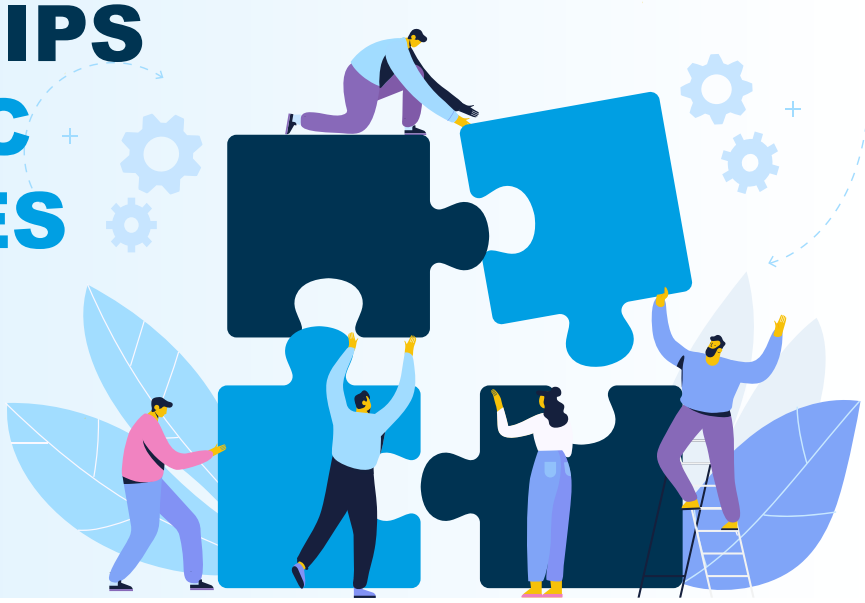
QUASI-PARTNERSHIPS IN PUBLIC COMPANIES



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When people think of a quasi-partnership company, they tend to imagine a small private company, owned and managed by its founders, operating like a partnership. But the term 'quasi-partnership' is (as Lord Wilberforce stressed in Re Westbourne Galleries Ltd [1973] AC 360, at 379D-H) no more than a "convenient but… also confusing" shorthand for a company in which equitable considerations make it unjust or inequitable for those behind it to insist on their legal rights or exercise them in a particular way. Shareholders in large public companies will welcome recent case law suggesting that they too, on appropriate facts, could rely on equitable considerations as grounds for an unfair prejudice petition under section 994 of the Companies Act 2006.

Since Re Astec (BSR) Plc [1999] BCC 60, the orthodox view has been that there is no room for equitable considerations in listed public companies. Jonathan Parker J there described their introduction in that context as "a recipe for chaos".

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However, the law is on the move in this area, and support is growing for the New Zealand Court of Appeal's assessment in Latimer Holdings Ltd v SEA Holdings NZ Ltd [2005] NZLR 328, at [106], that Jonathan Parker J's concerns were "distinctly overdrawn".

Prior to Astec, the courts occasionally recognised the existence of equitable considerations in public companies. In McGuinness v Bremner plc (1988) 4 BCC 161, the Scottish Court of Session (Outer House) held that the directors' decision to convene a meeting requisitioned by the petitioners on a date almost seven months after deposit of the requisition was unfairly prejudicial to the petitioners' interests, even though it was lawful under section 368 of the Companies Act 1985. In Bradman v Trinity Estates plc [1989] BCLC 757, at 759B, Hoffmann J seemed to regard it as arguable that a departure from the company's prospectus could be unfairly prejudicial. And when Alan Sugar and Terry Venables clashed in Re Tottenham Hotspur plc [1994] 1 BCLC 655, Sir Donald Nicholls V-C appeared to assume (without deciding the point) that equitable considerations could in principle arise in a public company in any case where the evidence suggested that the major shareholders had assumed obligations to each other that went beyond their legal rights. In this regard, he noted, at 660b-c, that:

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Against the backdrop of this cautious recognition came Astec, which drew on the similar but less emphatic reasoning of Vinelott J in Re Blue Arrow Plc (1987) 3 BCC 618, where he held that breaches of the Listing Rules and the Cadbury Code (a predecessor of the UK Corporate Governance Code) could not amount to unfairly prejudicial conduct.

