Quasi-partnerships, acquiescence, excessive remuneration and discounts on buy-outs: case law developments in the law relating to section 994

Several theoretical and practical issues in relation to the interpretation and application of section 994 of the Companies Act 2006 were considered in two High Court cases in early 2019.[1]

The issues covered included:

- The nature, duration and effect of 'quasi-partnership' relationships
- The effect of delay, knowledge, acquiescence and consent
- Excessive remuneration and the payment of dividends
- Discounts on the purchase of minority holdings

A wide range of other matters of more general company law interest were also discussed, including the law relating to corporate opportunities and the rights of access of individual directors to corporate information.

This article considers the coverage of the above issues in these two cases.

The relevant facts

As in many section 994 cases, the facts in both *Re AMT Coffee Limited* and *Re Westshield Limited,* particularly the latter*,* were detailed and complicated, encompassing events that had occurred over more than 20 and 40 years respectively.

Re AMT Coffee

AMT Coffee Limited is a family owned company that operates numerous retail coffee shops in the UK, including several at mainline railway stations. Its business began life as a partnership between three brothers. The business was incorporated in 1993, when the three brothers and their father (who was succeeded after his death by their mother) became equal shareholders and directors. At incorporation, it was therefore a 'classic' example of a quasi-partnership company.

Throughout the company's existence up to the date of the trial, there had been continual strong disagreements about how to run the company. The eldest of the three brothers had died in 2006. It was his surviving spouse, together with his other personal representative, who had brought the petition. Their complaints were:

"… in essence threefold. First, the directors paid themselves excessive remuneration. Second, the Company failed to give consideration in good faith to

[1] AMT Coffee Limited, Re 2019 EW HC 46 Ch, Re Westshield Limited, [2019] EWHC 115 (Ch)

the payment of dividends despite its accumulated profit and loss account. Thirdly, the directors benefited from loans from the Company at favourable rates."[2]

Re Westshield

Westshield Limited was an engineering and construction company that was incorporated in 1977 by the parents of the four siblings involved in the case. Each parent owned 50% of the shares. Over the course of 30 years, the shareholdings had altered as the children's involvement with the company increased. By 2007, the respondent, Patrick Waldron ("*P*"), and his father each owned 30% of the shares in the company and *P* had been appointed as managing director of the company. Mrs Waldron, the mother, and the three remaining children ("*A*", "*G*" and "*M*"), who were the petitioners, each owned 10% of the shares. *A* had also been appointed as a director of the company, *G* had been appointed as Company secretary. *M* held no office but had been employed by the company between 1997 and 2005.

Following the 'credit crunch' in 2008, the company experienced serious difficulties. In order to retain its banking facilities, and after acrimonious negotiations between the siblings, the shareholdings were further varied and the company's bank acquired a significant shareholding. At this point, *P* owned roughly 35% of the shares, *A* and *G* each held roughly 18%, *M* held 8% and the bank held 20%. Financial problems continued, however, and in 2010 the company entered a Company Voluntary Arrangement, which lasted until 2015.

In 2014, in order to acquire some contracts from a company that had gone into administration, *P* formed a separate company ("Tunnelling") of which he was the sole director and shareholder. Having obtained the contracts, Tunnelling then exploited them in a way that benefited both itself and Westshield. The petitioners argued that the acquisition of the contracts by Tunnelling was a breach of *P's* fiduciary duty as a director of Westshield.

At around the same time, *P* had also entered negotiations with the bank in order to acquire overall control of Westshield. This led to further disputes between the four sibling shareholders. As part of the dispute, *P,* as managing director, instructed the company's IT consultant to curtail access by *A* and *G* to various emails. *A* and *G* subsequently attempted to bribe the IT consultant into restoring their access. When *P* discovered this, he dismissed them as employees of the company. The petitioners argued that the dismissals were unfair on the basis that the bribery allegation was a mere pretext for the dismissals. They alleged that the real reason for their dismissal was *P's* wish to take control of the company.

The petitioners made, in total, nine separate allegations of unfairly prejudicial conduct, some of which were not pursued. The two central elements of their case were that unfair prejudice to their interests had arisen from *P's* actions in breach

[2] AMT Coffee Limited, Re 2019 EW HC 46 Ch, per HHJ Paul Matthews at 119

of his fiduciary duties and from the unjustified dismissal of *A* and *G* and their exclusion from involvement in the business of the company.

Discussion of quasi-partnership companies in Re Westshield

A large section of the judgment in *Re Westshield* [3] was devoted to a consideration of the nexus or interface between 'quasi-partnership companies' and the circumstances where equitable considerations arise.[4]

After setting out the facts and the issues that he would have to decide, HH Judge Eyre QC, began his judgment by considering the approach that he should take. Noting that counsel had agreed that *Hawkes v Cuddy* sets outs the three elements which a section 994 petition must establish,[5] he then referred to Lord Hoffman's well-known dicta to the effect that conduct in accordance with the relevant company's 'rules' is not normally unfair, but that there are some circumstances where 'equitable considerations' make it otherwise.[6]

The judge then asked himself, rhetorically: "What are the circumstances in which those considerations come into play?" and answered his own question by stating that such circumstances are 'akin' to the circumstances in which a company can be wound up on just and equitable grounds – and 'are commonly referred to as being those where the company is a quasi-partnership'.

