

# Legal Characterisation of Commercial Relationships in the UK: the Quasi-Partnership Example.

Professor David Milman,  
Centre for Law and Society,  
School of Law,  
Lancaster University.

[This paper is based upon a talk delivered to the Partnership, LLP and LLC Law Academic Forum Colloquium at the Nottingham Law School on 10 January 2019]

## **Introduction**

It is an uncomfortable fact of life that Western legal systems do on occasions struggle in attempting to characterise the precise status of certain commercial relationships which do not require a formal designation via registration. What the parties believe their relationship to be, may not be how the law treats such a nexus. It is trite law that such relationships are judged in substance by the law and not by how the parties designate them. But, even with that guidance to hand, resolution of commercial status is no easy matter. This issue of characterisation is important because the consequences of that differential may be profound, affecting the rights of the parties and the tax treatment of their association. Uncertainty in commerce is never welcome and the law should set its face against it<sup>1</sup>. Examples of this phenomenon of uncertain status abound. So, is relationship which is based upon the provision of labour one of employer/employee, or is the labour provider merely an independent contractor? This has generated much litigation in the UK in recent years<sup>2</sup>.

A more specific illustration of the genre well known to corporate lawyers in the UK concerns the distinction between a fixed and floating charge over a borrowing company's assets. This in the past has caused difficulties requiring intervention from the House of Lords<sup>3</sup>. Much of the steam went out of the issue with the abolition of Crown preference (which impacted upon floating, but not fixed, charges) by s. 251 of the Enterprise Act 2002, but as that form of top-slicing is now likely to make an unexpected return<sup>4</sup> to the landscape of UK corporate

---

<sup>1</sup> Lord Mansfield reminded us of the importance of this feature this in *Vallejo v Wheeler* (1774) 1 Cowp 143.

<sup>2</sup> See for instance *Pimlico Plumbers Ltd v Smith* [2018] UKSC 22.

<sup>3</sup> *Nat West Bank v Spectrum Plus Ltd* [2005] UKHL 41. See Berg [2006] JBL 22.

<sup>4</sup> This was announced by the Chancellor of the Exchequer in the November 2018 Budget Speech and a consultation is underway – see HM Treasury, “Protecting Your Taxes in

insolvency law, one might anticipate that the fires of litigation on this dichotomy will be relit.

A more general question is whether the interaction between two or more commercial players engaged in a collaborative venture could amount to a partnership in the eyes of the law. This is a dilemma that has bedevilled jurisprudence across many legal systems for centuries and has not been resolved<sup>5</sup>. This conveniently brings us to the particular subject matter of this essay on characterisation. The legal connections between the institutions of Partnership Law and Company Law are well recorded. Although there are major differences between the corporate and partnership forms, there is no doubt that the former entity owes a substantial debt of gratitude to the latter. If we look at official business format statistics for the UK, the registered company offering limited liability to shareholders might be regarded as the cuckoo in the nest. There are now estimated to more than six times the number of limited companies as there are partnerships. Undoubtedly, the availability of limited liability to shareholders has proved to be a decisive factor in the evolution of this profile. That said, the purpose of this present paper is to review the current state of play with regard to one particular aspect of that interface, namely the phenomenon of so-called **quasi-partnership company**. This, on a superficial level, may be seen as a hybrid entity combining together features from both traditions. But, on closer analysis, all is not what it seems. The thesis that is presented in this article is that the quasi-partnership concept served an important purpose when it first appeared in English Law but that it is no longer necessary to achieve that goal in view of developments in other areas of Corporate Law specifically and English Law generally.

### **The quasi partnership company emerges**

There are no official statistics available on the prevalence of quasi-partnerships in the UK and no mention can be found of them in the statutory language of the Companies Acts. Attempts by the Law Commission to craft a customised set of rules for the protection of members of quasi partnerships by introducing rebuttable presumptions of unfair prejudice got nowhere<sup>6</sup>. To all intents and purposes, for official and legislative purposes they are therefore invisible. We know that there are over 3 million limited companies registered in England and Wales at the Companies Registry. As the vast majority (more than 98%) of these are private companies, we may assume that many of these may well be candidates suitable for being regarded as quasi-partnerships<sup>7</sup>.

---

Insolvency” (26 February 2019). The likely change will take place for the tax year beginning in April 2020.

<sup>5</sup> See Milman [2018] 6 NIBLeJ 2 (open access) – republished in Proceedings of the Inaugural Conference of the Partnership, LLP and LLC Law Forum Special Print Edition 13-32 (2018, Nottingham Law School). Note also Milman (1983) 4 Co Law 199.

<sup>6</sup> See Shareholder Remedies (LC No. 246, 1997) para 3.30.

<sup>7</sup> But we must not assume that every private company incorporated under English Law qualifies as a quasi-partnership – Smith J issued a similar caution with regard to the position

The quasi-partnership idea appears to have first surfaced in English Company Law discourse through the judgment in *Re Yenidje Tobacco Co Ltd*<sup>8</sup>, an oft-cited authority dealing with winding up on the “just and equitable grounds”. This precedent featured a case of a private company which had been incorporated in 1914 to facilitate the merger of two existing firms. This new company was structured on a 50/50 shareholding basis, but then the two key individual players (who were the only directors of this company) fell out, with the resulting paralysis of the merged business. In those circumstances of complete deadlock the Court of Appeal drew heavily upon the Scottish Court of Session precedent of *Symington’s Quarries*<sup>9</sup> as the basis for its ruling in support of granting a winding up to resolve the impasse. In the Court of Appeal Lord Cozens-Hardy stated that this was a partnership in the guise of a company and therefore it was appropriate to adopt partnership ideas on when the court could dissolve the relationship. The phraseology of “quasi-partnership” was not actually used in the judgment in that case; that label appeared much later in reported litigation in the 20<sup>th</sup> century<sup>10</sup>.

