THE POSITION OF THE 'QUASI-PARTNERSHIP' TYPE PRIVATE COMPANY IN IRISH LAW

DEREK DUNNE*

I. INTRODUCTION

It is a fact of Irish commercial life that the vast proportion of Irish private companies, often started by families and friends amongst each other exclusively, are of the 'quasi-partnership' type, which, while taking the form of an incorporated company, is more analogous to the partnership in terms of management and ownership interests. Such companies are generally 'closely-held' *i.e.* with only a few participants, with the distinction between ownership and control upon which much of company law is premised rendered all but illusory due to the vesting of these diverse interests in the same personnel. Also, even outside the family-held company context, it is almost trite to state that prospective parties to commercial joint ventures (either for single projects or longer associations) will often possess an awareness of their commercial, technical and fiscal strengths and weaknesses stemming from long-standing commercial or personal association, and it is often upon the strength of this association that the participants choose to bind themselves together to pursue a jointly-intended purpose.[1] There are various mediums through which commercial joint ventures can be conducted,[2] but many prospective participants choose the private limited company given the obvious benefits of limited liability.

It has been accepted judicially in Ireland by Gannon J. in *Re Murphs' Restaurant*[3] that, where there exists between the

---

* B.C.L., LL.M. (N.U.I.), B.L.

[1] Which constitute a contract between, on the one hand, the company and its members, and on the other, the members inter se, by virtue of section 25 of the Companies Act, 1963, enforceable by the individual member in his capacity as a member, and the company itself.

[2] Legally, a commercial joint venture can take the following forms-

(1) The unincorporated joint venture conducted through the medium of a partnership as defined by the Partnership Act, 1890, or the limited liability partnership under the Limited Partnership Act, 1907.

(2) The consortium, which is a contractual agreement between undertakings with neither partnership or company involved, which are generally used for projects of extremely circumscribed duration and a definite purpose, which have the drawback of potentially unlimited liability exposure for the parties thereto should the venture be a financial failure.

(3) The corporate joint venture, conducted through the medium of a company duly incorporated under and subject to the statutory regime of the Companies Acts, 1963-1999 with the protection of limited liability.

participants such "a relationship of equality, mutuality, trust and confidence between them which constitutes the very essence of the company"[4] on the basis of which the participants constitute a joint venture, they may regard themselves by reason of this relationship "as equal partners in a joint venture, and that the company was no more than a vehicle to secure a limited liability for possible losses and to provide a means of earning and distributing profits to their best advantage with minimum disclosure".[5]

As recognised in *Ebrahimi v. Westbourne Galleries Ltd.*[6] in the 'quasi-partnership' type company, the participants often will not regard their commercial and legal relationship as being exhaustively defined by the constitutional documents of the company, but that they will each have "rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure", over and above their strict contractual rights, which are founded upon this 'personal relationship involving mutual confidence'.[7] These supplemental expectations and obligations derive from the nature and circumstances of the participants' relationship, and it is these extra-legal considerations upon which the continued viability and ultimate success of the joint venture company are contingent. Thus, it is submitted that the adequacy of the company as a medium through which to conduct the business of a joint venture is to be gauged in the ability of the statutory and common law regime governing the private company to afford adequate protection to and vindication of the 'legitimate expectations' over and above strict legal rights, for such constitute the essence of the joint venture company.

This paper is concerned with the position of the quasi-partnership type private company in Irish law; specifically, it is concerned with the question of whether Irish law has sufficiently adapted to this type of business arrangement, which breaks the precept of a separation between membership and management. Indeed, it may be said that the quasi-partnership type private company renders illusory separate

---

[3] [1979] I.L.R.M. 141 (H.C.).
[4] [1979] I.L.R.M. 141 at 151 (H.C.).
[5] [1979] I.L.R.M. 141 at 151 (H.C.).
[6] [1972] 2 All E.R. 492 (H.L.).
[7] *Ebrahimi v. Westbourne Galleries* [1972] 2 All E.R. 492 at 500 (H.L.) *per* Lord Wilberfource.

legal personality to an extent given the increasing difficulty of classifying the company as separate in practical terms from the participants running it. First, the discussion analyses the concept of a 'quasi-partnership' and attempts to define the unique characteristics of such a business medium. Only in the light of such an analysis can it be ascertained whether the law is sufficient to protect such an entity. Secondly, the legal framework of company law is discussed insofar as it is relevant to consideration of whether it has developed sufficiently to protect the interests of the participants of the quasi-partnership.

II. THE "ESSENCE" OF A "QUASI-PARTNERSHIP" TYPE PRIVATE COMPANY

It is necessary to outline a framework of some of the interests and obligations over and above those in the company's constitutional documents which the members of a quasi-partnership may have, for, as noted above, this in turn will condition any opinion on the adequacy of Irish law in protecting such interests.

Given that everything will depend on the context and the nature of the particular parties' relationship, an exhaustive list is impossible, but the following is a synthesis of judicial guidance on what the essence of a 'quasi-partnership' private company encompasses:

(1) As Lord Wilberforce stated in *Ebrahimi v. Westbourne Galleries Ltd.*[8] there will often be an understanding in a 'quasi-partnership' type private company that most, if not all, the shareholders will actively participate in the daily management of the company's business, or at least that each member of the venture should have a meaningful role in the formulation and pursuit of business policy, irrespective of the logical consequences of the formal distinction between ownership and control of the company as manifested in the articles of association, under which the powers of management of

[8] [1972] 2 All E.R. 492 (H.L.).

the company are exclusively devolved to the directors.[9]

(2) The parties will often constitute the company with a definite, often narrow, commercial purpose in mind and will also have negotiated amongst themselves the role each is to play in the attainment of this purpose. Because the contribution of each is generally fundamental to the ultimate success of the joint venture, any alteration in the personnel or control structure of the company could be potentially fatal to the substratum of the company. This would appear to be the rationale underpinning the suggestion of Lord Wilberforce in Ebrahimi that there will often be extensive "restriction on the transfer of the members' interest in the company".[10] More generally, as Brenda Hannigan[11] has commented, the necessity to preserve the basis upon which the company was founded implies an interest in the preservation of the company's *status quo vis-à-vis* management, capital and profit arrangements etc.

(3) In *Re Bird Precision Bellows Ltd.*[12] Nourse J. suggested that because the shareholders of a 'quasi-partnership' will generally have made substantial capital investment into the venture, they will have an interest in the fair, informed and proper running of the company's business so as to preserve the company's liquidity and the good relations of the members which are ultimately the foundation of, and the basis for the continuance and ultimate success of, the company. Also, the members will obviously have a continued interest in the company's financial affairs and their own interests generally, which might not necessarily be *ejusdem generis* with their strict legal membership rights.

As Lord Wilberforce recognised in *Ebrahimi*, the existence of such interests will give rise to 'equitable restraints' upon the exercise by the members of the quasi-partnership of their strict legal rights. Where any member acts in breach of an obligation fundamental to the nature of the parties' relationship, this may in itself provide grounds for winding the company up. However, it seems that the

---

[9] This is facilitated by Model Article 80 of the Table A model articles of the private company of the Schedule to the Companies Act, 1963.

[10] [1972] 2 All E.R. 492 at 500 (H.L.).

[11] Hannigan, B., "Section 459 of the Companies Act, 1985 - A Code of Conduct for the Quasi-Partnership?" (1988) L.M.C.L.Q. 60 at 63.

[12] [1984] Ch. 419 (Ch.D.).

mere existence of a 'relationship of trust and confidence' will not *in itself* give rise to interests and obligations that the court will protect by applying equitable considerations. As Lord Hoffmann held in *O'Neill v. Phillips*[13] in the absence of positive evidence of extra-legal interests and obligations of members arising from the nature of their relationship, the courts would not intervene to protect them by way of a winding-up or other appropriate order, for in such a situation there is nothing to protect. A mere breakdown in the confidence between the parties will not, in itself, justify the application of equitable restraints. Therefore, it seems that the onus of establishing that the essence of the company is defined by additional considerations stemming from the nature of the parties' relationship rests on the party asserting their existence. Furthermore, it must be affirmatively established that another member has breached them by his conduct. This also seems to be the position in Ireland. In *McGilligan v. O'Grady*[14] Keane J. opined *obiter* that, in appropriate circumstances, where it is clear that a member of a quasi-partnership has acted inconsistently with a basic expectation stemming from the nature of the members' relationship, the court would be inclined to protect them by appropriate order. Therefore, it is implicit that such supplemental expectations must be shown to exist, and positive evidence must be adduced to demonstrate that they have been breached. This is the first obstacle posed by the law on a quasi-partner seeking to have his extra-legal expectations protected. It might often be difficult to establish the existence of such expectations without documentary embodiment of them being available to the quasi-partner - as *O'Neill v Phillips*[15] demonstrates, a severe conflict of evidence might be fatal to the court's accepting that additional expectations over strict legal rights existed at all, which would leave the isolated quasi-partner without any redress at all.