The term 'quasi-partnership' has been used repeatedly in 'unfair prejudice' cases[7] following its appearance in Lord Wilberforce's seminal judgment in *Ebrahimi v Westbourne Galleries Ltd* [8]. While recognizing that the term may be convenient, HH Judge Eyre QC also described it as 'potentially misleading shorthand'. He reiterated the view of the Hong Kong Court of Appeal, that while 'quasi-partnership' may be a 'convenient label' for the situations when equitable considerations will arise, it is not a definition of those circumstances and:

"should not be allowed to subvert the underlying question: whether a petitioner can pinpoint matters giving rise to an equitable consideration which makes it unfair for those conducting the affairs of the company to rely upon their strict legal powers." [9]

[3] Re Westshield Limited, [2019] EWHC 115 (Ch) at 26-52
[4] A topic that was also considered earlier this year in a Company Law Newsletter editorial, see David Milman, " The quasi-partnership and company law", Co. L.N. 2019, 414, 1-5
[5] Hawkes v Cuddy (No.2)[2007] EWHC 2999 (Ch, [2008] BCC 39. In short: conduct of the company's affairs; prejudice to the interests of a member; that the prejudice is unfair.
[6] O'Neill v Phillips [1999] 1 W.L.R. 1092; [1999] at 1099A
[7] Before section 994, the relevant statutory provisions were section 459 of the Companies Act 1985 and section 75 of the Companies Act 1980.
[8] Ebrahimi v Westbourne Galleries Ltd [1973] A.C. 360;[1972]5 WLUK 13 (HL)
[9] Re Yung Kee Holdings Ltd [2014] 2HKLRD 313 at [107]

He further noted, however, that he nevertheless had to bear in mind Lord Hoffmann's comment in *O'Neill* that this:

"…does not mean that there are no principles by which those circumstances may be identified. The way in which such equitable principles operate is tolerably well settled and… It would be wrong to abandon them in favour of some wholly indefinite notion of fairness."

One weakness however in Lord Hoffman's judgment in *O'Neill*, as others have recognised[10], was his failure to be more specific in describing the relevant equitable principles and their operation in this context.

What are the relevant principles?

Although he did not explicitly set out the relevant equitable principles, Lord Hoffman referred repeatedly, in his discussion in *O'Neill* of the role of equity, to the relevance of 'good faith'. Thus, 'using the [company's] rules in a manner which equity would regard as contrary to good faith' would be unfair;[11] equity would traditionally restrain the exercise of strict legal rights if this would be contrary to good faith[12]; and equity would require that powers must be exercised in good faith. [13]

'Good faith' was raised in both *Re AMT Coffee* and in *Re Westshield*. In *Re AMT Coffee*, it was held that the directors had failed to consider 'in good faith' whether or not to declare dividends.[14] In *Re Westshield* it was relevant to the question, which frequently arises in section 994 cases and was considered in *O'Neill* itself, of whether or not an 'agreement' or 'understanding' between members of the company was sufficient to provide the equitable considerations that would allow the court to intervene.

It is clear that such agreements do not have to have 'the degree of certainty which would be necessary for an agreement to be enforceable as contract', but – here HH Judge Eyre QC cited *Khoshkhou v Cooper & others*[15] - that there must be "a sufficient degree of agreement that it can be said that there has been a breach of good faith in departing from it".

This, of course, leads ineluctably to the question, what are the requirements of good faith?

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[10] Robin Hollington, Hollington on Shareholders' Rights, 8th edn (Sweet & Maxwell 2016) at 7-36 (2)
[11] O'Neill v Phillips [1999] 1 W.L.R. 1092 at 1099
[12] O'Neill v Phillips [1999] 1 W.L.R. 1092 at 1098
[13] O'Neill v Phillips [1999] 1 W.L.R. 1092 at 1099
[14] See further below
[15] Khoshkhou v Cooper & others [2014] EWHC 1087 (Ch) per HH Judge David Cooke at 24

What does 'good faith' mean or require?

A full discussion of the meaning of 'good faith' is beyond the scope of this article. The term has been described as "protean" in character[16] (which is helpful to judges but is very unhelpful to lawyers seeking to advise their clients) and "it has been implied in some commentary that the search for its meaning is fruitless."[17] What is clear from a review of the UK authorities is that "There is no particular definition of 'good faith' in English law; it is in essence a 'principle of fair and open dealing…"[18]

The position does not seem to be any clearer in either Australia or the USA. Authorities in all three jurisdictions make copious references to the familiar concepts of honesty, fidelity, loyalty, and 'playing fair'. They also make numerous references to the absence of bad faith, the absence of intent to defraud or to seek unconscionable advantage, and the observance of reasonable commercial standards.