That this matter should have come to the attention of the courts at this particular time in the evolution of the modern corporate paradigm was no historical accident. We can well imagine how it came about because we saw the formal arrival of private company in English Law in the Companies Act 1907. Informally, the private company had been on the scene for decades prior to that date. The quasi-partnership genre is now widely recognised throughout the common law world and the English jurisprudence is on the whole faithfully applied<sup>11</sup>. The quasi-partnership thus appears to enjoy a global status as a form of business organisation. It therefore merits some examination in depth.

---

of proprietary companies in Australia in *Re Wondoflex Textiles Pty Ltd* [1951] VLR 458 at 465.

<sup>8</sup> [1916] 2 Ch 426. For perceptive analysis see McPherson (1964) 27 MLR 282. See also *Re Davis and Collett Ltd* [1935] Ch 693. Compare *Re Cuthbert Cooper & Sons Ltd* [1937] Ch 392.

<sup>9</sup> [1905] 8 F 121, [1905] SLR 43-157. The judgment here talks about a “domestic company” rather than a quasi-partnership. See also *Thomson v Dysdale* [1925] SC 311 where the partnership analogy was to the fore.

<sup>10</sup> Clearly one could point to the speech of Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at 379. Prior to that this designation was used in the judgments in *Charles Forte Investments v Amanda* [1963] 2 All ER 940 at 951 per Cross J and *Re K/9 Meat Supplies (Guildford) Ltd* [1966] 3 All ER 320 at 325 per Pennycuik J.

<sup>11</sup> See for instance *Tay Bok Choon v Tahanson Bhd* [1987] 1 WLR 413 where the Privy Council accepted that it represented the law in Malaysia. On the quasi partnership in Ireland see *Re Murph’s Restaurant Ltd* [1979] IEHC 1. For the comparable position in Singapore see *Eng Gee Seng v Quek Choon Tek* [2009] SGHC 205. The quasi-partnership is recognised in Hong Kong – *Re Yung Kee Holdings Ltd* [2004] 2 HKLRD 313. For a New Zealand perspective see *Vujnovich v Vujnovich* [1989] UKPC 21 and for Australian attitudes see *Re Optimisation (Australia) Pty Ltd* [2018] NSWSC 31 where the language in the judgment (e.g. paras [294]-[300]) is that of “close company” whereas the introductory summary refers to quasi partnership. The quasi partnership is recognised on the Indian subcontinent and in Africa in those countries where the British Empire ruled.

## What is a quasi partnership?

Although all commentators recognise that there is such a thing as a quasi -partnership which is recognised by law, this is not an easy matter to define with any degree of precision<sup>12</sup>. As we will see, the quasi -partnership concept is a fluid one that operates more as an *ad personam relationship descriptor* rather than as a permanent characterisation of an organisation. In *Fisher v Cadman*<sup>13</sup> Sales J characterised it as a shorthand label used to describe a relationship into which equitable considerations might intrude. This definitional question has caused difficulties ever since the concept of the quasi-partnership (however so described) first emerged.

A general definition of quasi-partnership was provided by Lord Millett in *CVC/Opportunity Equity Partners Ltd v Almeida*<sup>14</sup>:

“Companies where the parties possess rights, expectations and obligations which are not submerged in the company structure are commonly described as ‘quasi-partnership companies’. Their essential feature is that the legal, corporate and employment relationships do not tell the whole story; and that behind them there is a relationship of trust and confidence similar to that obtaining between partners which makes it unjust or inequitable for the majority to insist on its strict legal rights. “

Any attempt to define a quasi -partnership with more precision inevitably must confront the judgment of Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd*<sup>15</sup>. His Lordship in his speech focused attention on **three** factors as relevant to this classification – (1) the existence of a personal relationship involving mutual confidence between the parties; (2) the expectation that the claimant would participate in the management of the venture and (3) the operation of share transfer restrictions.

On the **first** criterion, a prior personal relationship might cover the situation where the company was incorporated on the back of an earlier partnership, but it is not restricted to that particular scenario<sup>16</sup>. Family connections may be relevant here and many family firms may constitute quasi partnerships<sup>17</sup>. A prior commercial interaction will not of itself be

---

<sup>12</sup> A point acknowledged by Brightman J in *Re Leadenhall General Hardware Stores Ltd* (1971) 115 Sol Jo 202.

<sup>13</sup> [2006] 1 BCLC 499 at para [84].

<sup>14</sup> [2002] UKPC 16 at para [32].

<sup>15</sup> [1973] AC 360. These 3 criteria were adopted by Lord Millett in *CVC/ Opportunity Equity Partner Ltd v Almeida* (supra) in a case which came to the Privy Council from the Cayman Islands. For academic critique of this jurisprudence see, Chesterman (1973) 36 MLR 129, Prentice (1973) 89 LQR 107, Rider [1979] 38 CLJ 148.

<sup>16</sup> When the Law Commission reviewed unfair prejudice petitions presented between 1994 and 1996 it found that only in some 10% of cases was there a pre-existing partnership - see Shareholder Remedies (LC No 246, 1997) Appendix J.