Therefore, it is advisable for the parties entering into a joint venture company to make explicit the basis upon which they are entering, make their expectations of each other clear, and embody these understandings in documentary form having contractual force

[13] [1999] 1 W.L.R. 1092 (H.L.).
[14] [1999] 1 I.R. 346 (S.C.).
[15] [1999] 1 W.L.R. 1092 (H.L.).

(i.e. a shareholders' agreement), or make appropriate adjustment to the company's constitution.

Assuming agreement to the satisfaction of all parties is achievable,[16] it is now proposed to examine the adequacy of company law's protection for quasi-partner's expectations.

III. PROTECTION OF INTERESTS THROUGH THE COMPANY'S CONSTITUTIONAL DOCUMENTATION

By virtue of section 25 of the Companies Act, 1963, the memorandum and articles of association constitute a contract between the members and the company, and between the members themselves. As such, any breach is personally actionable by any member as of right. The following focuses on what protection these documents might afford. As noted above, many of the expectations which members of a quasi-partnership may hold will by definition be extra-legal; therefore, any protection the company's constitution can afford them is limited by this consideration, unless otherwise embodied in another legally enforceable agreement such as a shareholder's agreement.

A. The Articles of Association

1. Alterations of Articles Must Be Bona Fide And In The Interests Of The Company As A Whole

The company's constitutional documents will embody the basis on which the quasi-partners entered the joint venture in the first place. Therefore, any attempts by the majority to alter the basis on which the members entered the company through alteration of the articles' provisions could violate any understandings between the members as to the manner in which the company's affairs will be conducted.

There is case-law circumscribing the freedom of the majority of the company to exercise their otherwise absolute right to amend the articles of the company by passing a special resolution pursuant to

[16] Naturally, the difficulty is securing agreement on these matters, which no legal system can compensate for given that the needs of every situation will differ.

section 15 of the 1963 Act; the rationale being the need to reconcile the tension between the right of the majority to prevail and the need to protect the legitimate entitlement of the minority to preserve the basis upon which they entered the company unimpeached. Where the court finds that the special resolution altering the articles was not made *bona fide* and in the interests of the company as a whole, it will be annulled.

(a) The test of invalidity of an amendment to the articles: There has been a change in emphasis as regards the concept of 'company as a whole' from meaning the company as a separate legal entity, to meaning the company members as a body.[17] Also, as was held by Bankes L.J. in *Shuttleworth v. Cox Bros and Co.*[18] there must be objective justification for the majority's belief that the alteration of the articles is in the members' best interests. This facilitates a more focused inquiry on the interests of the members themselves, an approach necessary in the context of the quasi-partnership where the identification of the interests of the members with those of the company is closest. Also, the conflict will be between the members themselves who will dispute their individual interests, and the *substratum* of the quasi-partnership could be destroyed should the majority be permitted to prevail in all cases. The requirement of objective justification for the alteration acts as a safeguard on this danger.

(b) Preservation of the *status quo*: The interests of the quasi partner most likely to be protected under this heading are his interest in playing a meaningful role in the venture until its successful conclusion and his interest in preserving his proportionate shareholding. It seems from the case-law that alterations facilitating the compulsory acquisition of the shareholdings of the minority at a price stipulated by the majority, thus terminating their association with the company, are the most frequent instances where the courts have declared alterations of the articles invalid.[19] There appears to be

[17] *Greenhalgh v. Arderne Cinemas Ltd.* [1950] 2 All E.R. 1120 (C.A.) *per* Lord Greene M.R., applied in Ireland in G. S. *Doherty v. Doherty*, High Court, unreported, Henchy J., 19 June 1969.

[18] [1927] 2 K.B. 9 (C.A.).

[19] *Brown v. British Abrasive Wheel Co. Ltd.* [1919] 1 Ch 290 (Ch.D.); *Dafen and Tinplate Co v. Llanelly Steel Co. (1907) Ltd.* [1920] 2 Ch 124 (Ch.D.).

no apposite Irish case on the matter but it seems that the law on this matter would develop along the lines of the English authorities and the decision of the High Court of Australia in *Gambotto v. W.C.P. Ltd.*[20] where the Court held that alterations compulsorily expropriating the minority are presumptively oppressive and thus invalid, and the onus of justifying the amendment rests on those supporting it. Brennan J. demonstrating circumspection about striking a fair balance between the minority and majority in a quarrelling company, suggested that such an amendment would only be valid if it is fair in all the circumstances to the minority; does not operate oppressively towards them; and is exercised for a proper purpose objectively connected with the need to safeguard the continuance of the company.

This approach of casting the onus on the majority to justify the termination of the quasi-partner's interests in participation in the company precludes the danger of unduly favouring the majority's right to control the company's affairs in the context of altering the basis on which the quasi-partners had entered into the venture. There appears to be no reason why Irish company law could not accommodate similar safeguards for a minority in a quasi-partnership whose interests may be disregarded by the majority.

2. Weighted Voting Rights- The Use of a Bushell v. Faith *Clause*

It appears that the company members may 'load' or 'weight' the voting rights of each share held by certain members on a poll being taken from one to any specified number, either generally, or specifically in the context of certain matters which peculiarly affect *his* or *her* interests or expectations of the company's appropriate course of conduct. The purpose of this is to afford such a member a realistic chance of defeating any measure by his or her own voting strength that the other members realise could prejudice his peculiar interests. This practice has been permissible in the United Kingdom since *Bushell v. Faith*[21] where the validity of a clause conferring a right to three votes per share on a poll on a certain shareholder director in the event of an ordinary resolution being proposed to

[20] (1995) 182 C.L.R. 432 (H.C.A.).
[21] [1970] A.C. 1099 (H.L.).

remove him as a director, pursuant to the United Kingdom equivalent of section 182 of the 1963 Act, was upheld. An argument that this was invalid as being inconsistent with the apparently unfettered statutory power of the company to remove its directors by ordinary resolution failed. Lord Upjohn stated that the effect of the statutory power of the company to remove its directors by ordinary resolution was merely to prohibit provisions in the articles prescribing the necessity of a special resolution to effect his removal. The Acts had never prohibited weighted voting rights on a poll by the articles as part of a share's terms of issue either generally, or in respect of certain types of resolution, such as the type in issue, and had Parliament wished to do so, it would have done so by express statutory stipulation. Given that section 182 is couched in the same terms as its UK equivalent, and given that there are likewise no prohibitions imposed by the Companies Acts, 1963-1999 on the weighting of voting rights on a poll in respect of any matters, it appears that the reasoning in *Bushell v. Faith*[22] is equally applicable in the Irish context. Therefore, the commercial expectations of a particular participant or director of the 'quasi-partnership', whether of meaningful participation in company affairs, his interest in the *status quo* of the company, or even his financial interests, could be legitimately protected by 'entrenching' his voting rights, affording him a realistic chance of defeating any proposal inconsistent with his expectations for the company.

3. Restrictions on the Right to Transfer Shares

Any alteration of the control structure and the personnel of the joint venture could fundamentally affect the interest of the parties in the maintenance of the status quo of the company and thus destroy the company. Therefore, in fulfilment of section 33(1) of the 1963 Act, it is common to incorporate extensive restrictions on the right to transfer shares in the articles or else in a shareholder's agreement, either in the form of pre-emption rights or director's powers to refuse to register new shareholders. As regards the pre-emption procedure, the Irish courts have demonstrated willingness to enforce all aspects of the procedure to the letter;[23] and, should any aspect not be

---

[22] [1970] A.C. 1099 (H.L.).

[23] *Lee and Co (Dublin) Wholesale Ltd. v. Egan (Wholesale) Ltd.*, High Court, unreported, Kenny J., 27 April 1978.

complied with, the directors have a *duty* to refuse to register any new member. As regards the exercise of the director's powers to refuse to register shares, it has been established that such are very difficult to upset, save where bad faith can be proved;[24] therefore, as regards maintaining the status quo of a quasi-partnership, restrictions on the transfer of shares, where exercised for that purpose, constitute a valuable safeguard on the maintenance of proportionate shareholdings.

