~~Purchase and redemption by companies of their own shares might lead to a reduction of capital, detrimental to creditors. Another problem is that if companies speculate in their own securities, they will disturb the market and mislead investors. This is why corporate self-dealings are, in principle, forbidden. Yet, statutes define a few cases in which companies are entitled to purchase or redeem their own securities. These two new regulations supplement the current provisions. The first (no. 98-02) is a very common kind of provision that aims at protecting shareholders by the usual twofold requirements: disclosure of information and pre-vetting. The second (no. 98-03) should be linked to the provisions enabling a company to buy or sell its own shares so as to 'regulate' their price (art 217(2) of the law no. 66-537). The COB, which is in charge of monitoring such interventions (art 217(5)) had already issued a regulation (no. 90-04) setting a string of limits and conditions to these self-dealings. The main rule is that, provided it is done in the interest of shareholders, a company can deal in its own shares either to preserve a lively market in its shares or to restrain excessive fluctuations in the prices of its shares. Regulation no. 98-03 adds new requirements to prevent companies from manipulating their share price and thereby deceiving the market. It also supplements existing criminal provisions that punish misleading practices such as market rigging (Regulation no. 90-04 and art 10(3) of the* Ordonnance *no. 67-833).~~

~~**Dr Andrew Kirsch**~~
~~**Bordeaux**~~

# Malta

## Case Law
## Unfair Prejudice Ruling

*Remedies for Maladministration – Unfairly Prejudicial Conduct of Company's Affairs, Just and Equitable Winding Up*

### Introduction

This case is one of the very first cases to deal with the new remedy introduced by s 402 of the Companies Act 1995. This provision authorises the Court to intervene in a number of ways – where it considers it just and equitable to do so – in order to protect shareholders against acts of a company which are oppressive, unfairly prejudicial or unfairly discriminatory to a member or members. The case concerned one of Malta's larger banks, whose shares are listed on the Malta Stock Exchange. The Government of Malta held or controlled approximately 70% of the shares. Early in 1999, the Government started negotiating with a leading foreign bank for the sale of its entire shareholding in the local bank. The Council of the Stock Exchange ordered the indefinite suspension of trading in the company's shares pending the finalisation of the negotiations and the conclusion of a due diligence exercise aimed at establishing a fair transfer price.

The company's memorandum of association prohibited any shareholder, other than the Government of Malta, from holding more than 3% of the shares. In order to enable the acquisition to go through, this restriction would have had to be removed. The directors of the company summoned an extraordinary meeting in order to adopt the amendment required to remove the restriction.

Thirty-six individual shareholders holding in aggregate a small minority of shares presented an application in the Civil Court against the bank under s 402 of the Companies Act of 1995. The minority shareholders claimed that the proposed amendment was prejudicial to their interests because it was intended to pave the way to accommodate a particular acquirer who as new majority shareholder could decide to de-list the Company's shares from the Malta Stock Exchange. This could adversely affect the transferability and consequently the price of their holding. They also protested the bank's failure to react against the indefinite suspension of trading in its shares on the Stock Exchange, which suspension they claimed was adversely affecting their interests.

### Judgment

The Court decided that it did not result that the defendant bank had not adequately safeguarded the rights of its minority shareholders. It ruled that it would not suspend the proposed extraordinary general meeting or to place in doubt the validity of the proposed amendment. Nonetheless it concluded that it would be just and equitable to issue an order under s 402 in this case. The Court explained that an order under s 402 would be issued where a shareholder proves, on the basis of reasonable probability, that he is suffering or will suffer prejudice as a result of the company's acts.