<sup>17</sup> See for instance *Re Lagan Holdings Ltd* [2008] NI Ch 23 where the assertion that a quasi-partnership existed between family members was not contested – see para [19] of the

sufficient to establish a prior personal relationship necessary for a quasi-partnership finding. On this qualification we should note the comments of Mann J in *Brett v Migration Solutions Holdings Ltd*<sup>18</sup> to the effect that a prior arm's length commercial relationship does not necessarily indicate a personal nexus. Thus, in *Wootliff v Rushton-Turner (No. 2)*<sup>19</sup> Chief Registrar Briggs dismissed a s. 994 unfair prejudice petition. He found that this company was based upon a purely commercial relationship lacking the personal features normally associated with a quasi-partnership. There was no prior personal relationship of the type that triggered equitable considerations and the respective rights of the parties in the company had been mapped out under a professionally drawn up share purchase agreement.

By comparison, by looking at *Re BC & G Care Homes Ltd*<sup>20</sup> we can see how a quasi-partnership finding helped the court to conclude that the exclusion of a one-third shareholder/director from management was unfairly prejudicial. The quasi-partnership finding was facilitated by the fact that the business had previously operated in partnership form. In *Pinfold v Ansell*<sup>21</sup> HHJ David Cooke also had no difficulty in determining that the petitioner (a 49% shareholder) was in a quasi-partnership relationship with the respondent majority shareholder, as a previous business relationship had existed between these parties. A remedial order under s. 996 of the Companies act 2006 in which the petitioner was to be bought out was therefore made in consequence of an unfair prejudice finding.

The personal element involved in establishing and maintaining a quasi-partnership link is reflected by the fact that such status can be lost by a change in the relationships within a company. On this aspect we could refer to the Scottish authority of *Third v North East Ice and Cold Storage Co Ltd*<sup>22</sup>, where the subsequent creation of a formal employment relationship between the protagonists was found to be sufficient to undermine any possibility of a quasi-partnership existing or continuing. We could also highlight the case of *Re Sunrise Radio Ltd*<sup>23</sup> where the petitioner had at some time in the past been a quasi-partner, but was not so at the time the matters complained of in the unfair prejudice petition actually took place. Conversely, a quasi-partnership nexus can develop between

---

judgment of McCloskey J. In *Shah v Shah* [2010] EWHC 313 (Ch) the existence of a quasi-partnership was initially not disputed but then it became contentious; however Roth J confirmed its existence – see para [99] of the judgment. But in *Thomas v Thomas Ltd* [1984] 1 NZLR 686 at 695 Richardson J observed that not every family company is (or remains) necessarily a quasi partnership.

<sup>18</sup> [2016] EWHC 523 (Ch) at para [203].

<sup>19</sup> [2017] EWHC 3129 (Ch), [2018] 1 BCLC 479 – note in particular paras [81]-[85].

<sup>20</sup> [2015] EWHC 1518 (Ch), [2016] BCC 615.

<sup>21</sup> [2017] EWHC 889 (Ch), [2017] 2 BCLC 489.

<sup>22</sup> [1998] BCC 242. But compare the observation of the court in *Quinlan v Essex Hinge Co Ltd* [1996] 2 BCLC 417 where the point was made that the fact that a shareholder/director also had a service contract with the company did not rule out the possibility of him being treated as a quasi-partner.

<sup>23</sup> [2010] 1 BCLC 367. See also *Re A Company (005134 of 1986) ex parte Harries* [1989] BCLC 383.

participators in a company much later in the day<sup>24</sup>. The alarming truth is that a particular company may be classed as a quasi-partnership at one point in its history, but not at other times. A recognition of this transient feature can be found in the judgment of HHJ Matthews in *McCallum-Toppin v McCallum-Toppin*<sup>25</sup>. ICC Judge Briggs commented in *Michel v Miche*<sup>26</sup> that the quasi-partnership nexus is not static. That should not be a difficult phenomenon for us as corporate lawyers to grasp, as registered companies can now convert from public to private status and vice versa<sup>27</sup>, though of course formal procedures must be adopted to achieve this transition. Corporate metamorphosis is not unusual, but the lack of transparency in the quasi-partnership context is unsettling.

**Secondly**, on the managerial participation issue<sup>28</sup>, it should be conceded that a quasi-partnership might be found to operate between two individuals where one of these parties wished to remain as a “dormant partner” without active managerial input<sup>29</sup>. This commendable open-mindedness in definitional matters itself has generated some confusion. The fundamental point to bear in mind however is that we are talking about labels and this should not disguise the fact that a quasi-partner is still a shareholder in a company: for confirmation of this fundamental truth see *Re Brand & Harding Ltd*<sup>30</sup> where Rose J wound up a farming company on the just and equitable ground in view of the continuing deadlock between the participants (who were sisters). However, there are still significant differences between the rules governing partners and those shareholder designated as quasi-partners. This differential is clear from a comparison of the cases of *Aas v Benham*<sup>31</sup> and *O’Donnell v Shanahan*<sup>32</sup> on the duty to account for windfall profits not arising from the operation of the firm’s business. The former decision exemplifies a stricter approach towards accountability in Partnership Law as compared to the attitude taken in the later Corporate Law precedent.

---

<sup>24</sup> *Croly v Good* [2010] 2 BCLC 569.

<sup>25</sup> [2019] EWHC 46 (Ch) at para [210] per HHJ Paul Matthews.

<sup>26</sup> [2019] EWHC 1378 (Ch).

<sup>27</sup> On this transition process see Companies Act 2006 ss. 90 and 97.

<sup>28</sup> Of course, this right to participate in management is a partnership staple – see Partnership Act 1890 s. 24(5). The expectation that a quasi-partner will remain in post as a director was one reason why the weighted votes arrangement in *Bushell v Faith* [1970] AC 1099 was upheld – see Lord Donovan at 1110-1111.

