order it sees fit, including requiring the company to refrain from doing the act complained of, or to do an act it has omitted to do. In practice, the most common remedy awarded to a successful petitioner is to order that their shares be purchased by those who caused the unfair prejudice. In this case the price will be fixed by the court and may be beneficial to the petitioner.
- **Petition for just and equitable winding-up of the company** (section 125 Insolvency Act 1986) – whereby a shareholder may petition a Court to wind up a company on “just and equitable” grounds. What constitutes “just and equitable” is a matter for the court to interpret, but may include situations where majority shareholders have consistently ignored the rights of the minority, or where there is a deadlock within a company.
- **Derivative claims** (sections 260-264 Companies Act 2006) – whereby a minority shareholder, as a representative of all of the other shareholders, initiates proceedings on behalf of the company in an attempt to right a wrong perpetrated by majority shareholders.

Case study: Blackpool Football Club

The ongoing saga of Blackpool FC – the famous “Tangerines” – illustrates how corporate law may be used by a club’s fans or groups of shareholders to gain control over “their” club. The club experienced financial difficulties following relegation from the Premier League in 2011, which led to a dispute between Blackpool’s longstanding owner, Owen Oyston, and Valeri Belokon, who owned a minority stake in the club through his company VB Football Assets. The dispute between them ultimately ended up in the High Court of England where, in *VB Football Assets v Blackpool Football Club (Properties) Ltd*, Belokon, as a minority shareholder, successfully petitioned the court pursuant to section 994 Companies Act 2006, alleging that he had been excluded from board decisions and that Oyston had misappropriated funds from the club following its promotion to the Premier League in 2010.

Although these legal proceedings ran in parallel with a high-profile and passionate fan-led campaign, deeply hostile to Oyston’s continued ownership, it was the section 994 petition that eventually brought the situation to a head.

Case study: North Melbourne Kangaroos Football Club

The types of corporate disputes recently seen in English football are also being played out in other sports and jurisdictions. For example, in Australian Rules Football, a bitter boardroom brawl broke out in 2007 regarding the future of the North Melbourne Kangaroos Football Club, one of Australia’s oldest and most famous clubs on the field, but one of its financially weaker ones due to its small fan base. Some members of the board, with the support of the Australian Football League, supported the relocation of the club from Melbourne to Australia’s Gold
Coast, some three hours’ flight away. Fans – perhaps understandably – wanted the club to remain in Melbourne. Surrounding the boardroom deliberations, the Kangaroos were rocked by a series of fan-led activist groups, which sought the winding up of the club’s long established shareholder structure as a means to stop the relocation. Ultimately, the dispute played itself out as a typical “boardroom” dispute, requiring directors to decide what was in the best interests of shareholders as whole, rather than the fan-base, though fan pressure undoubtedly played a role in causing the Kangaroos to remain in their historical heartland.

Majority shareholder rights – compulsory takeovers

Another recent area of interest relates to the removal, upon an acquisition, of minority shareholders who hold an interest of less than 10 percent in their clubs. In the sports sector this most often occurs in the context of club takeovers. Where such small interests exist, section 979 of the Companies Act 2006 gives a prospective majority shareholder the right to acquire minority shareholdings on a compulsory basis, provided it has acquired or unconditionally contracted to acquire:

1. not less than 90 percent in value of the shares to which the takeover offer relates and
2. not less than 90 percent of the voting rights carried by the shares to which the offer relates.

This year, a number of shareholders in Arsenal FC have expressed their frustration and anger at being compelled to sell their shares to majority shareholder Stan Kroenke, who owns all but 733 of Arsenal FC’s 62,217 total shares. The forced takeover was triggered after Alisher Usmanov agreed to sell his 30 percent stake to Kroenke, which led to Kroenke owning 97.14 percent of the club – more than the 90 percent requisite shareholding required for a compulsory takeover under section 979. Reports suggest that Arsenal FC’s AGMs have been increasingly hostile in recent years, with many independent shareholders opposing the re-election to the board of various members. This is set to continue as The Arsenal Supporters’ Trust is poised to reject Kroenke’s offer to buy out their members’ shares in the club in a symbolic gesture. They are seeking legal advice on how to challenge the compulsory purchase aspect of his takeover.