The Court held that the mere holding of an extraordinary general meeting to consider the proposed amendment could not be said to be contrary to the minority's interests. The law itself allowed amendments to be made to a company's statute and it set out the procedure to be adopted for this purpose. It also remarked that the minority shareholders could not claim some vested right that the Government would remain indefinitely the majority shareholder. The Court concluded that a change in the majority shareholder did not prejudice the minority shareholders' position. However, the Court ordered the bank to take all necessary precautions in favour of its minority shareholders in the event that the new majority shareholder makes an offer to buy out the minority shareholders. The Bank was ordered to obtain all the necessary professional advice in order to be able to do this, particularly for the purpose of arriving at a fair price for the acquisition of the shares. The Court also pointed out that under the companies legislation, directors have a number of duties some of which render them personally liable for their actions as directors. It held that it was the duty of the bank to safeguard the minority shareholders and their investment as far as it could.

The Court also ordered the bank to verify whether the duration of the suspension of trading in its shares by the Malta Stock Exchange was causing prejudice to the minority shareholders. Should it establish that this was the case, the company would be expected to take all the appropriate measures to remove the prejudice. As the Council of the Malta Stock Exchange was not, and it seems could not, be made a party to these proceedings, no order could be issued to it under s 402 in relation to the suspension of trading. The Court explained that the defendant bank could not be expected to answer for the acts of the Council as regulatory authority of the Malta Stock Exchange. It also held that the possibility of a de-listing of the company shares by the new majority shareholder was at that stage merely hypothetical.

*Various shareholders v Mid Med Bank Plc* Application No. 1059/99, Decided on 13 May 1999

David Fabri LLD
Malta Financial Services Centre

## ~~Spain~~

### ~~New Regulations on Foreign Investment in Spain and Spanish Investment Abroad~~

*~~Shareholders – Requirements, Register; Transfer of Shares – Register of Substantial Shareholdings~~*

~~Until now, foreign investment in Spain and Spanish investment abroad have been regulated respectively by Royal Decrees 671/1992 and 672/1992, both of 2 July. But with the coming into force of the Maastricht Treaty and, the passing of the provisions on freedom of movement of capital, established in Directive 88/361 of 24 June, a new Royal Decree became necessary with the object of adapting Spanish regulations to the new Community provisions.~~

~~In this way, Royal Decree 664/1999, of 23 April came into being, which introduces important modifications in the legal regime for foreign investment. These modifications affect, on the one hand, administrative procedures for previous verification and authorisation, which are done away with, the only requirement remaining being that of an 'ex post' declaration of the investments and this only for administrative, economic and statistical effects.~~

~~With regard to foreign investment in Spain, this general rule has one exception, in certain cases of investment from territories or countries. These, in accordance with Royal Decree 1080/1991, of 5 July, are considered to be tax havens, where a declaration prior to the investment is required, without prejudice to the fact that a declaration may also have to be provided after the investment has been made. However, investment in negotiable securities, shares in investment funds registered in the registries of the Spanish Securities and Exchange Commission and shares that do not exceed 50% of the capital of the Spanish company at which the investment is directed will be exempt from the preliminary declaration.~~

~~As in the case of foreign investment in Spain, where Spanish investment abroad is concerned, two types of declaration exist. The first is reserved for investments directed at territories and countries considered as tax havens to which we have referred before; while the second affects all investments in general, whether in tax havens or not. In the field of Spanish investment abroad, an exception to the requirement for a previous claim exists here also and this exception applies to the following cases: investment in negotiable securities; shares in investment funds; and investment that does not allow the investor to have any effective influence or control over the foreign company at which they are directed.~~

~~However, the liberalisation system established in this Royal Decree 664/1999, of 23 April may be suspended if the investment affects or may affect activities related to the exercise of public power or activities that affect or may affect public order, safety and health. In these cases, the investor affected will have to apply for previous administrative permission with respect to the operations that he proposes to carry out, from the time of notification of the suspension.~~

~~Equally, this system of liberalisation is suspended with respect to foreign investment in Spain in activities directly related to National Defence, such as those aimed at the production or trading of arms, munitions, explosives and war materials. In the case of companies on the stock exchange, only acquisitions by non-residents of over 50% of the capital of the Spanish company will require authorisation or those which, without reaching this percentage, permit the investor to form part of the administrative body, either directly or indirectly.~~

~~Antonio Viñal~~
~~Antonio Viñal & Co~~