<sup>29</sup> On this see *Re Fildes Bros Ltd* [1970] 1 All ER 923 at 926 per Megarry J.

<sup>30</sup> [2014] EWHC 247 (Ch) at para [8] per Rose J. Note also *Harrison v Thompson* [1992] BCLC 833 where the same point was made by Knox J (at 849) in the context of valuing an excluded member’s interest in the company and whether equitable interest could be brought into play in that valuation process.

<sup>31</sup> [1891] 2 Ch 244.

<sup>32</sup> [2009] EWCA Civ 751.

As participation in management is such an important aspect of a quasi-partnership relationship in most cases, the wrongful exclusion from management is most likely to be actionable<sup>33</sup>.

**Finally**, with regard to transferability of interest, this third indicia identified by Lord Wilberforce very much reflects partnership orthodoxy (see Partnership Act 1890 s. 24(7))<sup>34</sup>. It is easily satisfied in contested litigation relating to the existence of a quasi-partnership nexus as all private companies place restrictions upon share transfers. But we must remind ourselves such restrictions are not necessarily watertight<sup>35</sup>.

It is important to recall that in *Ebrahimi*<sup>36</sup> Lord Wilberforce did not say that these three features were the only considerations relevant to the issue of definition of a quasi-partnership<sup>37</sup>. Nor indeed did he suggest that all of these elements needed to be present in order for a quasi-partnership to arise<sup>38</sup>. Lord Wilberforce did not suggest a maximum shareholder number for a quasi-partnership to exist nor did he identify a minimum shareholding for a person claiming to be a quasi-partner. The Law Commission in 1997 was more adventurous in this regard but its proposals were never implemented<sup>39</sup>.

What is more difficult to appreciate is that it is also possible that a shareholder may be seen as being in a quasi-partnership relationship with another shareholder in a particular company, whilst other shareholders in the same entity do not enjoy that close form of nexus. Quasi partnership thus describes the nature of the relationships that may exist within an organisation rather than characterising the organisation itself. There has been some lively judicial discussion on matters related to this point. In *Re Yung Kee Holdings Ltd*<sup>40</sup> the Hong Kong Court of Appeal accepted that the presence of third party participators in the company did not necessarily rule out a quasi-partnership finding by the court. By way of contrast, the position in *Estera Trust (Jersey) Ltd v Singh (Re Edwardian Group Ltd)*<sup>41</sup> Fancourt J discussed the possibility whether a quasi-partnership could exist only between certain participants within a particular company. He clearly had reservations about this

---

<sup>33</sup> On this see Roth J in *Shah v Shah* [2010] EWHC 313 (Ch) at para [104] per Roth J.

<sup>34</sup> Also reflected to some extent in s. 31.

<sup>35</sup> That is the lesson of the litigation that culminated in *Re Coroin Ltd* [2012] EWCA Civ 179 and [2013] EWCA Civ 781. In both instances appeals from rulings of David Richards J reported in [2011] EWHC 3466 (Ch) and [2012] EWHC 2343 (Ch) were dismissed.

<sup>36</sup> *Supra*.

<sup>37</sup> *Fisher v Cadman* [2006] 1 BCLC 499 at para [84] per Sales J. So for instance the fact that profits are to be disbursed via directors salaries rather than shareholder dividends might be a relevant consideration according to Brightman J in *Re Leadendall General Hardware Stores Ltd* (1971) 115 Sol Jo 202.

<sup>38</sup> See *Fisher v Cadman* (*supra*) at para 89 per Sales J.

<sup>39</sup> See Shareholder Remedies (LC No. 246, 1997). The Law Commission favoured capping the criteria for a quasi-partnership company at a maximum of 5 members and requiring a claimant to own at least 10% of the voting shares – see para 3.46.

<sup>40</sup> [2004] 2 HKLRD 313.

<sup>41</sup> [2018] EWHC 1715 (Ch). For later proceedings on the question of valuation of the interests of the various parties see [2019] EWHC 873 (Ch).

contention, but did not appear to rule it out completely – see para [134] of his judgment. At the end of the day he reserved this issue for determination at a later day as is clear from para [139] of his judgment. Having rejected the contention that a quasi-partnership existed in this instance, Fancourt J nevertheless found that some unfair prejudice had occurred and granted a remedy in the form of a buyout order. The matter was revisited by HHJ Eyre QC in *Waldron v Waldron*<sup>42</sup> and the tentative views expressed in the Hong Kong Court of Appeal were supported in preference to those hinted at by Fancourt J. This must be the correct perspective because it would be unwise to fetter judicial discretion in relation to this question. Much will depend upon the individual circumstances of each case.

It also has been suggested to be the case that as a rule only equity (ordinary) shareholders can form a quasi-partnership nexus. Thus, in *Re Planet Organic Ltd*<sup>43</sup> the court indicated that a preference shareholder could not, without more, establish a quasi-partnership relationship. This again may be an over-generalisation, for there is authority to the effect that a member who has informally expected to be given a greater shareholding in a company in which he has invested via loans might qualify as a quasi-partner in appropriate circumstances, witness the approach of Marcus Smith J in *VB Football Assets v Blackpool FC (Properties) Ltd*<sup>44</sup>. Finally, we note that a quasi-partnership can arise within a group context and is not restricted to the paradigm of a small company: for confirmation of this observation see *Oak Investment Partners XII Ltd v Boughtwood*<sup>45</sup>. Corporate shareholders may in appropriate (but rare) cases have sufficient interactive capability to generate a quasi-partnership nexus<sup>46</sup>.