Professor Jennifer Payne (L.Q.R. 1999, 115(Jul), 368-372, 369) criticised Astec for failing to distinguish between equitable considerations (i) founded on personal expectations based on informal arrangements between members and (ii) arising from the universal expectations of all members (for example, as in Bremner, the expectation that requisitioned meetings should not be unreasonably delayed). She argued that the latter category of equitable considerations exists in all companies, including public ones.

Payne's approach is consistent with the subsequent reasoning of the Hong Kong Court of Appeal in Luck Continent Ltd v Cheng Chee Tock Theodore & Ors [2013] HJLRD 181, which upheld an unfair prejudice petition that relied on breaches of the applicable Listing Rules, Lam LJ stating, at [86]:

"… what are the terms on which the shareholders acquired the shares of the company? In my view, in the context of CYF, one of the fundamental terms must be that it should maintain its listing status. That must be the common understanding of all the shareholders when they acquired the shares of CYF. That common understanding can properly be described as a common understanding inter se between the shareholders." .

If Luck Continent is followed in this jurisdiction, activist shareholders aggrieved by corporate governance failings will be able to add the credible threat of a section 994 petition to their arsenal. Indeed, Arden LJ's suggestion in In Re Tobian Properties [2013] Bus LR 753, 762F-G, that whether a director's remuneration was excessive, and so unfairly prejudicial, may be assessed by reference to extra-statutory guidance, such as the Association of British Insurers' Principles of Remuneration, raises the prospect that, contrary to the reasoning in Astec, the courts may treat breaches of such guidance (in relation to corporate governance issues generally, and not just remuneration) as unfairly prejudicial conduct of a company's affairs.

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Furthermore, three recent cases pave the way, in an appropriate case, even for Professor Payne's first category, that of equitable considerations founded on informal arrangements between members, to form the basis of an unfair prejudice petition in a public company.

In Waldron v Waldron [2019] Bus LR 1351, HH Judge Eyre QC (sitting as a High Court Judge) concluded, at [41]-[42], that the court can grant relief based on equitable considerations arising between some members of a company only, if it can do so without infringing the rights of members who are not party to the relevant understandings.

In Il v Yesilkaya [2021] EWHC 1695 (Ch), ICC Judge Prentis developed this theme, holding, at [50]:

"In principle, it is no necessary bar to the establishment or continuation of a quasi-partnership relationship that it is between some only of the members. However, as Fancourt J in Re Edwardian Group Limited [2018] EWHC 1715 (Ch), [2019] 1 BCLC 171 discussed at [130]-[136], such a relationship is unlikely to arise or subsist in a way which is binding on the company except where it is between members constituting a majority of voting rights."

These cases suggest that in public companies where informal understandings exist between shareholders holding a majority of voting rights between them, those shareholders could in theory rely on a breach of those understandings as the basis for an unfair prejudice petition.

If Edwardian, Waldron and Il paved the way for unfair prejudice petitions in public companies relying on this first category of equitable considerations, the recent judgment in Re Klimvest Plc [2022] EWHC 596 (Ch) has now opened the door to them. It was a petition to wind up a Euronext-listed PLC on the just and equitable ground, which relied partly on informal understandings arising from the founders' and controlling shareholders' personal relationship. HH Judge Cawson QC (sitting as a High Court Judge) held, at [269], that it was unnecessary to determine whether Astec had been correctly decided (the petition succeeding on a different ground) but went on to observe:

"… on appropriate facts, equitable considerations might arise as between shareholders in a public listed company, but that this would be a rare event given that the parties would, in almost all cases, have submitted themselves to acting on a purely commercial footing. I can see that there might, conceivably, be circumstances where the existence of those equitable considerations might found the basis for some limited form of relief under Section 996 of the 2006 Act provided that the various considerations identified with regard to a public listed company and referred to in [Astec and Blue Arrow] were not impinged upon."

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Daniel Lightman QC and Max Marenbon represented the successful petitioner in Re Klimvest Plc [2022] EWHC 596 (Ch).