While these are all helpful indications of what 'good faith' requires, it is submitted that in the context of deciding whether or not, for the purposes of section 994, an informal agreement or understanding is enforceable, they do not provide anything approaching 'the degree of precision', which HH Judge Eyre QC stated is required.

Possibly, the most helpful statement in relation to the specific question of enforceable agreements for the purposes of section 994 comes from the *United States (Second) Restatement of the Law of Contracts* :

"Good faith performance or enforcement of a contract emphasizes *faithfulness to an agreed common purpose and consistency with the justified expectations of the other party*; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness." (Emphasis added)

But, although it is helpful, this statement is extremely short of pertinent detail.

Application of the law relating to quasi-partnerships and equitable considerations in Re Westshield

After considering the interface between quasi-partnerships and equitable considerations, HH Judge Eyre QC had to decide whether or not equitable considerations justifying restraint and 'interference' etc. applied in this particular case.[19] He concluded that they did.

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[16] Secretary, Department of Education, Employment, Training and Youth Affairs v Prince (1997) 152 ALR 127 per Finn J at 130

[17] LexisNavigator, citing EA Farnsworth, "Good Faith in Contract Performance", Beatson and Friedmann (eds) Good Faith and Fault in Contract Law, Clarendon Press Oxford (1995) at 157 n 13, http://www.lexisnexis.com [Accessed June 5 2019]

[18] LexisNavigator, http://www.lexisnexis.com [Accessed June 5 2019]

[19] Re Westshield Limited, [2019] EWHC 115 (Ch) at 60

His conclusion was expressed to be on the basis that the company was 'regarded …as a family business' and there were a number of indications of a 'family arrangement' or 'family understanding' governing the parties' involvement in the company. The conduct of the parties had indicated that "the affairs of the Company were treated …not just [as] a matter of arm's length commercial agreement" and "the three brothers [were] approaching the matter as members of a family team rather than being bound solely by their commercial and legal relations."[20]

Presumably, HH Judge Eyre QC must have felt that a departure from these family arrangements would have constituted a breach of good faith, but there is no reference to any matter in the case that specifically constituted such a breach. The judge makes it clear that *if* the petitioners *A* and *G* had been removed without due cause, that would have been contrary to the 'family understanding', but that was not the case here.

Many, possibly a majority, of cases where a s 994 petition has been lodged will involve 'family companies' which will almost inevitably have entailed some family 'arrangement' or 'understanding'. How does a shareholder (or their legal adviser) know whether or not such arrangements and understandings will allow equity to intervene?

Ultimately it will be for a judge to decide, having looked at 'the overall picture', whether or not a breach of such understandings or arrangements will constitute a breach of good faith. It seems quite likely that, without more precise guidance on the requirements of 'good faith', one judge's interpretation of the relevant facts may often differ from another's, as indeed occurred in *O'Neill* itself.[21]

In the event, perhaps somewhat ironically, unfair prejudice in the case could be demonstrated without any recourse to equitable considerations. In acquiring contracts on behalf of Tunnelling, *P* had been in breach of his fiduciary duty, which "will generally indicate that unfair prejudice has occurred".[22]

Can quasi-partnerships exist between only some of the members of a company?

Before reaching a final decision in the case, HH Judge Eyre QC had to decide two points of principle. The first was whether or not a 'quasi partnership' - adopting the term as a 'convenient label' - can arise where there are some members of the company who are not a party to the mutual understandings that exist between other members. The judge was faced with a choice between two contrasting

[20] Re Westshield Limited, [2019] EWHC 115 (Ch) at 61,63,64

[21] The three judges in the Court of Appeal all reached a different decision from the five judges in the House of Lords, although only one full judgment was delivered in each court, by Nourse LJ and Lord Hoffman respectively. O'Neill v Phillips [1997] 5 WLUK 32; [1998] B.C.C. 405; O'Neill v Phillips [1999] 1 W.L.R. 1092

[22] Re Westshield Limited, [2019] EWHC 115 (Ch) at 51, following Arden LJ in Re Tobian Properties Ltd [2012] EWCA Civ 998, [2013] BCLC 567 at [22].

authorities[23], although it was clear that neither judgment was binding because both the relevant judicial statements were not only qualified, but were also obiter dicta.

In *Re Yung Kee Holdings Ltd,* [24] the Hong Kong Court of Appeal had held that:

"… although the presence of third-party shareholders was a relevant and potentially a highly relevant factor when a court was determining whether equitable considerations existed such as to impose restraints on the exercise of the legal powers of those controlling the company *it did not necessarily preclude a finding that such considerations were present*." (Emphasis added).