However, on the other hand, it is necessary to protect the minority against the improper exercise by the majority of their powers of allotment. It is inherent in the power to allot newly issued shares, which is vested in the directors, that the existing control structure of the company and the respective voting strengths of the parties will thereby potentially be adversely affected. It is common practice for the participants to a joint venture to waive pre-emption rights in a shareholders' agreement and leave the director's powers of allotment of newly issued shares unfettered. This leaves the power of allotment open to abuse. It is conceivable that the directors could utilise the power to dilute the shareholdings of a dissenting minority and thereby exclude them from meaningful participation in the company, contrary to their legitimate expectations as quasi-partners. In this case, a successful claim of abuse of powers will be the only remaining safeguard (save perhaps section 205). *Nash v. Lancegaye (Ireland) Ltd.*[25] asserted a clear jurisdiction to invalidate allotments made for improper purposes. As was held by the Australian High Court in *Whitehouse v. Carlton Hotel Property Ltd.*[26] an allotment of shares made for the purpose of defeating the voting power of existing shareholders by altering the existing control structure is one made for an improper purpose, and is void. This seems to represent the Irish position. However, one doubt remains - to what extent are allotments made for impermissible purposes ratifiable by the majority in general meeting? There are *dicta* in the English cases of

[24] Especially in the context of the power to refuse registration contained in Model Article 3, which gives the directors untrammelled discretion, without the need to assign any reasons therefor, to refuse to register transferees, see *Re Smith and Fawcett Ltd.* [1942] 1 Ch. 304 (C.A.).
[25] (1958) 92 I.L.T.R. 11 (H.C.).
[26] (1987) 162 C.L.R. 285 (H.C.A.).

Hogg v. Cramphorn[27] and *Bamford v. Bamford*[28] which seem to suggest that allotments made for improper purposes may be ratified, and, in the *Re Burke, Clancy and Co. Ltd.*[29] Kenny J. referred in unqualified terms to the right of a company in general meeting to ratify acts *intra vires* the company but outside the director's powers. Therefore, the extent to which the rubric of abuse of director's powers can afford adequate protection to the quasi-partner's expectation of retaining the proportionate shareholding remains uncertain.

B. The Memorandum of Association.

1. Preserving the objects of the company

Attempts to alter the quasi-partnership's objects will generally pose a threat to the company's purposes and thus potentially destroy the members' relationship. Fortunately, there is a safeguard built into the general power to alter the objects clause by special resolution. Section 10(6) provides that a minority may object to any purported alteration of the company's business objects, and the court has unfettered jurisdiction to cancel, affirm or condition the alteration as it deems appropriate in the circumstances. An additional safeguard of the minority's interest is the court's explicit jurisdiction to end their association with the company by ordering a buy-out of the dissenting minority's shares - a particularly appropriate power where the minority's expectations of the role they are to play may be an interest so fundamental to the joint venture that its breach by altering the objects of the company may leave them with no option but to end their association with the quasi-partnership.

2. Entrenching the interests of members through the Memorandum

A distinction must be drawn between the five compulsory clauses of the memorandum, which are all alterable by special resolution, and non-compulsory clauses which the members may insert at their will to tailor the company documents to their own peculiar requirements, which can be made unalterable by virtue of section 9

[27] [1967] Ch. 254 (Ch.D.).
[28] [1970] Ch. 212 (C.A.).
[29] High Court, unreported, Kenny J., 23 May 1974.

of the 1963 Act (which provides that the provisions of the memorandum are unalterable, save to the extent expressly authorised by the 1963 Act). Section 28(1) of the 1963 Act, which provides that the non-compulsory clauses are generally alterable by special resolution, must be read subject to section 28(3) of the 1963 Act which provides that, where the memorandum itself expressly prohibits it, any non-compulsory clauses may be made unalterable. Where the consent of the other members to the embodiment of the member's peculiar expectations for the company's conduct in these non-compulsory clauses can be obtained, this provides a convenient method of 'copper-fastening' matters fundamental to the particular relationship of the members at the outset, protecting whatever matters they might individually perceive to be integral to their participation in the venture. This device can mitigate the effects of the inherent inability to exhaustively embody the relationship in legally enforceable instruments. It provides a more secure contractual basis for securing the protection of legitimate expectations of quasi-partners than the shareholders' agreement, the value of which as a means of adjusting the company to the peculiar essence of the quasi-partners' relationship is uncertain. This is considered below.

IV. THE POSITION OF SHAREHOLDERS' AGREEMENTS

The shareholders' agreement is an increasingly common method of contractually embodying the essence of the quasi-partners' relationship as an alternative to doing so through the company's constitutional documents, which are difficult to alter. Shareholder's agreements can be supplemented regularly to protect the legitimate expectations of the members arising from the circumstances of their relationship.

However, the Irish courts have not yet addressed the legal implications of using shareholders' agreements. The first problem with shareholders' agreements is the uncertainty as to the extent to which directors may by bound by them. If a director-member binds himself to act in accordance with the terms of the shareholders' agreement, certain of which impinge on matters within the scope of his delegated powers of management of the company under Model Article 80, he may be in breach of his fiduciary obligation to the company not to fetter his powers of management and to that extent is not bound by the agreement in his capacity as a director because contractual obligations cannot override those of fiduciaries. This was decided in *Clark v. Workman*.[30] As such, the agreement will only bind him in his capacity as a member. This may mean that, where such a situation arises, the directors may formulate company policy without having regard to any provisions in the agreement prescribing the necessity to obtain the members' consent, acting in both or more capacities. This position could prejudice the quasi-partner members' legitimate expectations of participation, and could result in the dissipation of company finances on ventures that he may consider ill conceived, and render the agreement a 'dead letter'. However, given that in quasi-partnerships the distinction between directors and members is by definition less clear-cut, this potential problem may and should not present too many problems in practice. But there is a danger that a court, erring on the side of caution, may insist on strict adherence to such classical company law theory.

Also, on the authority of the Court of Appeal's decision in *Fulham F.C. Ltd. v. Cabra Estates p.l.c.*[31] it is possible to argue that a shareholders' agreement, while technically a fetter on the directors' powers of management, confers a substantial benefit on the company. Such agreements are very much in the company's best interests and should be upheld. It is difficult to regard a shareholders' agreement intended to contractually protect the legitimate expectations of quasi-partners so as to afford the essence of the quasi-partnership a measure of protection as being anything other than in the company's best interests; therefore provisions circumscribing the directors' freedom to act could be justified.

However, the second apparent problem with shareholders' agreements is more problematical for their effectiveness as a means of protecting a quasi-partners' interests. In the joint venture private company, it is common practice to provide in a shareholders' agreement that the unanimous consent of the members in respect of

[30] [1920] 1 I.R. 107 (Ch.D.)
[31] [1994] 1 B.C.L.C. 363 (C.A.).

certain aspects of company affairs is necessary for the company to act in the proposed manner, in an attempt to afford all members a real say in the conduct of company affairs and as a means of protecting all their diverse expectations. However, the decision in *Russell v. Northern Bank Development Corporation Ltd.*[32] casts doubt on the enforceability of such agreements where they trench upon the company's ability to exercise its statutory powers. From this decision, it seems clauses which trench upon the company's powers of resolution under the Companies Acts (*i.e.* ordinary resolution to remove a director under section 182; special resolution to alter articles and memorandum) are vulnerable, a conclusion which results in certain of the interests of the quasi-partners in participation and the finances of the company being open to attack. Therefore, where clauses in shareholders' agreements providing for unanimous consent in respect of certain aspects of company conduct, designed to protect the interests of all the members (extremely common in practice), impinge upon the company's powers of action under statute, they may be struck down. This decision disproportionately reduces the potential of the shareholders' agreement to act as a legally enforceable means of confirming the existence of quasi-partners' expectations and making them subject to the court's protection.[33]

V. THE IMPACT OF THE RULE IN FOSS v. HARBOTTLE ON QUASI-PARTNERSHIPS

The rule in *Foss v. Harbottle*[34] re-affirmed by the Supreme Court in *O'Neill v. Ryan*[35] posits that where a wrong has been done to the company, the proper plaintiff to seek redress for this wrong is the company itself, the necessary corollary being that an individual shareholder may not, as a general rule, bring proceedings to overturn a decision wronging the company where the wrong is ratifiable by

---

[32] [1992] 3 All E.R. 161 (H.L.).

[33] However, these problems could be overcome by the Irish courts' seeming willingness to impose fiduciary duties upon the directors of quasi-partnerships in relation to their shareholders, which in itself could provide a means of protecting legitimate expectations without the need of recourse to contract. This matter is considered below.

[34] (1843) 2 Hare 461 (Ch.D.).

