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Just and equitable winding up petitions: whether a company is a quasi-partnership may change over time

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The rights of a shareholder presenting a just and equitable winding up petition may depend on whether the company is a quasi-partnership, with the courts being more inclined to have regard to equitable considerations where that is the case. A recent decision of the Court of Appeal of the Cayman Islands has clarified that quasi-partnership status is not set in stone and may change over time.

Background

The just and equitable ground for winding up under section 92(e) of the Companies Act (2023 Revision) (the Act) permits the Court to subject the exercise of legal rights to equitable considerations which may make it unjust or inequitable to insist on legal rights or to exercise them in a particular way. This reflects the well-established position adopted by the House of Lords in *Ebrahimi v Westbourne Galleries Ltd*.[1]

Where a company is a quasi-partnership, an irretrievable breakdown in trust and confidence between the participating members may justify a just and equitable winding up by importing equitable considerations. However, absent a quasi-partnership, a breakdown of trust and confidence is not usually in itself enough to justify winding up on the just and equitable ground.

Court of Appeal decision

Augusta Healthcare, Inc v Valley Health System[2] was an appeal from a decision of the Grand Court to wind up a solvent insurance captive, Virginia Solutions SPC Ltd (the Company) on the just and equitable basis. The critical issue on appeal was whether the Judge was right to categorise the Company as a quasi-partnership.

The Court of Appeal held that, in considering this issue, it is important to have regard to the position at the time that a loss of trust and confidence is alleged. The Grand Court Judge was entitled to find that the relationship between the founding members amounted to a quasi-partnership in the early years of the Company's life, as the relations between the original members were governed not merely by the Company's constitutional documents but by implicit obligations of good faith. There was ample material on which the Judge could find that the founding members embarked on the enterprise in the hope or expectation that it could be made to work through the goodwill of the persons representing the Company's members, notwithstanding the immaturity of the Company's constitutional documents and despite a lack of certainty as to the strict legal position.

However, this position changed over time. After 2008/09, the founding members decided to record the basis of their participation in the Company in several documents in the context of the impending arrival of a new member, including a participation agreement between the Company and its members. Once in place, the participation agreement comprehensively defined the obligations of the members and the Company and provided a remedy for any failure to meet those obligations. The Court of Appeal held that,

[1] *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360.

[2] *Augusta Healthcare, Inc v Valley Health System* (unreported, 28 July 2023, CICA).

after the entry of the participation agreement, there was no scope for the superimposition of equitable considerations. It was not permissible to have regard to the basis on which the Company was initially established and ignore the subsequent formalisation of the parties' relationship by contract. Consequently, the Judge had been wrong in finding that the Company was a quasi-partnership at any point after 2009 and there was no basis for the Company being wound up.

The Court of Appeal further held that, once the Judge had determined that the petitioning member had established a *prima facie* case for winding up, the Judge should have gone on to consider whether any of the statutory remedies in section 95(3) provided a more appropriate remedy. The failure of the Judge to consider whether there was an alternative remedy to winding up was another reason for setting aside the judgment.

Conclusion

The winding up petition was dismissed and the joint official liquidators of the Company discharged.

This decision helpfully clarifies that when considering whether the company is a quasi-partnership, it is important to have regard to the position at the relevant time that a loss of trust and confidence is alleged. A company may not start out as a quasi-partnership but may become one. The converse is also true: a company may start out as a quasi-partnership but cease to be one. In this case, once the parties had formalised their relationship by contract there was no room to impose equitable principles.

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