By contrast, in the more recent case of *Estera Trust Ltd v Singh,* [25] Fancourt J had said that he was "very doubtful" that the relevant equitable restraints could arise where there were shareholders who were not parties to the underlying understanding, "except perhaps in a case where the shareholders that are not party to the equitable considerations are either a very small minority or are closely connected to the quasi-partners … such that the established quasi-partnership character of the company does not change."[26]

In reaching his decision, Fancourt J had placed significant weight on the 'character' of the company which, if the court were to intervene, would normally be 'akin to a partnership'. If some members of the company were not a party to the relevant 'mutual rights and understandings', the company would not (normally) have the requisite partnership characteristics.

In *Re Westshield*, HH Judge Eyre QC, while accepting that:

"Where there is a close analogy between the character of the company and that of a partnership it is more likely than in other circumstances that there will be equitable considerations"

observed that, nevertheless: "The partnership analogy is an analogy and is not the basis for the intervention by the court."

Fancourt J had also expressed concern about the potential adverse effects on other members of the company of allowing a quasi-partnership to exist in such circumstances. HH Judge Eyre QC agreed with the view of the Hong Kong court that "It will often be open to the court to craft relief … 'without impinging upon the rights of the third-party shareholders' or where that is not possible to say that those rights preclude relief in the particular circumstances."

[23] Re Yung Kee Holdings Ltd [2014] 2HKLRD 313; Estera Trust Ltd v Singh [2018] EWHC 1715
[24] Re Yung Kee Holdings Ltd [2014] 2HKLRD 313
[25] Estera Trust Ltd v Singh [2018] EWHC 1715
[26] Estera Trust Ltd v Singh [2018] EWHC 1715 at

It is respectfully submitted that HH Judge Eyre QC was correct in preferring the approach in Re Yung Kee.[27]

Must there be a causal connection between the relevant misconduct and the exclusion in order for exclusion from a quasi-partnership to be unfair?

In *Re Westshield*, as in many other 'quasi-partnership' cases, one of the complaints of unfairness related to the exclusion of a 'quasi-partner' from the management of the company. This led to the second substantive point on which the judge ruled.

It is settled law that in deciding whether or not unfair prejudice has occurred, the conduct of the petitioner may be taken into account.[28] Placing weight on the word 'response' used by Patten J in *Grace v Biagioli* [29], counsel for the respondent in *Re Westshield* argued that, for a person's conduct to be relevant to the question of whether or not their exclusion was unfair, there had to have been 'some 'causal connection' between the conduct and the exclusion.

This argument was firmly rejected. Not only, said the judge, would it be a misinterpretation of *Grace v Biagioli*, but it would also be wrong in principle. Since unfairness is determined objectively (i.e. not on the basis of the perceptions of the partied involved), all the circumstances known to the court must be taken into account, *even if they were not known at the time of the exclusion. (*Emphasis added*).*

It is respectfully submitted that this must be correct. As the judge continued: "It would be perverse if the court were permitted and required to look to all the circumstances of the case in order to decide whether the relevant equitable considerations are present but required to look only to some of the circumstances in order to decide whether a particular action was unfair and so precluded by those considerations."[30]

Delay, Knowledge, Consent and Acquiescence

These 'inter-related concepts'[31] are often relevant to s 994 petitions. There is no statutory limitation period applicable to unfair prejudice petitions but delay and acquiescence are 'as relevant as misconduct [on the part of the petitioner] in the

[27] Professor Milman's comments in a recent Company Law Newsletter editorial support this approach. David Milman,"The quasi-partnership and company law", Co. L.N. 2019, 414, 1-5

[28] Re London School of Electronics Ltd [1986] Ch. 211 [1985] 3 W.L.R. 474, (1985) 1 B.C.C. 99394

[29] Grace v Biagioli [2005] EWCA Civ 1222; [2005] 11 WLUK 179; [2006] B.C.C. 85

[30] Re Westshield Limited, [2019] EWHC 115 (Ch) at 49

[31] To borrow the term used by HHJ Paul Matthews, AMT Coffee Limited, Re [2019] EWHC 46 (Ch) at 149

context of the issues of unfairness … of … treatment … and the appropriate remedy."[32]

Both cases specifically considered 'acquiescence' and its effect. In *Re Westshield*, the matter was covered very succinctly, whereas in *Re AMT Coffee,* HHJ Paul Matthews devoted a sizeable section of his judgment to a description and analysis of the relevant law.[33]

Having concluded, in *Re Westshield*, that one (only) of the petitioners' complaints had been shown to be unfairly prejudicial conduct, HH Judge Eyre QC had to consider whether acquiescence should preclude relief. He held that it did. He found that the petitioners "were prepared to allow matters to continue without complaint and delayed in taking action even after … they learnt of the possibility of legal redress ...." They had done so "either because they did not in reality regard [the respondent's] behaviour as having been inappropriate or because they were content for the Company to continue to derive the benefits which flowed to it from the arrangement notwithstanding that there were also benefits for [the respondent]." It was only when the petitioners had subsequently been dismissed from their employment with the company (which the judge had held had been justified) that the proceedings had been 'triggered'.