[35] [1993] I.L.R.M. 557 (S.C.).

majority decision. Therefore, proceedings could not be instituted save with the leave of the majority shareholders of the company. In short, the isolated quasi-partner may find himself without redress.

In the context of the 'quasi-partnership' private company, it is submitted that the rule operates to exclude legitimate causes of action, the subject–matter of which is apt to be the denial by the majority of the isolated participant's 'legitimate expectations' of participation and his interests in the company.

Firstly, the rule led to an unprincipled distinction between wrongs done to the company and wrongs impinging upon the member's personal rights, the latter not attracting the rule's operation.

The courts have traditionally interpreted the criterion of 'corporate wrong' liberally, with the result that much of dubious majority activity (for example, breaches of director's duty not to make a secret profit)[36] which might be thought to amount to matters very much detrimentally affecting the interests of the members was caught within the ambit of the rule. This trend biased in favour of the 'interests of the company' culminated in the Court of Appeal decision in *Prudential Assurance Co v. Newman Industries (No. 2)*[37] where it was held that members may not take a personal action in respect of conduct causing diminution in their shareholding's value because such a loss in value is a mere reflection of the loss suffered by the company; a conclusion upheld by the Supreme Court in *O'Neill v. Ryan*. However, this is a type of conduct that intimately concerns the interest typically held by a quasi-partner in the maintenance of the company's capital position.

It appears that members' personal rights to which the rule has no application arise in three contexts- firstly, under the company's constitutional documents which constitute a contract under section 25 of the 1963 Act and where the particular provision in question confers a right on the member which the court considers too fundamental to the member for its breach to be sanctioned by the

[36] *Cook v. Deeks* [1916] 1 A.C. 554 (P.C.).
[37] [1982] Ch. 204 (C.A.).
[38] The courts have not essayed an exhaustive list of the types of rights under the company's constitutional documents that will be considered too fundamental to the members to be overridden by the majority, and neither have they enunciated any test under which such rights could be ascertained. Examples of cases where such fundamental personal rights under the constitutional documents were found are *Rayfield v. Hands* [1960] 1 Ch. 1 (Ch.D.) (a term in the articles obliging directors to purchase an outgoing member's shares); *Salmon v. Quinn and Axtens* [1909] 1 Ch 311 (C.A.) (articles provided that no board decision would stand where either of two particular directors dissented).

majority;[38] secondly, under statute; and finally, it has been accepted by the courts that directors may in certain circumstances owe fiduciary duties to the individual shareholders, which are enforceable by them personally.[39] The drawback of this limitation to the rule of *Foss v. Harbottle* in the context of the 'quasi-partnership' company is that the divergent personal interests of the various participants which constitute the essence of the company will by definition exist outside their strict legal rights as embodied in the company's documents, and, as such, unless embodied in an otherwise enforceable instrument (*i.e.* a shareholders' agreement), cannot be protected under the rubric of 'personal rights'. Even where a member can point to some provision in the company's constitutional documents as mirroring an extra-legal expectation of his, he must overcome several hurdles before he may enforce it personally. Firstly, the section 25 contract is only enforceable by a member in his capacity as a member, and not in some other capacity (i.e. director or solicitor); a requirement which the courts have traditionally construed strictly. This approach is inappropriate in the 'quasi-partnership' type company, where the diverse roles of management and membership are merged in the same persons. Secondly, again in the context of the section 25 contract, it appears that the member must prove that in the circumstances the right in the articles was so fundamental to his interests that it cannot be overridden by the majority's whim. Again, this subjects his right of action to the presumptive entitlement of the company itself, acting through its majority, to ratify breaches of its own constitution, which, being a matter of internal management, the courts will generally not interfere with.[40]

The rule is subject to certain exceptions, most notably the 'fraud upon the minority' exception, the boundaries of which remain unclear, but it seems that only bad faith is actionable under this,[41] which excludes negligence damaging the company's value, which appears ratifiable by the majority.[42] Finally, procedural constraints

---

[39] A point to which I shall return separately, in the context of conjecturing whether Irish law has developed to the point where it can be considered that the participants in a "quasi-partnership" joint venture company can be said to owe fiduciary duties to each other.

[40] *Edwards v. Halliwell* [1950] 2 All E.R. 1064 (C.A.).

[41] For example the misappropriation of corporate property, see *Cook v. Deeks* [1916] 1 A.C. 554 (P.C.).

[42] *Daniels v. Daniels* [1978] Ch. 406 (Ch.D.).

operate on the minority shareholder's ability to avail of them. Where he wishes to redress a wrong done to the company under an exception to *Foss v. Harbottle*[43] he must institute a derivative action against the company, which, as held in *Prudential Assurance Companies v. Newman Ltd*.[44] requires him, as a preliminary issue, to prove his standing to take the action by establishing that the case *prima facie* comes within one of the exceptions to the rule. As a final difficulty, the court will take the views of the other minority shareholders into consideration in deciding whether a derivative action should be permitted, and, should they demonstrate no enthusiasm for the proceedings, the court will strike the action out.[45] This could leave an isolated member of a quasi-partnership without any redress.

A final drawback is that any relief obtained will be corporate in nature, to reflect the fact that it is the company that has been damaged. As such, any relief will not be tailored towards protecting the members' interests.

Therefore, the effect of the court's adherence to the logical consequences of the rule in *Foss v. Harbottle*[46] is to potentially exclude the minority shareholder's ability to litigate in respect of majority conduct which could adversely affect their expectations of their relationship with the majority, such as breaches of director's duties, gross negligence damaging the value of their shareholding, and conduct of various degrees of culpability in relation to the company affairs which, while deserving of redress, might fall short of the criterion of fraud in the 'fraud on a majority' exception.

VI. RELIEF UNDER SECTION 205, 1963 ACT

The fundamental unsuitability of the rule in *Foss v. Harbottle*[47] as a means of adequately accommodating the legitimate expectations of the isolated minority in the 'quasi-partnership' has thankfully been mitigated by the enactment of section 205 of the 1963 Act, which

---

[43] (1843) 2 Hare 461 (Ch.D.).
[44] [1982] Ch. 204 (C.A.).
[45] *Smith v. Croft (No. 3)* [1987] B.C.L.C. 355 (Ch.D.).
[46] (1843) 2 Hare 461 (Ch.D.).
[47] (1843) 2 Hare 461 (Ch.D.)

provides that any member may institute proceedings where "the affairs of the company are being conducted or that the powers of the directors are being exercised in a manner oppressive to him or to any of the members (including himself), or in disregard of his or their interests as members ...".

A. The Protective Scope of Section 205: the Concept of "Oppression" and "Disregard of ... Interests ... as Members"

In *Scottish Co-Operative Wholesale Society v. Meyer*[48] Viscount Simonds adopted the dictionary meaning of 'oppression' - "burdensome, harsh and wrongful", which was accepted in Ireland by Keane J. in *Re Greenore Trading Co Ltd.*[49] as being the correct meaning of the like concept in section 205. The oppression impugned in *Re Greenore* was a transaction in contravention of section 60 of the 1963 Act, which appeared to suggest that actionable 'oppression' under section 205 was *ejusdem generis* with illegal action by the majority - an interpretation that would radically restrict the remedial scope of section 205. This interpretation has subsequently fallen into disrepute in Ireland, Keane J. himself having commented extra-judicially[50] that section 205 is intended to "assist victims of conduct which, although not unlawful, is unfairly detrimental to their positions as members".

It was held by Kenny J. in *Re Irish Voting Motorists' Bureau Ltd.*[51] that the question of whether conduct constitutes actionable oppression section 205 is to be determined by objective standards. As Courtney[52] comments, this makes appropriate concession to the peculiar context in which the conduct complained of took place; for what might not be oppressive in the large company may very well be oppressive in the quasi-partnership where interests are most closely intertwined and are most deserving of protection.

Consistent with the Irish court's willingness to assess conduct complained of under section 205, it is established that a single act is

[48] [1959] A.C. 324 (H.L. (Sc.)).
[49] [1980] I.L.R.M. 94 at 101 (H.C.).
[50] Keane J., *Company Law in the Republic of Ireland* (2nd ed., Butterworth, Ireland, 1991), p. 286.
[51] High Court, unreported, Kenny J., 21 May 1974.
[52] Courtney, T.B., *The Law of Private Companies* (2nd ed., Butterworths, Dublin, 2002), p. 1094.

sufficient to give rise to actionable oppression under section 205.[53] A single act by the majority may more easily suffice to destroy the *substratum* of a quasi-partnership than may be the case in a larger private company, as opposed to an ongoing course of conduct, and this recognises this.