Minority shareholder activism is not solely the province of well-known clubs. Enfield Supporters’ Trust actually founded a rival club – Enfield Town FC – in 2001 due to fan disaffection with the owners of Enfield FC, and fans at Tonbridge Angels FC took legal steps during the 2014/15 season to purchase shares in the club in order to make it majority-owned by supporters. The impact of the rise in shareholder activism can, therefore, be seen at all levels of the national sport, a phenomenon which can be reasonably expected to be followed in other sports and jurisdictions.

Conclusion

The bottom line is that prudent boards should bear in mind that some of their most intense clashes may end up playing out in the courts rather than on the field. Thanks in part to ongoing corporate investment attracted by growing broadcasting incomes, there have never been more financial and emotional incentives for fans and shareholders to use the full spectrum of their legal rights in order to achieve their objectives.

Mitigating risks against disputes

Boards need to be prepared for a variety of strategies and tactics in relation to shareholder activity. These include, but are not limited to, the following:

- **Due diligence** should be undertaken to establish: whether the entity is solvent
  - Whether any of the business records, accounts or other documents may give rise to liability in the future and/or have already given rise to liability/litigation on behalf of the entity pursuant to legislation and/or case law
  - What the entity’s future plans are and whether it has a business plan and
  - Whether there are any discrepancies between what is reported and what is actually going on in the business.

- **Know your customer checks** – these checks may help verify the identity of the entity to ensure there are no
issues, for example, with money laundering.

- **Review articles of association** – the articles of association are a key constitutional document of a company which are used to internally organize and manage the day-to-day running of the business. Care must be taken when a company has bespoke articles. In such a case, further obligations may be imposed on you as a shareholder which are out of the ordinary and not common in other companies of the same type.

- **Review of the good governance report** – this report assesses the overall standard of governance at the largest UK-listed FTSE companies. The Good Governance Index acts as a barometer, ranking companies according to 47 indicators of corporate governance. The entity may be featured in this report; however, even if it is not, the index may still shed light on what considerations should be taken into account when discussing goals and strategies and whether it would consequently be feasible/ whether buying shares in a company is a good investment.

- **Ensure communications between all interested parties to establish:**
  - **Clear goal and purpose** – agree upon goals for the business and the other shareholders as well as strategies and plans for achieving the desired goals. If goals and visions do not align at the outset, disputes are highly likely to occur in the future;
  - **Clear responsibilities** – produce a responsibility matrix that clearly outlines from the outset the responsibilities of all shareholders as well as the respective organizations;
  - **Disputes avoidance** – agree from the outset how any disputes are to be dealt with, and carefully consider the drafting of any dispute resolution clause (in the shareholders’ agreement) to avoid inconsistencies and ambiguities;
  - **Regular reviews** – ensure the progress of the goals and status of the entity are reviewed regularly. This can be done using management accounts and reports on the business’ activities. The reviews can ensure that any issues are flagged as soon as possible and dealt with before losses or any other negative impacts for example occur and/or increase; and
  - **Record business activities** – ensure that proper records are kept to avoid disputes but also help resolve a dispute swiftly as the records may clarify why certain decisions were made or actions taken.

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1 Section 996(2) Companies Act 2006 lists the following other examples:

(a) regulate the conduct of the company’s affairs in the future;

(b) require the company:
   
   (i) to refrain from doing or continuing an act complained of; or
   
   (ii) to do an act that the petitioner has complained it has omitted to do.

(c) authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;

(d) require the company not to make any, or any specified, alterations in its articles without the leave of the court;

(e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company’s capital accordingly.

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