# RELEVANCE OF PARTNERSHIP PRINCIPLES IN COMPANY LAW - WINDING-UP ON THE 'JUST AND EQUITABLE' GROUND

Three interesting cases were reported in consecutive years in relation to applications by shareholders to wind-up the company based on the 'just and equitable' ground pursuant to s 218(1)(i) of the Companies Act 1965. They are *Fairview Schools Bhd v Indrani a/p Rajaratnam (No 2)*,[1] *Ngan Tuck Seng v Ngan Yin Hoi*[2] and *Loh Eng Leong v Lo Mu Sen & Sons Sdn Bhd*.[3]

In *Fairview Schools Bhd*, several shareholders of Fairview School Bhd applied to court for an order that the company be wound up based on, inter alia, the 'just and equitable' ground. They protested against the sale of several vital company assets. The trial judge found that the company was a quasi partnership and, relying on *Ebrahimi v Westbourne Galleries Ltd*[4] and *Re Yenidje Tobacco Co Ltd*,[5] ordered that the company be wound up. Among the factors which influenced the judge's decision were :

(1) the assets of the company belong to the shareholders; and
(2) the sole reason of the company's existence was that it should oversee and manage the assets.[6]

The Court of Appeal disagreed. The appellate court discussed who the actual owner of the assets in question was, whether it belonged to the shareholders or the company, and in the end concluded that the company alone was the beneficial owner of all its assets. This alone,

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[1][1998] 1 MLJ 110.

[2][1999] 5 MLJ 509.

[3][2000] 5 MLJ 529.

[4][1973] AC 360.

[5][1916] 2 Ch 426.

[6]*Supra*, note 1 at p 114.

according to Mahadev Shankar JCA (as he then was), delivering the judgment of the appellate court, negatived "any suggestion that there was a quasi partnership in existence".[7] The learned judge further said:[8]

> The reliance on *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492 and *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426 was therefore misplaced. Those cases concern situations in private companies where the shareholders stand in relation towards each other in the same way as partners do who get into a deadlock in the administration of the firm's affairs. In the present case, [the Company] was the sole owner of all the company's assets and there was no express or implied partnership between the group of three and the other parent shareholders before incorporation or afterwards. All [of the Company's] resolutions were passed with the majority of votes prescribed by the M & A and the Companies Act 1965. There is therefore no analogy between this case and the two quasi-partnership decisions aforesaid. A court cannot in pursuit of what it considers 'fair' ignore the agreements between the parties."

In the second case, *Ngan Tuck Seng*[9], two shareholders complained against their removal as directors in The Ngan Yin Groundnut Factory Sdn Bhd. The shareholders argued that the company, having taken over the partnership business, was in substance a partnership company. Their removal as directors was an act in breach of the good faith and understanding shared between partners that each should be allowed to participate in the management and control of the company. With their removal, the trust and confidence enjoyed between the partners was gone and therefore it was just and equitable that the company be wound up.[10] The respondent, on the other hand, submitted that it was not in every case where it was claimed that an incorporated entity was in substance a partnership company that the court will readily superimpose over the company the equitable principles enunciated by Lord Wilberforce in *Ebrahimi*. There must be "something more" than merely to allege the existence of a partnership.[11] Unfortunately Clement

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[7] *Ibid* at p 143.

[8] *Ibid* at pp 143-144.

[9] *Supra*, note 2.

[10] *Ibid* at p 516.

[11] *Ibid* at p 521.

Skinner JC did not decide on the issue as he found that the petitioners had failed to discharge their duties as director in good faith and thus their removals were justified.