Finally, it is clear from *Re Murph's Restaurant Ltd.*[54] that oppression need not be suffered by the quasi-partner in his capacity as a member, and this was recently confirmed by implication by the Supreme Court in *McGilligan v. O'Grady*[55] in the context of granting an interlocutory injunction pending the trial of a section 205 action, where a director complained of his removal as a director pursuant to section 182 of the 1963 Act. Keane J. held that, on the facts, an arguable case of oppression had been made out, which justified an interlocutory injunction. This recognises that, in the quasi-partnership context, it is inappropriate to separate the interests of a shareholder and a director due to the expectations of participation and the tailoring of financial arrangements on that basis, and also for the reason that management and ownership will generally vest in the same persons. Holding otherwise would frustrate the remedial purpose of section 205.

The second ground for relief under section 205 is where the minority can prove "disregard of his or their interests as members", which is a lesser standard than 'oppression'.[56] The criterion of "interests" is much wider than 'rights' and enables the court to have regard to matters going beyond the strict legal rights embodied in the articles,[57] which suggests that the extra-legal interests of the members in participation and the proper running of the company stemming from the circumstances of the relationship of trust and confidence are actionable under this part of section 205 in the event of a failure to prove actionable oppression. This view is supported by the *obiter* comments of Keane J. in *McGilligan v. O'Grady*[58] to the effect that where the majority acted inconsistently with the expectations created

[53] *Re Williams Group (Tullamore) Ltd.* [1985] I.R. 613 (H.C.) *per* Barrington J.; *Re Westwinds Holding Ltd.* High Court, unreported, Kenny J., 21 May 1974, where, the sale of lands at an undervalue - a single incident - was held to constitute actionable oppression under section 205.
[54] [1979] I.L.R.M. 141 (H.C.).
[55] [1999] 1 I.R. 346 (S.C.).
[56] *Re Williams Group(Tullamore) Ltd.* [1985] I.R. 613 (H.C.).
[57] *Re Sam Weller and Sons Ltd.* [1990] B.C.L.C. 80 (Ch.D.).
[58] [1999] 1 I.R. 346 (S.C.).

by the circumstances of a relationship of trust and confidence underpinning the quasi-partnership private company, for example by removing a director in violation of his legitimate expectations to participate in the company's affairs, this in itself might constitute oppression or disregard of the interests of the members in appropriate circumstances. The Irish courts seem willing to cast the protective scope of section 205 broadly in recognition of the exigencies presented by the quasi-partnership.

A final matter worthy of note is that the Irish courts have recognised that litigation under section 205 need not be adversarial in the strict sense. Rather, where the parties acknowledge that very serious differences of opinion have arisen and that existing contractual arrangements between them are not adequate to redress their grievances, but they remain willing to preserve their legal and business relationship should appropriate compromise be reached, it appears that, where they both consent, the court has jurisdiction to make such orders under section 205 as it sees fit to remedy their grievances. Costello J. accepted this as legitimate in *Colgan v. Colgan*.[59] Therefore, section 205 is a potentially invaluable means for the parties to quasi-partnership to seek external guidance for the resolution of their grievances while allowing them to preserve their relationship and company intact, for remedies granted under section 205 need not be directed towards terminating the parties' association. However, this is subject to the *caveat* that any disagreement must be genuine and cannot be resolved in any other way other than recourse to the court. As *Horgan v. Murray*[60] demonstrates, the court possesses inherent jurisdiction to strike out a petition under section 205 where it discloses no reasonable cause of action, or where it may be classified as frivolous or vexatious.

B. The Types of Conduct Actionable under Section 205

It is clear from section 205 itself that breaches of directors' duties are actionable, irrespective of the majority's general right to ratify, which is not the case under *Foss v. Harbottle*.[61] Secondly, *any* aspect of the conduct of the company's affairs by the majority may be

---

[59] High Court, unreported, Costello J., 22 July 1993.
[60] [1998] 1 I.L.R.M. 110 (S.C.)
[61] (1843) 2 Hare 461 (Ch.D.).

impugned under section 205.

Exclusion from the management of the company in violation of the quasi-partner's expectation of participation can ground a successful petition, as is clear from *Re Murphs' Restaurant*[62] and *McGilligan v. O'Grady*.[63] Another aspect of violation of a petitioner's legitimate expectations of participation is non-consultation with him by the controllers, which in itself is conduct inconsistent with the basis of the quasi-partnership and is actionable under section 205.[64]

Also, oppressive conduct in relation to the petitioners' financial interests is clearly actionable, as is illustrated by the impugning of a sale of land at a gross undervalue benefiting a director at the expense of his fellow members in *Re Westwinds Holding Ltd*.[65]

It is unclear whether failure to declare dividends is actionable under section 205, as it is common for joint venturers to enter their venture with no expectation of dividend, given the nature of the project they undertake. However, as *Re Sam Weller and Sons Ltd*. and *Re Cumana Ltd*.[66] demonstrate, it is possible that a persistent failure to declare or increase dividend while excessive directors' remuneration is being siphoned from the company could constitute oppression, as it is a benefit at the expense of the minority.

It seems that mere mismanagement of the company and irregularity in the conduct of the company's affairs in breach of legitimate expectations of the proper running of the company is not actionable *per se*, unless part of a deliberate scheme to deprive the minority of their rights or cause them loss and damage.[67]

This does cast some uncertainty over a minority shareholder's ability to litigate in respect of negligent acts devaluing his shareholding; however, there is no reason in principle why a course of mismanagement characterised by *gross* negligence should not be actionable.

Generally, a shareholders' interest in preserving the *status quo* of

[62] [1979] I.L.R.M. 141 (H.C.).
[63] [1999]1 I.R. 346 (S.C.).
[64] *Re Clubman Shirts Ltd*. [1983] I.L.R.M. 323 (H.C.).
[65] High Court, unreported, Kenny J., 21 May 1974.
[66] [1986] B.C.L.C. 430 (C.A.).
[67] *Re Clubman Shirts Ltd* [1983] I.L.R.M. 323 (H.C.) *per* O'Hanlon J.; *McCormick v Cameo Investments Ltd*. [1978] I.L.R.M. 191 (H.C.) *per* McWilliam J.

the company will be based on his expectation of retaining his proportionate shareholding. While pre-emption rights and the restrictions on share transfer may often secure this, it is no guarantee of the minority's position within the company. As *Pennell v. Venida Investments*[68] demonstrates, the directors could exercise their powers of allotment where they are aware that the minority cannot benefit from any pre-emption procedure due to external constraints (i.e. financial difficulties) and would thereby have *carte blanche* to alter the control structure to suit their own interests at the expense of the minority's. For this reason, it has been accepted in principle by Hoffmann J. in *Re A Company*[69] that allotments may be unfairly prejudicial, where it can be demonstrated that they are designed to damage the minority. There seems no reason in principle why the Irish section should not be able to accommodate such courses of conduct designed to damage the *status quo*. Of course, it is possible for such expectations to be protected under the pre-emption procedure and under the rubric of abuse of director's powers.

The degree to which the types of conduct held actionable under section 205 approximate to matters that can affect the 'legitimate expectations' of quasi-partners is notable. Therefore, it is submitted that section 205 is a more suitable forum for the resolution of quasi-partnership disputes than the rule in *Foss v. Harbottle*,[70] as it is sufficiently flexible to accommodate any matters which impinge upon the basis of the quasi-partnership, provided that the quasi-partner can meet the *caveat* that these expectations were in fact in the contemplation of the parties to the venture at the time when he claims that they were acted inconsistently with by the majority.

C. Remedial Discretion under Section 205

Under section 205, the court has discretion to make any order it sees fit, but its discretion is conditioned by the requirement that the relief should bring an end to the matters complained of. Therefore, depending on the circumstances, this relief need not be of a kind that terminates the quasi-partners' association with the company; rather, it can be directed to protecting his extra-legal expectations of

[68] Chancery Division, unreported, 25 July 1974, LEXIS Transcript.
[69] [1985] B.C.L.C. 80 (Ch.D.).
[70] (1843) 2 Hare 461 (Ch.D.).

company conduct. Therefore, again section 205 makes appropriate concession to the context in which the matters complained of arose. For example, it might be that the matters complained of arose due to deficiencies in the company's constitution, with no default on the members' part. In those circumstances, the court may order appropriate alterations to the company's articles or memorandum, the advantage of which is that they may not be altered again without the consent of the court.[71] This will preserve the basis on which the quasi-partners agreed to carry on business. Secondly, where the circumstances indicate that the relationship of the parties has broken down to the extent that the quasi-partner cannot continue his association with the venture, the court may order that the oppressive majority buy out his shares. The court possesses untrammelled discretion to ensure that the value at which the majority purchase the shares is fair in all the circumstances to the petitioner; in other words, exercising this remedy under section 205 provides the petitioner with an excellent chance of adequately recouping his investment. This protects his financial interests.