At the end of the day, whether a company embodies a quasi-partnership or not involves an holistic consideration by the court of all of the factors present in each individual case. There is unfortunately no simple or mechanistic litmus test that can be utilised. The judge will play a pivotal role.

### **Quasi partnerships and close companies: a distinction without a difference?**

---

<sup>42</sup> [2019] EWHC 115 (Ch).

<sup>43</sup> [2000] BCC 610.

<sup>44</sup> [2017] EWHC 2767 (Ch). Note also *R and H Electrical Ltd v Haden Bill Electrical Ltd* [1995] BCC 958.

<sup>45</sup> [2010] EWCA Civ 23. In this context note *SCWS Ltd v Meyer* [1959] AC 324, noted by Wedderburn in (1958) 21 MLR 653. In this Scottish appeal that proceeded to the House of Lords Lord Keith observed (at 361) that the subsidiary company that was the focus of the oppression claim consisted of a quasi-partnership between its parent company and the petitioners

<sup>46</sup> See the discussion in the Hong Kong authority of *Pearl Link International Ltd v Recruit Co Ltd* [2005] HKCFI 366. But in this case the court questioned whether a quasi-partnership can arise where one of the key participators in the firm is the state. One might suggest that this is too narrow a view to take, particularly as state investment funds are active across the corporate sector.



Before leaving this characterisation issue we should note the relationship of the quasi partnership concept with those entities classed as “close companies”, an American descriptor that is now in widespread use across the globe and one that is increasing supplanting the term “quasi-partnership”<sup>47</sup>. These terms are often used interchangeably in corporate law discourse and it may well be that the designation of “close company” avoids some of the difficulties with the introduction of partnership notions. That interchangeability may, however, on closer analysis be a misconception as far as English Law is concerned. It would be fair to say that all quasi-partnerships are close companies, but not all close companies are quasi- partnerships in English law. Close companies are indisputably small private companies, but they may lack the personal interactive elements that trigger a quasi-partnership relationship.<sup>48</sup> There are more close companies in existence in the UK than there are quasi-partnerships<sup>49</sup>.

### **Implications of a quasi partnership characterisation**

The main consequence of a company being labelled as a quasi-partnership is that it enables the court to introduce equitable considerations when analysing the relationship between participants within a company. A quasi-partnership involves mutuality on the part of the players<sup>50</sup>. So, for instance it might impose equitable constraints upon how voting rights are exercised, over and above those operating under general Company Law. We could cite here *Clemens v Clemens Bros Ltd*<sup>51</sup> where Foster J imposed such constraints so as to protect against the dilution of a minority shareholder’s interest. A quasi partner may thus enjoy rights (and be subject to obligations) which do not feature in the formal constitution of the company or in any service contract<sup>52</sup>.

---

<sup>47</sup> See Prentice (1983) 3 OJLS 417.

<sup>48</sup> On close companies in general see J.A. McCahery and E.P.M. Vermeulen, Corporate Governance of Non-Listed Companies (2008)(OUP) at 24 et seq. A valuable analysis is provided by Rider in [1979] 38 CLJ 148.

<sup>49</sup> This would appear to follow from data included in the Bolton Report on Small Firms (Cmnd 4811, 1971). Bolton estimated (at para 2.2) that 90% of incorporate small firms were close companies and it is submitted that that high figure could not represent the number of quasi-partnerships. See generally Chesterman, Small Businesses (2<sup>nd</sup> ed, 1982) (Sweet and Maxwell).

<sup>50</sup> But it does not mean that each quasi partner enjoys the same level of rights. In *Quinlan v Essex Hinge Co Ltd* [1996] 2 BCLC 417 the court commented upon senior/junior quasi partners. See also *Shah v Shah* [2010] EWHC 313 (Ch) at para [102] per Roth J.

<sup>51</sup> [1976] 2 All ER 268. Reading the judgment, there is no specific finding of a quasi-partnership, but it is interesting to note that Foster J drew upon Lord Wilberforce’s speech in *Ebrahimi* (supra) to provide the basis for his conclusion. Foster J seemed keen to treat the case on its own facts and not to develop a general principle.

<sup>52</sup> Note the comments of E.W. Hamilton QC in *Quinlan v Essex Hinge Co Ltd* [1996] 2 BCLC 417.

The court can also deploy judicial discretion when deciding whether it is appropriate to apply the strict provisions of the Companies Acts. So, for instance, it might mean that the standard rules on company meetings/ resolutions do not have to be met. This concession has morphed into a distinct body of jurisprudence derived ostensibly from *Re Duomatic Ltd*<sup>53</sup>, but in fact having a much longer juristic lineage<sup>54</sup>. At its heart it accepts that quasi-partnerships are very much in substance operating domestically like partnerships, and therefore the strict rules of Company Law do not always have to be applied. But that concession is available only if the company is solvent and creditor interests are therefore not in jeopardy. That is a critical limitation upon judicial flexibility to note.