In *Loh Eng Leong*,[12] several shareholders of Lo Mu Sen & Sons Sdn Bhd applied to wind up the company on the just and equitable ground by contending that the company as a family company could not achieve an understanding among its members and, as such, there was a deadlock among the shareholders and the board of directors. Again *Ebrahimi* was cited to support this contention. This argument was rejected. Zulkefli J. distinguished *Ebrahimi* from the case before him as in *Ebrahimi*, the company was a partnership before it became a company. In the present case, the learned judge said that the principles of partnership law cannot apply because "there is no partnership at all".[13] The learned judge added:[14]

> In my view that even if the petitioners were right in the contention that the [company] when it was first incorporated was in substance a partnership, I would still nevertheless find that the company after its incorporation had remetamorphosed into a company that is being managed under the Companies Act and under its articles and memorandum of association. From the documentary exhibits in the form of minutes of the meetings of the board of directors and the EGM of the company ... it clearly shows that the [company] has been managed strictly in accordance with its article and memorandum of association. On this point I would like to refer to the case of *Re Lo Siong Fong* [1994] 2 MLJ 72 wherein his Lordship VC George (as he then was), inter alia, held that the courts recognized situations where the relationship between the parties results in what it is really a partnership taking the form of an incorporated company. However in that case his Lordship found that such a relationship among the members had been altered beyond recognition and that the quasi partnership had remetamorphosed to being an incorporated company not only in form but in fact as well.

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[12] *Supra*, note 3.

[13] *Ibid* at p 544.

[14] *Ibid* at pp 545-546.

## The cases examined

Apart from the fact that all the petitioners in the above cases applied to wind up the company based on the 'just and equitable' ground pursuant to s 218(1)(i) of the Companies Act 1965, all three cases bear two other similarities. They are:

(1) The petitioners argued that the companies in question were partnership companies, quasi partnerships, or companies which were in substance partnerships;
(2) The petitioners in support of their cases cited *Ebrahimi*.

With the exception of *Ngan Tuck Seng* where the court did not conclusively deal with the issue of whether the company was a partnership company, the courts in the other two cases rejected the petitioners' argument that the companies were partnership companies. The Court of Appeal in *Fairview Schools Bhd* viewed three factors as decisive:

(1) The company was the sole owner of all the company's assets.
(2) There was no express or implied partnership between the shareholders.
(3) All of the company's resolutions were passed with the majority of votes prescribed by the memorandum and articles of association (which is an agreement between the shareholders) and the Companies Act 1965.

In *Loh Eng Leong*, the petitioner's contention that the company was a partnership company was rejected by the High Court because:

(1) There was never a partnership in the first place.
(2) Even if the Company when it was first incorporated was in substance a partnership, it had remetamorphosed into a company.
(3) The Company had been managed strictly in accordance with the Companies Act and its memorandum and articles of association.

### Section 218(1)(i) examined

Section 218(1)(i) allows the court to order the winding-up if the court is of the opinion that it is just and equitable that the company be wound up. There is nothing in the section which requires the court to find that there is in existence a partnership company.

## Ebrahimi examined

In *Ebrahimi*, Lord Wilberforce noted that the phrase 'just and equitable' is a ground in which a partnership may be dissolved. This is an area where the company legislation has borrowed from partnership law. Therefore, it was recognised that even in a limited company, there are individuals, with rights, expectations and obligations among them.[15] This just and equitable ground "enables the court to subject the exercise of the legal rights to equitable considerations; considerations, that are, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."[16]

However, it is not in every company that equitable considerations will be applied. Lord Wilberforce said:[17]

> The super imposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there will be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

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[15] *Ebrahimi*, *supra*, note 4 at p 379.

[16] *Ibid.*

[17] *Ibid.*

## Comments

*Ebrahimi* was read and interpreted by the courts in a restrictive way. Merely because a partnership may be dissolved based on a 'just and equitable' principle does not mean that a company must be in substance a partnership company before the court may exercise their powers to wind-up the company on the same ground. Equitable obligations apply in non-partnership relationships as well; they are not exclusive to partners. For example, joint venturers have been held to owe equitable obligations to one another.[18] Shareholders may also, in appropriate cases, be imposed with an equitable duty to other shareholders.[19]