However, one drawback in the remedial scope of section 205 is that the courts may not grant compensation *per se* for any oppressive conduct. So held the Supreme Court in *Irish Press p.l.c. v. Ingersoll Irish Publications Ltd*.[72] Blayney J. stating that such a remedy was not directed towards ending the matters complained of as section 205 required. It is difficult to justify the denial of the right to award compensation under section 205 in the quasi-partnership context, for, where the value of the petitioner's shareholding has been damaged by his fellow members' incompetent management, but he is still willing to continue in the company, the remedy he receives will not remedy the damage he has suffered. It will be recalled that actions for diminution in shares' value is not actionable under *O'Neill v. Ryan*;[73] therefore, there is a gap in the protection section 205 can afford to quasi-partners' financial entitlements.

[71] Section 205(4) of the Companies Act, 1963.
[72] [1995] 2 I.L.R.M. 270 (S.C.).
[73] [1993] I.L.R.M. 557 (S.C.).

VII. DOES IRISH LAW SUPPORT THE IMPOSITION OF FIDUCIARY DUTIES BETWEEN THE PARTICIPANTS OF A "QUASI-PARTNERSHIP" JOINT VENTURE COMPANY *INTER SE*?

It has always been the case that partners are the agents of each other, and as such fiduciary obligations in relation to each other arise by virtue of that relationship. However, the position was until recently less clear in the joint venture company context.

It is submitted that Irish law has sufficiently developed to support the proposition that the relationship of 'mutual trust and confidence' between the participants of the 'quasi-partnership' private company may in itself, in appropriate circumstances, suffice to justify the imposition of fiduciary duties on the directors of the "quasi-partnership" in relation to their shareholders.

As was held in *Percival v. Wright*[74] the general rule is that directors owe their fiduciary duties to the company, and do not by virtue of their offices owe fiduciary duties to the company membership or creditors of the company. However, the strength of this precept has been eroded, and there is evidence of an expansion of the scope of the director's fiduciary obligations in relation to the classes of person who would have a legitimate interest in the director's management of company affairs, in seeming recognition of the fact that to classify the interests of the company as separate and distinct from the interests of the classes of person who stand in relation to the company is an artificial approach.[75] In the context of whether directors can be said to owe duties to their shareholders, it was accepted in *Allen v. Hyatt*[76] that fiduciary obligations are owed by directors to their shareholders where they expressly undertake to act in a certain way in relation to them in the context of dealings which closely concern the shareholders' interests,[77] which are enforceable by the shareholders personally. It is possible to say that

---

[74] [1902] 2 Ch. 421 (Ch.D.).

[75] In *Re Frederick Inns* [1994] 1 I.L.R.M. 387 (S.C.), Blayney J. held that, in the context of an insolvency, where the company ceased to be the beneficial owner of its assets, the directors owed a fiduciary duty to the *creditors* of the company not to dispose of the company's assets.

[76] (1914) 30 T.L.R. 444 (P.C.).

[77] In short, an agency relationship. It has always been the case that fiduciary obligations arise between agent and principal.

the scope of that decision was broadened by the observations of Woodhouse J. in the New Zealand case of *Coleman v. Myers*[78] which held that, in the context of the proposed take-over of a family-held quasi-partnership company, the directors owed a fiduciary duty to the shareholders to fully disclose all information relevant to an informed decision on the question of whether to accept the offer. Woodhouse J. enunciated the following guidelines on the question of when the directors may be said to stand in a fiduciary position to the shareholders:

> ... [a] dependence upon information and advice, *the existence of a relationship of confidence*, the significance of some particular transaction for the parties and the extent of any positive action taken by or on behalf of the directors to promote it.[79]

This statement attracted obiter support in Ireland from McWilliam J. in *Associated Properties Ltd v. Securities Trust Ltd.*[80] where, in the context of a take-over, he accepted in passing that the directors of the company stood "to some extent in a fiduciary position to the shareholders in relation to the proposed take-over". Recently, the statement of Woodhouse J. in *Coleman v. Myers* was accepted as representing the law in Ireland and applied by the Supreme Court, *per* Keane J. in *Crindle Investments, Roche and Roche v. Wymes, Woods, Bula Holdings and Bula Ltd.*[81]

This is an extremely significant development in the quasi-partnership context because, although Irish law has never tended towards favouring the imposition of fiduciary duties between shareholders *inter se*, the fact remains that in the quasi-partnership the distinction between the management and ownership of the

[78] [1977] 2 N.Z.L.R. 298 (C.A.).
[79] [1977] 2 N.Z.L.R. 298 at 325 (C.A.) emphasis added.
[80] High Court, unreported, McWilliam J., 19 November 1980.
[81] [1998] 2 I.L.R.M. 275 (S.C.).

company is all but extinguished, as these interests will generally vest in the same persons. Therefore, the logical import of imposing fiduciary duties on the directors in relation to their shareholders in the 'quasi-partnership' context is to impose fiduciary duties on the members of the quasi-partnership in relation to each other. In addition, these obligations are enforceable personally by the members.

Applying the guidelines in *Crindle Investments*, where members can successfully aver the existence of extra-legal expectations, stemming from the relationship of trust and confidence, and where they can establish that the nature of the relationship of the parties was such that it was deserving of protection, it seems their expectations will be protected. For example, the extent to which the shareholders are involved in the conduct of the company's affairs and the relative importance of company transactions to them are of relevance in determining whether circumstances warrant the placing of fiduciary obligations on the directors in relation to the shareholders. These are matters very much at issue in the quasi-partnership where the participants will have defined roles to play and also an interest in involvement in aspects of the company's affairs vitally affecting their extra-legal legitimate expectations. As a second example, the imposition of fiduciary obligations on the managing members means that they cannot profit themselves at the expense of the company, and thus the other members, for they will incur the constructive trustee's obligation to personally account for any profits made to the company.[82] Ultimately, this constitutes a safeguard on the member's extra-legal interest in the continued financial viability of the company.

Imposition of fiduciary obligations on the company members would seem to alleviate the problems caused by the inherent inability to exhaustively embody the participants' relationship in a contract, as a result of which the parties will be thrown back to reliance on each other's willingness to honour any legitimate expectations of each other's conduct arising,[83] and the uncertainty surrounding shareholders' agreements in Irish law. The imposition of fiduciary

---

[82] *HKN Investments O.Y. v. Incotrade P.V.T. et al* [1993] 3 I.R. 152 (H.C.) *per* Costello J.

[83] Loke, A.F.H., "Fiduciary Duties and Implied Duties of Good Faith in Contractual Joint Ventures" (1999) J.B.L. 538.

obligations on directors *vis-à-vis* their shareholders could be a more satisfactory means of securing protection for the quasi-partners' legitimate expectations than the shareholders' agreement as it focuses on the nature of the parties' relationship and imposes fiduciary obligations on the strength of this, and the expectations of the quasi-partners may thus be protected, with no contractual basis for these expectations necessary.

It might be thought, contrary to what is argued in this paper, that the cases on whether directors can ever owe fiduciary obligations to shareholders stand for no more than the proposition that such obligations only arise where it can be said directors stand in an agency relationship to their shareholders, and no other context. It has always been the case that fiduciary obligations exist between agent and principal. Certainly all the cases were decided in the factual context of single instances of major business deals where the conduct of the directors in question left open no other inference than that they were acting as agents for the shareholders in the transactions. The remarks of the judges are certainly capable of being construed in this fashion. However, I believe that such a narrow interpretation would be unjustified in the quasi-partnership context, where a common sense approach compels the conclusion that virtually every piece of business concluded is on the basis of everyone acting for everyone else, all the time.

Also, it is possible to argue that such a proposition as the one argued for above would have the indirect effect of swallowing up the rule in *Foss v. Harbottle*[84] in that where members of a quasi-partnership can aver such a relationship of confidence, any acts inconsistent with it will enable them to take personal action, something by definition forbidden under the rule. It is also conceded that should the position argued for above be a correct statement of Irish law on the matter, the 'floodgates' of litigation may open given the removal of the obstacle to have majority approval for court action within the company; all aggrieved members of all companies would have the right to take action in the courts. However, given the rule's increasing artificiality (dealt with above), the fact it was premised on a separation between company control and membership

[84] (1843) 2 Hare 462 (Ch.D.).