In *Re AMT Coffee* the respondent argued that there were three ways in which consent and acquiescence had occurred. Firstly, the arrangements in relation to remuneration and dividend policy etc. that the petitioners complained of, had been agreed to by the older brother, (the first petitioner's deceased husband) before his death.

HHJ Paul Matthews referred, apparently with approval, to in *Re KR Hardy Estates Ltd* [34], where the deputy judge, Martin Mann QC, had said: "Obviously, prejudice which directly or indirectly arises because of a course of conduct to which a member or class of members of a company has consented is by definition not relevantly unfair and cannot be relied on."

It was argued that, here, the estate of the deceased would have to give notice that the deceased's previous consent had been withdrawn before any action formerly carried on with his consent would become unfair.

This argument was - almost summarily - rejected. It was not right to treat consent given before death 'as though it applied in perpetuity thereafter unless positively withdrawn.' Furthermore, the actions complained of were matters that 'arise again and again in the life of [a company]'; consent on one occasion does not constitute

[32] Robin Hollington, Hollington on Shareholders' Rights, 8th edn (Sweet & Maxwell 2016) at 7-205
[33] AMT Coffee Limited, Re [2019] EWHC 46 (Ch) at 149 - 177
[34] Re KR Hardy Estates Ltd [2016] BCC 367

consent on all other occasions. The death 'had changed everything' and the presence or absence of any withdrawal of consent was irrelevant.

The respondent's second argument in relation to consent revolved around the role of executors, their ability to bind each other and the capacity in which they act, when they are also directors and shareholders of the relevant company. This argument, the details of which are beyond the scope of this article, was also rejected by the judge.

The third argument was that the petitioner, not only as executor, but also in her personal capacity as beneficiary of the estate, had consented and acquiesced in the arrangements.[35] HHJ Paul Matthews set out five separate meanings of 'acquiescence', as follows:

1. "…mere failure to speak out or complain, unaccompanied by anything else." This, he said, would not usually be legally significant.

2. "… delay without more." This, he said, would generally be significant only when the delay exceeds appropriate limitation periods.

3. "…a kind of waiver or election between two inconsistent courses of action (for example, so as to waive the forfeiture of a lease whose terms have been breached). If there is such a waiver or election, the party concerned will not be able subsequently to change his or her mind and opt for the inconsistent course of action."

4. "…words or (more likely) conduct from which it may be inferred that a person has positively assented to a particular situation." This, he said, is legally significant whenever informal consent is a relevant element.

5. "… a failure to complain of an infringement of rights and reliance by the infringer on that failure to his or her detriment. This last case is a form of equitable estoppel, based upon a duty in equity to speak."

In *Re AMT Coffee* HHJ Paul Matthews held that only the final two meanings were relevant. The respondents were claiming:

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[35] Some linguistic authorities draw a distinction between acquiesce *'in'* and acquiesce *'to'*. See, for example, Termium Plus, the official linguistic data bank of the Canadian Government, states that 'acquiesce in' indicates passive agreement with something, whereas 'acquiesce to' means to submit voluntarily to a thing, situation or condition. Although this nice distinction is relevant in the context of section 994 petitions, it may be asking too much of judges to expect them to be consistent in their usage of the appropriate preposition. Nevertheless, they presumably ought to, and no doubt will, take into account the passivity or otherwise of a petitioner's acquiescence. https://www.btb.termiumplus.gc.ca/tpv2guides/guides/wrtps/index-eng.html?lang=eng&lettr=indx_catlog_a&page=9wnuaxWQ10rU.html [Accessed 29 May 2019]

"….*either* that somehow, she [the petitioner] *actually agreed* to what was done (the fourth sense of the word), *or alternatively* that by failing to complain she has *represented her agreement* (even if she did not actually agree) to it, and the respondents have relied upon that representation to their detriment, thus making it unconscionable for her now to deny it (the fifth sense of the word)." He then went on to hold that neither of these had occurred.

A number of points on consent and acquiescence arise from the two cases.

Actual agreement

In this context, actual agreement need not be express but can be inferred from words or conduct. This follows the standard approach in contract law.

The effect of consent

The statement in *Re KR Hardy Estates* that "prejudice which … arises because of a course of conduct to which a member… has consented is by definition not relevantly unfair…" presents the question of consent as a binary matter. Either consent has been given or it has not. This follows the approach in criminal law.

It may have been intended to be implicit in the statement in *Re KR Hardy Estates* that for 'consent' to be so decisive, it must be clear, complete and unqualified consent. If this is not the case, however, it is submitted that the statement in *Re KR Hardy Estates* may be too sweeping a proposition. It is difficult to see why, for the purpose of determining unfairness under s 994, there should not be scope for argument that the circumstances in which consent has been given and the nature and the degree of the consent may affect the question of unfairness.

