



Bryan G. Baynham, Q.C. is the chair of HGE's commercial litigation group. His practice focuses on complex commercial and insurance litigation, including the defence of directors and professionals. He was admitted to the bar of B.C. in 1973 and was appointed Queen's Counsel in 1997. You may contact him at 604 895 2802 or by email at bbaynham@hgelaw.com.

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of greater import. Whether the director ought to be fairly excused in the circumstances must involve a consideration of all the circumstances surrounding the conduct and should have regard for the question whether the granting of relief is opposed by someone affected by the director's action or conduct".²

In *Ebco* a minority shareholder (Discovery Enterprises Inc., an entity owned by the Provincial Government) sued Helmut Eppich by way of a derivative action. Discovery alleged (on behalf of, and in the name of Ebco Industries) that Helmut Eppich had acted in breach of his duties as a director by agreeing to an arbitration in 1992 which effectively split Ebco Industries in two, dividing it between Helmut Eppich and his brother Hugo Eppich. More particularly, Discovery alleged that the agreement between Helmut and Hugo Eppich to have Ebco Industries pay the costs of this arbitration was in breach of their duties as directors, such that Helmut Eppich should re-pay to the company the full amount spent on the arbitration. Helmut Eppich's argument, in basic terms, was that the arbitration expenses were proper corporate expenses, given that an arbitrated split of Ebco Industries between the two brothers was necessary in order to ensure the company's survival in the face of a deadlock on the board of directors. Helmut Eppich argued in the alternative, however, that if the arbitration expenses were personal in nature, he ought nonetheless to be relieved from liability, on the basis of s. 202.

Pitfield, J. accepted Helmut Eppich's primary position, and held that there was no wrongdoing in charging the arbitration cost to Ebco as "the arbitration was the reasonable means chosen to avoid the wind-up of Ebco in the face of a deadlock between the brothers who shared voting control of the company".³

An important finding was that Helmut Eppich had acted honestly providing full disclosure to all relevant parties.

Nonetheless, Pitfield J. went on to consider the s. 202 Company Act argument, holding in the alternative that even if it had been improper to charge the arbitration cost to the company, he nonetheless would have exercised his discretion under s. 202 to absolve Helmut Eppich of the obligation to account for any portion of the costs paid.⁴ Important in this regard was

Pitfield J.'s finding that Helmut Eppich had acted honestly, providing full disclosure to all relevant parties throughout. There was no attempt to conceal from Discovery the fact that the company was paying the arbitration costs. In fact Discovery was provided with a copy of the arbitration agreement approximately a week after its execution, which showed that Ebco Industries would be paying these costs. Furthermore, Pitfield J. noted that the arbitrator himself, none other than former

B.C. Chief Justice Nathan Nemetz, concurred with the decision to have the costs charged to the company.⁵ Pitfield, J. emphasized that none of the other minority shareholders were complaining about the expense, and indeed that the arbitration had benefited all of the shareholders, including Discovery, by preserving Ebco Industries, albeit in a revised and smaller form. Pitfield, J. concluded that this derivative action was an attempt by Discovery "to squeeze something out of Ebco in respect of an unsatisfactory investment".⁶ Thus, had it been necessary, the Court would have excused Helmut Eppich from any liability under s. 202.

OTHER DECISIONS RELATING TO SECTION 202

The *Ebco* decision is significant with respect to s. 202 because there are so very few decisions that examine this important provision. Pitfield J. noted the lack of authorities, and relied in part upon the earlier decision of our Court of Appeal in *Doncaster v. Smith* (1987) 15 B.C.L.R. (2d) 58. There, a receiver manager of three related companies sold the assets of one of the companies without first amalgamating the companies, resulting in a greater than necessary