(absent in a quasi-partnership type company), and the consequences the rule may have for aggrieved members of quasi-partnerships, would it be such a bad thing for the rule to be challenged in this manner? Certainly, review of the rule is long overdue; it is submitted that a sufficiently strong case exists for its complete abolition. Also the courts can still retreat from the consequences of such a potential clash by holding that directors can only owe fiduciary obligations to their shareholders in contexts where directors are clearly the agents of the shareholders in relation to specific transactions. Or, in the event that the courts eventually decide that it is generally the case that directors owe fiduciary duties to their shareholders, they could confine such a position to the quasi-partnership type company only, where such a close relationship as seemingly required for the imposition of fiduciary obligations would normally exist. In this way, the distinction between management and control could still be recognised.

Also, it is submitted that the ‘floodgates’ does not withstand analysis, given that an aggrieved quasi-partner could still seek redress under section 205 as a viable alternative. Either way, the grievance will ultimately reach a courtroom.

VIII. “MAKING A CLEAN BREAK”

In the event of an irretrievable breakdown in the good relations between the parties to the company, the only practical option remaining for the wronged participant will be to end his association with the ‘quasi-partnership’. The purpose of the following is to assess how able Irish company law is in facilitating the escape of a quasi-partner with his interests intact.

A. The Ability of Irish Company Law to Arrive at a Valuation of Shares Fair in all the Circumstances

Short of procuring the winding-up of the company on the “just and equitable” ground,[85] or obtaining an order under section 205, the only way for a participant to extricate himself from a ‘quasi-partnership’ is to sell his shares. However, the nature of the private

[85] Under section 213(f) of the Companies Act, 1963.

company creates several difficulties for the joint venture participant seeking to terminate his membership. In effect, he may be 'locked in' to the company. By definition, a private company must restrict the right to transfer its shares.[86] Such restrictions will encompass powers conferred by the articles of association on the directors to refuse to register as a member any transferee of a member's existing shareholding,[87] the exercise of which, as outlined above, are difficult to upset save where the aggrieved transferee can point to *mala fides* on the directors' part.

Secondly, the prohibition on the private company's inviting public subscription for its shareholdings disproportionately reduces the scope of potential markets for private company shareholdings[88] with the result that the scope for arriving at a fair value for private company shareholdings is narrowed in the context of the necessity to escape from a quasi-partnership where relations have broken down, where the inclination to accept offers from willing buyers is greatest, no matter how unreasonable they might be. Because, in the absence of an express provision in the Articles or a shareholder's agreement, there is no automatic right to a dividend unless and until declared, reserves could build up in the company in respect of which the members have no right of access. Therefore, financial interests could be impinged upon.

This creates a need for company law to ensure that the departing quasi-partner's shares, valued pursuant to a court order under section 205, a winding-up, or a voluntary sale, will receive a valuation fair in all the circumstances which will ultimately enable him to recoup his capital investment in the joint venture.

1. On a "Voluntary" Sale

The underlying principle in court-supervised share valuation is to assess the company's true worth and assess the value of the shares in

---

[86] Section 33(1) of the Companies Act, 1963.

[87] Considered *ante*. Model Article 3, which confers an absolute discretion on the directors, without an obligation to assign reasons for so doing, to refuse to register as member any transferee of a shareholding. Secondly, restrictions in the articles relating to the transferee's status, which are generally omitted in favour of the more structured and comprehensive protection afforded to existing members' control by the pre-emption procedure; and finally, restrictions relating to the transferee's qualities.

[88] See generally Hetherington, J.A.C., and Dooley, M.P., "Illiquidity and Exploitation: A Proposed Statutory Solution to The Remaining Close Corporation Problem" (1977) 63 Va. L. Rev. 1.

the light of the company's worth. The company's articles often contain provisions for the valuation of shares by independent experts in the context of voluntary transfers, with a provision that the expert's certificate of valuation will be conclusive of the shares' true worth. While the decisions of these experts are not beyond judicial review,[89] the courts will generally classify such extra-judicial valuation mechanisms as aspects of the company's internal management which the members implicitly pledged to adhere to upon subscription to the constitutional documents[90] and so decline to question the experts' judgement or the stipulated bases upon which they acted. Where the member cannot prove cause under section 205 and so actuate the court's remedial discretion to arrive at a fair valuation for shares, or prove cause that the company should be wound up under the 'just and equitable' ground, his options for recouping his capital from the company will be restricted to a sale of his shares valued pursuant to the mechanism. However, this method might not be conducive to reaching a valuation bearing a genuine relation to the company's true worth owing to the possibility of the mechanism excluding external factors having a real bearing on the true worth of the company from the experts' consideration. Therefore, it is possible that a valuation mechanism's effect will be to value shares intrinsically (*i.e.* value will be determined in accordance with the proportion their nominal value possess in relation to the total nominal value of the authorised share capital), unless the company participants are sufficiently cognisant of the potential effects of external constraints on shareholdings' true worth. As McHugh J. recognised in the Australian High Court decision of *Gambotto v. W.C.P. Ltd.*[91] the nominal value of the shares "is not decisive of the fair value of the shares";[92] often, fair valuation can only be reached by taking into account such matters as:

[89] Where there is blatant mistake, or evidence of actuation by *mala fides*, or where the experts give reasons for their conclusions, which are then reviewable under the rubric of relevant considerations; see *Johnson v. Chestergate Manufacturing Co. Ltd.* [1915] 2 Ch. 338 (Ch.D.).
[90] *Campbell v. Edwards* [1976] 1 W.L.R. 403 at 407 (C.A.) *per* Lord Denning M.R. (1899-1999).
[91] (1995) 127 A.L.R. 417 (H.C.A.).
[92] (1995) 127 A.L.R. 417 at n. 69 (H.C.A.).

> … information concerning the current and historical market prices of the shares where they are applicable, the net book value of the assets and the value of the company both as a going concern and on a liquidation together with any reports or appraisals prepared in relation to the alteration [in value], and any firm offers for, or serious inquiries about the purchase of, the assets of the company.[93]

The *laissez-faire* attitude of the courts in relation to deference to experts' conclusions on the true value of shareholdings will inevitably result in situations where the departing quasi-partner voluntarily selling his shareholding receives a price fundamentally at variance with his initial capital, which may mean that he leaves the company on a financial loss. Where he cannot prove his case under section 205, these problems become acute. Therefore, Irish law seems deficient as regards the need to ensure that extra-judicial share valuation mechanisms adequately protect the financial interests of the victims of irretrievable breakdowns in confidence.

2. On a Sale of Shares Pursuant to Section 205

However, as Nourse J. emphasised in *Re Bird Precision Bellows Ltd.*[94] different considerations must apply where the quasi-partner is being bought out by the majority pursuant to an order under section 205 for in such cases it will be:

> … no longer tolerable for him to retain his interest in the company [and] a sale of his shares will ... be his only practical way out short of a winding up. In that case it seems to me that it would [be] ... most unfair that he should be bought out on the fictional basis applicable to a free election to sell his shares in accordance with a company's articles of association, or indeed on any other basis, which involved a discounted price.[95]

[93] (1995) 127 A.L.R. 417 at n. 76 (H.C.A.).
[94] [1984] Ch. 419 (Ch.D.).
[95] [1984] Ch. 419 at 430 (Ch.D.).

In short, the oppressive conduct of his fellow-members has forced him to terminate his membership and in this sense the court-sanctioned sale has been forced upon him. Therefore, the Irish courts have consistently held that the object of a sale of his shareholding is to compensate him for the damage caused to their value by the oppressive conduct. As O'Hanlon J. recognised in the context of quasi-partnership type companies in *Re Clubman Shirts Ltd.*[96] the purpose of valuing shares pursuant to section 205 is to reflect the member's original investment in the venture. To this end, applying the Court of Appeal's conclusions in *Re Cumana Ltd.*[97] and *Re Bird Precision Bellows Ltd.*[98] O'Hanlon J. held that the court had an unfettered discretion under section 205 to stipulate a price for the shares fair in all the circumstances taking into account all factors the court deems relevant, and the merits of the case, irrespective of any pre-ordained valuation mechanism.[99]

In apparent recognition of the compensatory objective of section 205 and the need to ensure that the oppressed member recouped as much of his investment as fairness demanded, the courts have consistently held that as the company is of the 'quasi-partnership type, the price should be determined on a *pro rata* basis, not on a discount basis, as is common practice in a free election to reflect the fact that the shareholding is a minority one.[100] Costello J. accepted this as the law in Ireland in *Colgan v. Colgan*.[101] The High Court judgment of Barron J. in *Irish Press v. Ingersoll Productions Ltd.*[102] demonstrates that a like breadth of discretion resides with the court in determining what the appropriate valuation date for the shares should be, to compensate for any diminution in value caused by the oppressive conduct.