Is detrimental reliance essential for acquiescence?

On the surface, the two cases appear to take a different view as to whether or not any 'detriment' is required to have been suffered by the respondent, if relief is to be denied because of 'acquiescence'. It is notable, given HHJ Paul Matthews' comments in *Re AMT Coffee*, that there is no mention in *Re Westshield* of any reliance by the respondent on the petitioners' failure to complain earlier and no mention of any detriment being suffered by the respondent as a result of any such reliance.

In reaching his decision HHJ Paul Matthews referred to the House of Lords' decision in *Fisher v Brooker*[36] where Lord Neuberger had stated "at least in a case such as this, I am not convinced that acquiescence adds anything to estoppel and laches*."* In relation to *estoppel,* Lord Neuberger then cited *Gillett v Holt* which stated that the 'overwhelming weight of authority shows that detriment is required', although,

[36] Fisher v Brooker [2009] 1 WLR 1764

this was subject to the important caveat that 'the requirement must be approached as part of a broad inquiry' into unconscionability."[37]

In the context of section 994, do Lord Neuberger's comments apply to acquiescence in the same way that they apply to estoppel? It is noted that his equation of the two concepts was qualified by 'in a case such as this'. If the two concepts *are* to be treated in the same way, is detrimental reliance an essential requirement for acquiescence or, is it, although highly relevant, still subject to the judge's 'broader' view on the question of unconscionability?

The latter view would make it easier to reconcile the decisions on this point in *Re AMT Coffee* and *Re Westshield* but, as with the question of 'good faith', it would, in theory at least, lead to greater uncertainty for prospective litigants and make it more difficult for parties to make informed decisions on settlements that are intended to avoid litigation. It would be helpful to have further judicial guidance on this point.

Excessive remuneration

In *Re AMT Coffee,*[38] the directors' pay had not been properly authorised in accordance with the company's constitution. Similar situations had arisen in *Re A Company (No 004415 of 1996)*[39] and *Irvine v Irvine*[40].

In *Re A Company*, Scott VC stated the need, in such a situation, for the directors to justify their remuneration, by '*objective commercial criteria',* as being 'within the bracket that executives carrying the sort of responsibility and discharging the sort of duties that they were carrying and discharging would expect to receive…'. (Emphasis added)

This was followed by Blackburne J in *Irvine v Irvine,* who stated that Scott VC's test required the court to determine whether or not the remuneration was 'appropriate in amount'. Arden LJ, as she then was, subsequently endorsed this approach, in *Re Tobian.*[41]

What are the 'objective commercial criteria' that need to be taken into account?

in *Re AMT Coffee* three experts provided evidence. One of the few substantive points on which they agreed was that 'benchmarking' was appropriate:

"This is the process by which the relevant function or functions within the company are identified and then the appropriate benchmark companies are found, and relevant information about remuneration is extracted."[42]

[37] Gillett v Holt [2001] Ch 210, 232D
[38] AMT Coffee Ltd, Re [2019] EWHC 46 (Ch)
[39] Company (No.004415 of 1996), Re [1997] 1 WLUK 249
[40] Irvine v Irvine [2006] EWHC 583 (Ch); [2006] 3 WLUK 652
[41] Re Tobian, also known as Maidment v Attwood, [2012] EWCA Civ 998 at 36
[42] AMT Coffee Ltd, Re [2019] EWHC 46 (Ch) at 92

There were however many disputes between the experts as to which companies were 'the appropriate comparators' and whether the data used was reliable. Other criteria that were referred to included the company's annual turnover and profit (or loss), market capitalization, remuneration surveys, and evidence of job offers made to the directors.

Unsurprisingly, the three experts took very 'different approaches' to the question of remuneration. It is not stated explicitly that each expert's approach produced an outcome that was more favourable to the party on whose behalf it was submitted as evidence, but it seems clear that this was the case. In his review of the evidence the judge found flaws in the methodology of all three experts and concluded that none of it was admissible.[43]

Expert evidence is not essential to the determination of whether or not remuneration is excessive.[44] As HHJ Paul Matthews put it "… you do not need to be a carpenter to know when someone has made a table badly".[45] He commented that the company's approach to remuneration had been based "on anything but commercial factors" . He then considered a range of factors before concluding that the directors had received excessive remuneration. Three key factors were the executive or non-executive role of the directors, the company's turnover and its profitability. The judge acknowledged that turnover and profitability were 'only factors' in the decision, but they were 'rough indicators' of the degree of responsibility taken by the directors and in some cases demonstrated that the remuneration was 'plainly excessive'.

The discussion in *Re AMT Coffee* illustrates that in cases where 'excessive remuneration' is an issue, there will almost always be an extensive list of factors that could be classified as 'objective commercial criteria'. It will almost always be possible to raise critical questions and doubts about the data selected by experts and their methodology. Judges will have an extremely wide discretion as to the criteria that they select either to subject to criticism or to treat as important.