Even Lord Wilberforce himself pointed out in *Ebrahimi*, that the just and equitable ground for winding up is "a recognition of the fact that a limited company is more than a mere legal entity, with a personality of law of its own" and that the shareholders may be "individuals, with rights, expectations and obligations inter se".[20] Lord Wilberforce did not intend that the three elements outlined by him were to be the comprehensive rule that should be applied in all circumstances, as he said: "It would be impossible, and wholly undesirable, to define the circumstances in which these [equitable] considerations will apply".[21] Siti Norma Yaakob J. (as she then was) understood this, when she said in *Woodsville Sdn Bhd v Tien Ik Enterprises Sdn Bhd*[22] that the three elements "merely sets out the circumstances under which the equitable considerations can be adopted and by way of an illustration, the three elements were stated as examples where the just and equitable provision can apply" and that "Ebrahimi's case does not lay down any test when the 'just and equitable' provision can be applied".[23] What is therefore necessary is to find out what these rights, expectations and obligations are rather than trying to determine whether there was a partnership in existence.

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[18]*United Dominions Corp Ltd v Brian Pty Ltd* (1985) 157 CLR 1; 60 ALR 741.

[19]*Clemens v Clemens Brothers Ltd* [1976] 2 All ER 262.

[20]*Ebrahimi*, supra note 4, at p 379.

[21]*Ibid.*

[22][1994] 3 MLJ 89.

[23]Ibid at p 101.

In addition, the fact that the company is governed by the memorandum and articles of association and the companies legislation should not preclude a finding of a relationship which is in substance a partnership, or that the shareholders have certain rights or expectations. The mere fact that the articles generally provide that directors manage the company's business should not be used by controlling shareholders to deny any obligations or prior understanding between them that the business is to be conducted in a certain way; nor can the controlling shareholders contend that the minority should no longer expect to be involved in the management of the company, contrary to the prior understanding between them, merely because the articles provide for the appointment of directors by majority votes of the shareholders.

## Conclusion

Implicit in *Fairview Schools Bhd* and *Loh Eng Leong* is that the courts are very reluctant to grant an order based on the 'just and equitable' ground as the mere fact that every company must abide by the memorandum and articles of association will negate any finding of a partnership relationship. In addition, petitioners have the burden of proving the prior existence of a partnership, or at least a relationship which is in substance a partnership. Perhaps the courts will be less reluctant to impose on shareholders a duty in equity if upon the finding of such a duty they will have more discretion to make orders which they think are appropriate in the circumstances, instead of being obligated to wind-up the company, as required by s 218(1)(i).

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# VIOLENCE AGAINST THE WIFE - PROTECTION AVAILABLE UNDER THE DOMESTIC VIOLENCE ACT 1994

## Introduction

Violence perpetrated behind closed doors subsists despite the rapid progress in human civilisation. Domestic violence is synonymous with the household, as its victims are usually family members, such as wives, children, incapacitated adults and sometimes even husbands. Every family member in any household is a potential victim of violent acts committed by another member of the family and this phenomenon is not limited to any specific category of people distinguished by ethnic, origin, race or religion.

As domestic violence is committed within the matrimonial home, the victim would rather suffer in silence than reporting it to the authorities concerned. Looking at it the other way round, the victim is usually under threat or undue influence not to report the violence or too embarrassed to do so. As the same is committed within the confines of privacy, society has often chosen not to interfere.

Malaysia is not free from this social problem. Prior to the enforcement of the Domestic Violence Act 1994, domestic violence cases were viewed as family matters and were therefore given less attention. The only civil remedy then available to the victim was pre-emptive in nature, namely, an injunction. The less attractive alternative that was available was to prosecute the assailant under the Penal Code. Malaysia also has a very unique set of laws relating to matrimonial matters governing Muslims, that is, the syariah law. In the case of *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib*,[1] the plaintiff and defendant were husband and wife. The plaintiff alleged that during the course of their marriage, her husband battered her on numerous occasions. The plaintiff subsequently filed a suit in the High

[1] [1992] 2 MLJ 793.