---

[96] [1991] I.L.R.M. 43 (H.C.).

[97] [1986] B.C.L.C. 430 (C.A.).

[98] [1986] 1 Ch. 658 (C.A.).

[99] For example that the company was a quasi-partnership and that his co-members had forced out the member.

[100] *Re Bird Precision Bellows Ltd.* [1986] 1 Ch. 658 (C.A.).

[101] High Court (*ex tempore*), unreported, Costello J., 22 August 1993.

[102] High Court, unreported, Barron J., 16 December 1993. On appeal, the Supreme Court did not disturb his conclusion on the issue of the appropriate valuation date for the shares, although it overruled his conclusion that compensation was within the remedial scope of section 205, see *Irish Press v. Ingersoll Productions Ltd.* [1995] 2 I.L.R.M. 270 (S.C.).

B. Problems with the Jurisdiction to Wind up the Company on the "Just and Equitable" Ground

Where there is an irretrievable breakdown in the relationship of trust and confidence between the parties,[103] or an unbreakable deadlock in management,[104] or a failure of substratum, or where the members act inconsistently with the relationship upon the basis of which they entered the company,[105] often the only solution short of a petition presented under section 205 will be to wind the company up on the 'just and equitable' ground under section 213(f) of the 1963 Act. Potentially, this is an excellent means for the quasi-partner to extract his full financial commitment from the company, for, as a shareholder, he has a right to participate with the other shareholders in the distribution of surplus assets on a winding-up after all creditors' demands have been met. However, it is submitted that this basis of terminating his association with the company is not conducive to his receiving his full investment. The members' right to participate in winding up proceeds is deferred until all the creditors have been paid, and it is often the case on a winding-up that the company has been mismanaged to such an extent that it has been grossly devalued. Secondly, even where there are funds sufficient to meet the company's debts and leave a surplus from which the shareholders can claim, the basis upon which the assets of the company are valued on a winding-up is less than satisfactory. As Linnane comments, the danger in liquidating a solvent company's assets on a wind-up is that the assets might be sold "at break-up value, without regard to goodwill and the 'know-how' of the company, and a winding up by the court can be lengthy and costly".[106] These factors could result in the wronged member receiving a sum of money on a winding up bearing no relation to his original investment. While the winding-up jurisdiction possess the advantage of terminating the members' association with the

[103] *Re Murph's Restaurant* [1979] I.L.R.M. 141 (H.C.).
[104] *Re Yenidje Tobacco Co Ltd.* [1916] 2 Ch. 426 (C.A.); *Re Vehicle Buildings and Insulations Ltd.* [1986] I.L.R.M. 239 (H.C.).
[105] *Ebrahimi v. Westbourne Galleries* [1973] A.C. 360 (H.L.); *McGilligan v. O'Grady* [1999] 1 I.R. 346 (S.C.).
[106] Linnane, H., "Oppression of Members: Section 205 Companies Act, 1963" (1995) C.L.P. 3 at 11.

company where it is no longer tolerable for him to continue, it possesses the disadvantage of not being sufficiently defined so as to ensure that a member may escape a quasi-partnership with his financial investment relatively intact. This is to be contrasted with the wide discretion under section 205 to arrive at a value for shares consistent with the quasi-partners' financial expectations.

It will also be noted that matters falling short of an irretrievable breakdown in the parties' relationship have been held to warrant a winding-up; thus, the potential for the court to wind up a company exists even where none of the parties genuinely desire it. This problem makes it advisable for quasi-partners to include detailed provisions in their documentation concerning deadlock and other eventualities to obviate this unwanted possibility. It also seems possible to avoid such a situation by unanimously consenting that the court has jurisdiction to make orders under section 205.

IX. CONCLUSIONS

Company law has thus had to accommodate the 'quasi-partnership' type private company as the backbone of Irish business life, which marks a departure from classical theory, and accommodate them by acknowledging that the essence of such companies does not lie in the company's constitution, but in the relationship of the parties constituting it and in equitable considerations, which must be adequately protected if the integrity of the quasi-partnership type company is to be maintained. The characteristics of quasi-partner expectations have been identified, and the development of company law analysed in terms of how adequate it is to protect these extra-legal expectations. It has been seen that the rule of *Foss v. Harbottle*[107] is fundamentally unsuitable as a means of protecting the legitimate expectations of a minority within a quasi-partnership, as it operates to effectively preclude the isolated quasi-partner from asserting his grievances. Fortunately, the Irish courts have cast the protective scope of section 205 widely, in recognition of its utility as a forum to protect the essence of quasi-partnerships. However, before such extra legal expectations may be

[107] (1843) 2 Hare 461 (Ch.D.).

protected, they must be proved to exist in fact and the contemplation of the members- a reasonable restraint given the need to balance the rights as between dissenting quasi-partners.

Also, because the parties may agree that the court has jurisdiction to make the appropriate orders under section 205 to remedy their grievances, and thereby obtain guidance on how best to remedy their grievances, they may be able to continue in business.

It has been seen that the types of conduct actionable under section 205 converge with matters that can prejudice what I regard as the 'essence' of a quasi-partnership. With the exception of compensation, the courts possess untrammelled discretion to remedy the grievance complained of appropriately, thus making concession to the peculiar context. Of particular note is the ability of the courts to ensure that an isolated quasi-partner may leave the company while receiving a price for his shares that reflects their true value.

The difficulty of challenging the exercise by the directors of their powers to refuse to register new members, and any pre-emption procedure, constitutes an important safeguard on the expectation of the shareholders to preserve the existing control structure of the company. However, it seems that Irish law has not yet had an opportunity to develop structured safeguards on the exercise of the power of allotment to frustrate any directorial intention to thereby erode the minority's expectations of meaningful participation. The extent to which such abuses of power are ratifiable remains questionable in Ireland, which creates a need for clarity.

While the law cannot compensate for the inability of quasi-partners to reach contractually binding agreement on their commercial relationship, there is scope to secure protection for the basis on which the quasi-partners entered the company through the company's constitution, whether by way of unalterable clauses in the memorandum, weighted voting rights in the articles, or otherwise. Particularly in the context of preserving the minority's interest in the status quo, the courts have firmly asserted a power to invalidate any amendment to the articles expropriating their shareholding.

The value of using shareholders' agreements to embody the quasi-partners' relationship is doubtful, for the reasons given above. However, such problems as caused by the inability to contractually plan may be overcome in the quasi-partnership context in the light of the recently-asserted equitable jurisdiction to impose fiduciary obligations on directors in relation to their shareholders where the nature of the relationship justifies it, even where the parties' expectations of each other are not contractual, which is a flexible way of protecting the essence of the quasi-partnership.

It appears that Irish law has not adapted yet to the situation where there is no option available but to wind up the company, where the relationship between the parties has broken down to such an extent that merely terminating one party's association under an appropriate section 205 order will not suffice to end the matters complained of. As regards the need to ensure that the financial interests of the venturers are secure in a winding-up, Irish company law has not as yet made appropriate provision for reconciling the rights of creditors with the need to liquidate surplus assets on a systematic valuation basis that will give the venturers a realistic chance of reclaiming their financial interests.

The thesis of this discussion is that Irish law has adapted well to the quasi-partnership, and is able to afford the legitimate expectations of the quasi-partners adequate protection where it is shown they exist, save in the case of the need to facilitate the departure of the quasi-partner from the company where circumstances demand it while preserving the quasi-partner's financial stake in the venture so far as possible.

General public and private companies companies and partnerships features of the registered company. Incorporation by registration Transferable shares Limited liability Disclosure and formality The advantages of forming a company The purpose of company law The sources and reform of company law. 2 Formation and Promotion.Â THE LAW COMMISSION RECOMMENDATIONS A new derivative action Active case management of s 459 proceedings Presumptions in s 459 proceedings A new â€˜exitâ€™ article for Table A. 14 Winding up THE TYPES OF WINDING UP Compulsory winding up Voluntary winding up Powers of the liquidator The distribution of the companyâ€™s assets DISSOLUTION STRIKING OFF DEFUNCT COMPANIES. is the law which deals with the creation and regulation of business entities. Most common business entities are companies and partnerships. It also deals with the relationships between companies and their shareholders, creditors, regulators and third parties. company. is a group of people which is treated as a legal person, with a separate identity from its shareholding members. Limited liability, separate personality, tax treatment, flexible. partnerships. are not considered to be a legal person and are not able to own property in its own name. shareholders.