The labelling of a company as a quasi-partnership can also empower the courts to take into account contextual factors when operating the winding up on the “just and equitable” ground jurisdiction which is now conferred by Insolvency Act 1986 s. 122(1)(g)). This idea owes much to the partnership heritage<sup>55</sup>. This was most apparent in the leading case of *Ebrahimi v Westbourne Galleries Ltd*<sup>56</sup> itself. Here certain acts undertaken by controllers of a private company (thereby damaging the interests of a minority), acts which were otherwise perfectly legal under strict Company Law, were regarded as providing sufficient grounds to wind up a company on the just and equitable ground because the company in question could be regarded as a quasi-partnership. The expectations of fairness had been infringed and this justified judicial intervention of the most drastic kind. For a more recent illustration of this approach at work in a quasi-partnership context we note *Re Brand & Harding Ltd*<sup>57</sup> where Rose J ordered the winding up of a quasi-partnership company in the light of irreconcilable disputes between the participators. There was no other practical solution. Furthermore, the beauty of this remedy is that it absolves the court of the need to point the finger of blame at any of the protagonists and it can instead fall back on deadlock as a reason for ending the relationship<sup>58</sup>. In spite of these comments we should note that a quasi-partnership finding will not lead the court to block the lawful exercise of majority powers but it may produce the conclusion that a just and equitable winding up is the only proper solution<sup>59</sup>.

---

<sup>53</sup> [1969] 2 Ch 365.

<sup>54</sup> See Milman [2017] 46 CLW Rev 198 for an overview of the relevant jurisprudence.

<sup>55</sup> On the historical origins of this jurisdiction see McPherson (1964) 27 MLR 282.

<sup>56</sup> *Supra*. Uncondoned wrongful behaviour by a quasi-partner might justify such a winding up – *Re Worldhams Park Golf Course Ltd* [1998] 1 BCLC 554 (Neuberger J). For another example of the winding up jurisdiction being used where the business of a quasi-partnership had ceased to operate but there was a reluctance to close it down via a voluntary liquidation see the ruling of Scott J in *Re Perfectair Ltd* [1990] BCLC 423.

<sup>57</sup> [2014] EWHC 247 (Ch).

<sup>58</sup> The Scottish ruling in *Jesner v Jarrad Properties Ltd* [1992] BCC 807 exemplifies this approach.

<sup>59</sup> This is well illustrated by *Bentley-Stevens v Jones* [1974] 2 All ER 653 where an interim injunction to prevent the removal of a director was refused by Plowman J.

The quasi-partnership designation can have particular resonance in the context of an unfair prejudice petition presented to the court under s. 994 of the Companies Act 2006<sup>60</sup>. If the petitioner can establish the existence of a quasi-partnership that can improve prospects of success to a significant degree by bringing into play considerations that might not otherwise apply. The self-imposed restriction on the courts simply protecting the petitioner's rights qua member in a case of alleged unfair prejudice might be relaxed. There is no absolute "clean hands" bar, but the behaviour of the petitioner in a quasi-partnership case is not completely irrelevant<sup>61</sup>. That said, it is equally clear that an unfair prejudice petition is not always dependent for its success upon a quasi-partnership being proved to exist as we see below. The existence of a quasi-partnership may also be relevant to the consequential matter of remedies if the unfair prejudice petition were to succeed. The normal remedy available under s. 996 is that the respondent be ordered to buy out the petitioner at "fair value". In determining what constitutes "fair value" the courts will often start from the assumption that a minority shareholding in a private company must be valued at a discount. That reflects the market position where such a shareholding is sold to a buyer on a consensual basis because a minority shareholding carries inevitable risks. That default rule will however often be disapplied if the presence of a quasi-partnership is accepted by the court<sup>62</sup>. In such circumstances, valuation will usually be based on a pro rata basis, which improves the financial outcome for the successful petitioner<sup>63</sup>. Views here on the part of the courts with regard to valuation differ, but, that said, there is consensus that at the end of the day this ultimately is a matter for the court to determine using its discretion based upon the facts of each individual case.

The facilitation of both realisation of shareholder interest via winding up and exit in the wake of proven unfair prejudice is important because, as Lord Hoffmann observed in *O'Neill v Phillips*<sup>64</sup>, there is **no automatic right of exit** for a shareholder even in a quasi-partnership<sup>65</sup>. The concept of quasi-partnership is then exploited through litigation to produce these practical outcomes.

---

<sup>60</sup> On this aspect see Hannigan [1988] LMCLQ 60. In its survey of unfair prejudice petitions presented between 1994 and 1996 the Law Commission some 30.5% of cases featured the quasi-partnership issue – see *Shareholder Remedies* (LC No. 246, 1997) Appendix J.

<sup>61</sup> See the comments of Nourse J in *Re London School of Electronics Ltd* [1986] Ch 211.

<sup>62</sup> One reason for this is that the discount rule would not be applied when valuing partnership interests – see *CVC/Opportunity Equity Partner Ltd v Almeida* [2002] UKPC 16 at paras [41]-[42] for explanation by Lord Millett.

<sup>63</sup> For the relevant practice here see the various approaches outlined in *Re Bird Precision Bellows Ltd* [1984] Ch 419, *Strahan v Wilcock* [2006] EWCA Civ 13, *Irvine v Irvine (No. 2)* [2007] 1 BCLC 445, *Re BC & G Care Homes Ltd* [2015] EWHC 1518 (Ch), *Estera Trust (Jersey) Ltd v Singh* [2018] EWHC 1715 (Ch) and *McCallum Toppin v McCallum-Toppin* [2019] EWHC 46 (Ch).

<sup>64</sup> [1999] 1 WLR 1092.

<sup>65</sup> See also para [64] in *Davies v Lynch-Smith* [2018] EWHC 2336 (Ch) per HHJ Hodge QC

The recent decision of HHJ Hodge QC in *Davies v Lynch-Smith*<sup>66</sup> shows that it is perfectly possible for the court to reject any finding of a quasi-partnership (see paras [61] and [81] of the judgment) in a small private company, but at the same time to conclude that there was unfair prejudice. Here HHJ Hodge QC found that the unfair prejudice arose not through an exclusion from management (which could be a very significant ground for complaint in a quasi-partnership), but out of a failure to offer to buy out the petitioner on a discounted basis.