As with the question of 'good faith', it is submitted that while the criteria used in reaching a judgment on the question of 'excessive remuneration' may be 'objective', there is little scope for confidence that any two judges, faced with the same evidence and set of facts, will reach the same decision.

[43] AMT Coffee Ltd, Re [2019] EWHC 46 (Ch) at 111

[44] See Re Tobian, also known as Maidment v Attwood [2012] EWCA Civ 998 at 48. No expert evidence had been adduced but Arden LJ held that ' There were ample grounds on which the judge could reach the conclusion that Mr Attwood's remuneration was out of the norm for this particular company, and in that sense (if no other) that the remuneration was excessive.'

[45] AMT Coffee Limited, Re 2019 EW HC 46 Ch, Re Westshield Limited, [2019] EWHC 115 (Ch) at 123

The need to consider payment of dividends

The decision in *Re AMT Coffee* confirms the view expressed in leading practitioners' texts that a failure by the directors to make a decision in good faith on whether to declare (strictly, usually to recommend) the payment of dividends can amount to unfairly prejudicial conduct.[46] In this case, the decision was bolstered by the fact that the company had sufficient reserves, had paid out large bonuses to directors and had lent large sums of money to the directors via loan accounts.

HHJ Paul Matthews commented that "… the non-payment of dividends is to a considerable extent the obverse of the remuneration question. The more that profits are lawfully paid out to directors and others in remuneration, the less there is available to be paid out to shareholders by way of dividend. Where all the shareholders work in the business, this matters less …."

Should the burden of proof shift?

Clearly there may be situations where the failure to consider in good faith whether or not to declare dividends will not be unfairly prejudicial; factors of the kind referred to by the judge are bound to be relevant and should be taken into account. Would it be beneficial for the courts to go further than they have done previously, however, and state that a failure by the directors to consider in good faith whether or not to declare a dividend is*, in itself,* prima facie, unfairly prejudicial? This would reflect the underlying view that "shareholders have a prima facie right to participate in the profits made by a company which are available for distribution"[47]. It might also have a small salutary effect of the sort that Arden LJ referred to in *Re Tobian* when she said that *"* the unfair prejudice remedy [is] important as a means of encouraging proper corporate behaviour in the management of smaller companies…" [48]

Discounts on the purchase of minority holdings

Both cases considered whether or not a discount should be applied in the valuation of a minority stake when a share purchase had been ordered following a successful petition. In *Re Westshield,* HH Judge Eyre QC was not required to decide the question, - having declined to grant the petitioners relief - but he had received submissions on the matter so set out the conclusion that he would have reached. He endorsed the approach set out in *Re Lloyds Autobody Ringway Ltd.*[49] Thus,

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[46] See Robin Hollington, Hollington on Shareholders' Rights, 8th edn (Sweet & Maxwell 2016) at 7-166; Victor Joffe QC, David Drake, Giles Richardson, Daniel Lightman QC, and Timothy Collingwood, Minority Shareholders, Law, Practice, and Procedure, 6th edn (OUP 2018) at 6.199

[47] Robin Hollington, Hollington on Shareholders' Rights, 8th edn (Sweet & Maxwell 2016) at 7-166, making reference to Re a Company (No 00370 of 1987), ex p Glossop [1988] 1 WLR 1068, 1076 C-F

[48] Re Tobian, also known as Maidment v Attwood [2012] EWCA Civ 998

[49] Re Lloyds Autobody Ringway Ltd [2018] EWHC 2336 (Ch) per HH Judge Hodge QC at [113 - 114]

even though there had been a family 'understanding' that would allow equity to intervene in the respondent's exercise of his strict legal powers, the dismissal of the two petitioners *A* and *G* had been justified, and any buying out order of the shares would therefore have been on a fully discounted basis.

In *Re AMT Coffee,* where a buyout was ordered, the answer to the question had a practical as well as a theoretical consequence. HHJ Paul Matthews analysed it in some detail.[50] Firstly, he had to decide whether the company should be treated as a quasi-partnership. If so, that led to two questions:

- Did it necessarily mean that the shares *must* be valued on a non-discounted basis?
- Could a non-discounted order be made, even if the company was not a quasi-partnership?

In answering these questions he had to consider two differing streams of authority. In *Strahan v Wilcock*[51] and *Irvine v Irvine (No 2)*[52] the judges had indicated, respectively, that it would be "difficult to conceive of circumstances in which a non-discounted basis of valuation would be appropriate …where there was unfair prejudice … but [a quasi-partnership] relationship did not exist" and that "Short of a quasi partnership or some other exceptional circumstance" any valuation should be on a discounted basis.