As a quasi-partnership relationship is personal to individuals it is not a relationship (with attendant obligations) that can automatically be transmitted to a person acquiring the shares of one of the quasi partners, whether by voluntary transfer or transmission by operation of law on death<sup>67</sup>. It may survive the insolvency of the company in which the relationship is housed<sup>68</sup>, but such an economic transition will affect the enforceability of rights which will be subordinated to those of creditors.

What is also important to remember is that these consequences flowing from a quasi-partnership characterisation are purely inward facing. The fact that a company might be classed as a quasi-partnership cannot expose the quasi-partners to a loss of their limited liability privilege<sup>69</sup>. This is a significant limiting factor in terms of the “spread” of the concept which is entirely “domestic” in terms of its operation.

### **The significance of a shareholder agreements and customised arrangements**

The quasi-partnership concept has created an important methodology for a court to resolve domestic disputes. But in more recent times it has been compelled to grapple with the implications of the advent of shareholder agreements on this question. Such agreements are used to customise relationships within a private company in a way that the standard articles of association may not be able to achieve. Such agreements were not common when the quasi-partnership concept emerged in the early days of the 20<sup>th</sup> century. Therefore equitable principles were introduced to combat the apparent rigidity of Company Law; these days that process of introducing “flexibility” is often achieved via contract.

The courts are therefore increasingly reluctant to hold that a quasi-partnership finding can undermine specific contractual arrangements (whether contained in the articles of

---

<sup>66</sup> [2018] EWHC 2336 (Ch).

<sup>67</sup> The Singapore Court of Appeal made this point in *Ting Shwu Ping v Sconone Pte Ltd* [2016] SGCA 65 at para [96] per Prakash JA. The same could be said of a shareholder agreement as obligations undertaken therein do not pass to new members unless such individuals subscribe to them – see *Russell v Northern Bank* [1992] 1 WLR 588.

<sup>68</sup> See HHJ Eyre QC in *Waldron v Waldron* [2019] EWHC 115 (Ch) at [72].

<sup>69</sup> This may be inferred from the approach taken by Lords Templeman and Oliver sitting in the House of Lords hearing the *International Tin Council* case (*JH Rayner Ltd v DTI* [1990] 2 AC 418 (see at 479 and 508). This is a significant limiting factor in terms of the “spread” of the concept. It is entirely “domestic” in terms of its operation.

association<sup>70</sup> or a shareholder agreement). This was apparent in the judgment of Binchy J in Irish case of *Hamill v Vantage Resources*<sup>71</sup>. If the parties have established their relationship through arms' length commercial negotiations the scope for the introduction of equitable principles is inevitably more constrained. Conversely, informal commercial relationships open up the possibility of equity filling the vacuum<sup>72</sup>. In *Re Coroin Ltd*<sup>73</sup> David Richards J made the point that the potential for equitable principles to intrude was limited where a small group of professional investors (some of whom had never met) had combined together in a corporate entity and had employed a shareholder agreement which unusually had explicit good faith commitments. In *Estera Trust (Jersey) Ltd v Singh*<sup>74</sup> Fancourt J concluded (at para [159] of the judgment) that, even if a quasi-partnership had been present when the company was formed, it was superseded by a later shareholders' agreement. Contract thus trumps equitable considerations in this regard. On the other hand, if there is a quasi-partnership relationship subsisting in reality, any sort of denial of that fact in a shareholder agreement is unlikely to be effective<sup>75</sup>.

If the constitution of the company confers special rights on a class of shareholder (particularly if that is a single shareholder) it is submitted that this again might deter the court from finding that a quasi-partnership exists. There is no need for the court to intervene by adding an equitable gloss on matters already expressly provided for.

## **Reflections**

There continue to be a number of cases in which the quasi-partnership issue has come before the UK courts. As far as quasi-partnership identification is concerned it is often a subsidiary issue that is raised in a broader litigation context. It is never a self-standing issue. Sometimes the point is conceded<sup>76</sup>; in other instances it is the subject of dispute. Whether a quasi-partnership nexus exists or not is really a question of mixed law and fact: an appellate court will be most reluctant to gainsay a first instance determination on this matter<sup>77</sup>. Looking at the results of these cases, one could note that outcomes are not always easy to

---

<sup>70</sup> See *Re Posgate and Denby Agencies Ltd* [1987] BCLC 8, *Re A Company (005685 of 1988) ex parte Schwartz (No. 2)* [1989] BCLC 427.

<sup>71</sup> [2015] IEHC 195. Mann J made much the same point in *Brett v Migration Solutions Holdings Ltd* [2016] EWHC 523 (Ch) at para [64].

<sup>72</sup> See here the comments of Robert Walker J in *R and H Electrical Ltd v Haden Bill Electrical Ltd* [1995] BCC 958.

<sup>73</sup> [2012] EWHC 2343 (Ch) at para [636]. Confirmed on appeal on other grounds in [2013] EWCA Civ 781.

<sup>74</sup> [2018] EWHC 1715 (Ch).

<sup>75</sup> See here the comments of Birss J in *Sudicka v Morgan* [2019] EWHC 311 (Ch) at para [193].

<sup>76</sup> As in *Re London School of Electronics Ltd* [1986] Ch 211.

<sup>77</sup> Equally an appellant will be reluctant to challenge a first instance finding on such a determination – see *Prescott v Potamianos* [2019] EWCA Civ 932 at paras [50]-[51] of the combined judgment of the court.

predict. Each case is fact dependent and often the conclusion is marginal. On balance, the quasi-partnership contention is more likely to be rejected than accepted<sup>78</sup>, but it is by no means a desperate last throw of the dice.

Measuring the scale of the issue is problematic. If we look at reported litigation in the UK since the year 2000 we find that the quasi-partnership issue has arisen in at least 25 cases. But in many instances the point is not seriously challenged and the litigation instead develops along different lines. Intuition suggests that where the issue is contested then a quasi-partnership conclusion is reached in a minority of cases. There should be no surprises in this statistical outcome. It mirrors the reluctance of the courts to infer a partnership where the matter is in dispute<sup>79</sup> and is part of a broader phobia against introducing equitable principles into commercial relationships<sup>80</sup>. Looking at related jurisdictions, such as Hong Kong, the picture in terms of a judicial finding of a quasi-partnership is broadly similar<sup>81</sup>.

As to why these cases continue to arise it would be easy to point to informality as the root cause of the problem. That is undoubtedly a factor, particularly in family cases, but the quasi-partnership issue can be triggered in broader contexts.

The quasi-partnership concept is still firmly established as a feature of UK Company Law, even though for the purposes of companies' legislation it is invisible<sup>82</sup>. It nevertheless has a real presence in reported case law<sup>83</sup>. It shows that UK Corporate Law does have a significant case law component<sup>84</sup> and is not wholly a creature of statute. But in many senses, it could be said that it is now an unnecessary complication in modern Corporate Law. The courts could now usually arrive at the desired conclusion by making use of more flexible and general concepts, such as "legitimate expectations". The watershed cases where the quasi-partnership question arose have been overtaken by wider legal developments. The classic case of *Ebrahimi v Westbourne Galleries Ltd*<sup>85</sup> illustrates this. It is unlikely to have proceeded as it did had the unfair prejudice (as opposed to the narrower concept of "oppression") jurisdiction been in play at the relevant time when the litigation arose. Alternatively, in the years to come, the judiciary might develop the point that a quasi-partnership is a species of joint venture, and that it is, therefore, a type of relational

---

<sup>78</sup> It was rejected by ICC Judge Briggs on the facts of *Michel v Michel* [2019] EWHC 1378 (Ch).

<sup>79</sup> See Milman (op cit footnote 5) at 25-26.

<sup>80</sup> See *Re BA Peters plc* [2010] 1 BCLC 142 at para [21] per Lord Neuberger commenting up the undesirability of creating new equitable proprietary rights in relation to an insolvent company.

<sup>81</sup> See for example the outcomes in the litigation in *Pearl Link International Ltd v Recruit Co Ltd* [2005] HKCFI 366, *Cosmo Solution Ltd v Wistrade Far East Ltd* [2010] HKCFI 958 and in *China Habit Ltd v Health Links Development Ltd* [2018] HKCFI 1703.

<sup>82</sup> See Kershaw, *Company Law in Context* (2009) (OUP) at 613.

<sup>83</sup> On the emerging discrete regulation of domestic companies see Rider [1979] 38 CLJ 148.

<sup>84</sup> On this general issue see Milman [1990] LMCLQ 401.

<sup>85</sup> *Supra*.

contract. If so, the views of Leggatt LJ in favour of importing a duty of good faith into such relationships might become more widely accepted<sup>86</sup>. The need for using the quasi-partnership device to achieve much the same result is thus diminished.

It could be argued that the quasi-partnership phenomenon arose out of the failure of UK Corporate Law to pay adequate attention to the needs of the smaller company<sup>87</sup>. That criticism is less apt today with the Thatcherite reforms in the early 1980s<sup>88</sup> and the broad acceptance of the “Think Small First” philosophy in official quarters<sup>89</sup>.

The arrival on the scene of other business forms has further muddied the traditional divide between partnership and company. In particular, we now have the LLP thriving in practice since its introduction into the UK by the Limited Liability Partnerships Act 2000 – this is very much a form of entity operating like a partnership domestically but more like a company externally. The LLP phenomenon has spread globally<sup>90</sup>. There are also new types of customised limited partnership that have been introduced into the UK more recently<sup>91</sup>. These new entities are mandated by legislation and one might therefore ask why it is that the courts have been allowed to introduce (and then continue to apply) the concept of quasi-partnership on their own initiative. Indeed, if there is a real continuing need for the quasi-partnership device to be deployed in English Law, should not the legislature dictate that? If it were to go down that road the usage of the concept of close company might have some advantages.

Returning to the present and in the absence of reform, the problem of characterisation of forms of commercial relationship will not go away. The quasi-partnership conundrum is but one example of this phenomenon. Resolution of this conundrum depends upon having a commercially astute judiciary. Fortunately, in the UK we are blessed with that resource.

7709

---

<sup>86</sup> See here *Al Nehayan v Kent* [2018] EWHC 333 (Comm). Note also *Bates v Post Office (No. 3)* [2019] EWHC 606 (QB).

<sup>87</sup> On this criticism (made nearly 40 years ago) see *Morse and Tedd* [1971] JBL 261.

<sup>88</sup> We could cite here the deregulatory reforms implemented by the Companies Act 1981.

<sup>89</sup> Most notably in the Company Law Review – see Final Report URN (01/942) at paras 1.52-1.55 where it is described as a core policy.

<sup>90</sup> The LLP in some form or another has for example been adopted in Singapore (2005), India (2008) and Kenya (2011).

<sup>91</sup> For example the limited partnership for private funds – see Legislative Reform (Private Fund Limited Partnerships) Order 2017 (SI 2017/514).