By contrast, in *Re Bird Precision Bellows Ltd* [53] Oliver LJ had emphasized the wide discretion of the court to do what is fair in all the circumstances.[54] This approach had been supported and followed in the more recent cases of *Re Sunrise Radio Ltd* [55] [2010] 1 BCLC 367 and *Re Blue Index Ltd.*[56] The question had been considered most recently in *Estera Trust v Singh.* [57]

In *Estera* Fancourt J said that where there was a 'true' quasi-partnership, there was a *presumption* in favour of non-discounted order. If there was no quasi-partnership there was no such presumption but a non-discounted order *could* nevertheless be made. He had also emphasized judicial discretion in setting a 'fair price'. In particular, market value was not 'the only alternative in cases where a non-discounted valuation is inappropriate.'

While emphasizing that he did not have to express a concluded view on this 'controversy', HHJ Paul Matthews seemed to prefer the *Estera* approach: "… it is at least clear that the weight of authority is that there is a discretion to be

[50] Re AMT Coffee Limited 2019 EW HC 46 Ch at 194 - 216
[51] Strahan v Wilcock [2006] 2 BCLC 555
[52] Irvine v Irvine (No 2) [2007] 1 BCLC 445
[53] Re Bird Precision Bellows Ltd [1986] Ch 658
[54] Re Bird Precision Bellows Ltd [1986] Ch 658, at 669DE
[55] Re Sunrise Radio Ltd [2010] 1 BCLC 367
[56] Re Blue Index Ltd [2014] EWHC 2680 (Ch)
[57] Estera Trust Ltd v Singh [2018] EWHC 1715

exercised." It is respectfully submitted that this is correct and the short answer to the two questions stated above is 'No' and 'Yes' respectively.

The factors that HHJ Paul Matthews took into account in exercising the discretion included:

- whether or not the circumstances would have justified an order for just and equitable winding up (where a discount would not normally be applied);

- whether the petitioner could fairly be regarded as a 'willing seller' (which will not usually be the case);

- the extent, if any, by which the wrongdoers would benefit from their unfair conduct if a discount were applied. This would occur if, for example, the acquisition of the new shares would lead to a shareholding crossing a significant voting threshold, such as 50% of the share capital;

- the fact that a sale to a third party had been hindered by the behaviour of the respondents.

Corporate opportunities

As with decisions on section 994, the law relating to breach of fiduciary duty by directors who take advantage of corporate opportunities is highly fact sensitive. The application of the principles of honesty, loyalty, good faith and avoiding conflict of interest that bind directors requires "care and sensitivity both to the facts and to other principles, such as that of personal freedom to compete…"[58]

One factor that will be taken into account is whether or not the director came across the opportunity in their capacity as a director. In *Re Westshield* the respondent, *P*, had learnt of the opportunity while 'having a pre-Christmas drink at a railway public house' and argued that, at the time, he was not acting in his capacity as a director. HH Judge Eyre QC described this as 'wholly artificial' and took a robust approach to the issue. Firstly, he said, 'it was only because of his position in the company that others would know that he might be interested in such information…' Secondly, it was the respondent's ability to cause the company to complete those contracts which made the [opportunity] worthwhile. The opportunity which came to *P* could not "be seen separately from that ability to cause the Company to engage in those activities and so is to be seen as coming to him by reason of his position in the Company."

Directors' rights

Another area of company law where it would be helpful to have much greater clarity relates to the precise rights of individual directors. In *Re Westshield* the

[58] Foster Bryant Surveying Ltd v Bryant [2007] EWCA Civ 200, [2007] B.C.C. 804 per Rix LJ at 76

petitioners had been dismissed from their employment with the company because of misconduct which included trying to access emails which *P*, the respondent and managing director did not wish them to see. The petitioners argued that, as directors, they were entitled to 'full access to all the affairs of the company'. HH Judge Eyre QC rejected this argument: "a director … is entitled to the information necessary to enable him or her properly to undertake the duties of a director" and "… [the] board is entitled to full information about every aspect of a company's affairs." This did not mean however "a director is simply by virtue of his position as director entitled to see all e-mails or other documents generated in the course of the company's business." There could, on the other hand, be "no confidentiality from the board of a company acting as the board ...."

Conclusion

The careful, detailed and extensive judgments in these two recent cases provide much helpful information that is of value to academics and practitioners. Clear answers have been given in relation to two specific questions regarding 'quasi-partnership companies'. Further guidance has been given on the subject of acquiescence, although it would be useful if a future judgment could clearly confirm the position as regards the need for detrimental reliance.

On the other hand, the two judgments also seem to confirm that predicting the decision of a court, when it has to consider whether an informal agreement between the parties is binding - which will hinge on the question of 'good faith' - is likely to remain extremely difficult. The same will apply to decisions on whether or not directors' remuneration has been excessive, In petitions where these are relevant questions, this will compound the inherently high risk of litigation. This in turn is likely to have two contrasting practical consequences. Any increase in the risk of litigation will presumably often make parties more inclined to try to settle a dispute out of court, but the additional uncertainty of the negotiating strengths of the parties may make such settlements more difficult to reach.