

No fiduciary duties between shareholders in a quasi-partnership (*De Sena and others v Notaro*)

11/05/2020

Commercial analysis: In a demerger transaction between shareholders in a family-run company, the defendant shareholder did not owe any fiduciary duties to the claimant shareholder. The transaction involved a commercial negotiation in which the parties had intrinsically opposed interests, and the recognition of fiduciary obligations was inconsistent with the nature of that transaction. The claimant's claim for equitable compensation representing the alleged undervalue at which they had sold their shares in the company, or an account of profits, was dismissed. The court considered what was required for fiduciary obligations to arise between shareholders. In particular, it considered and rejected the claimant's argument that fiduciary duties were appropriate because the company was in the nature of a quasi-partnership. Alternative claims in duress and unjust enrichment, and against the company's accountants and solicitors (not raising a point of principle or considered in this note), also failed. Written by Seb Oram, barrister, at 3PB Barristers.

De Sena and another v Notaro and others [\[2020\] EWHC 1031 \(Ch\)](#)

What are the practical implications of this case?

One of the three, traditional characteristics of a quasi-partnership company is that the shareholders have formed or continued an association between themselves on the basis of a personal relationship involving mutual confidence (the other two are: an understanding that some or all of the shareholders will participate in the business; and restrictions on the transmissibility of shares).

The point of interest in *De Sena v Notaro*, is the attempt to argue that the quasi partnership nature of the company (or that mutual confidence between the shareholders) gave rise to fiduciary obligations between the shareholders. Conventional wisdom is that, in a quasi-partnership, equitable considerations would simply restrain the exercise of strict legal rights (for example, under the articles of association) if that would be contrary to good faith (*O'Neill v Phillips* [\[1999\] 1 WLR 1092](#) (HL), at paras [1098], [1103]).

The argument was rejected in principle—'[...]even if the company could be regarded as a quasi-partnership for one purpose...that does not mean that it would be a quasi-partnership for any other, let alone all purposes [...]' (at para [237]).

Instead, whether or not a shareholder will owe fiduciary obligations to another will depend on proving a special factual relationship. It is not enough that the defendant is in a position through which they will have the potential to affect the claimant's interests. They must voluntarily assume an obligation to act in the best interests of that other, and to subordinate their own interests to those of that other (at para [186]–[189]).

What was the background?

The first claimant (the claimant) and the first defendant (the defendant) were siblings, and were both shareholders and directors in a holding company managing the family's businesses, which operated in property development and hotels in the South-West. The claimant held 31.25% of the shares and the first defendant held 43.75% (the remaining 25% held by other siblings).

In April 2011, they entered into a demerger agreement, the effect of which was to extract the claimant from the business. Under it, the claimant gave up their shares in the company, in return for which certain of the company's assets were transferred to a newly incorporated nominee company owned and controlled by the claimant.

The claimant alleged that the defendant had owed them fiduciary duties, which the defendant had breached by the manner in which the demerger had been concluded. It was alleged (among other things) that the defendant had: (i) failed to disclose the true value of the assets of the group and imposing their own values, (ii) sought to remove the claimant as a director, and to obtain the claimant's shares at an undervalue, (iii) forced the claimant to take assets which they did not want

and which the defendant knew were significantly less valuable than real property owned by the group, (iv) instructed that false information be provided to the tax authorities in order to obtain clearance for the demerger, and (v) pursued his own interests over those of the claimant.

What did the court decide?

The claims were dismissed because the defendant did not owe fiduciary obligations to the claimant:

- previous cases asserting the existence of de facto fiduciary obligations had arisen in the context of a serious imbalance of power, and access to information, between the alleged fiduciary and its principal. That was absent in *De Sena* (at para [235])
- the fiduciary character had to be assessed in light of the particular obligation to which it was said to attach, and not to the relationship generally. While negotiating the demerger, the claimant was in a commercial negotiation with the defendant in which it was obvious that their commercial interests were opposed. To the extent that the defendant preferred their own interests, and they were entitled to do so (at paras [191], [236], [240])
- even if the company had been a quasi-partnership, that fact alone would not give rise to fiduciary obligations between its shareholders (at para [237])

Since the claim failed on the question of duty, the allegations of breach and loss did not require detailed consideration.

The court's analysis avoids the unnecessary creep of the 'quasi-partnership' doctrine, and shows a reluctance to impose fiduciary duties in commercial transactions, unless properly justified. It also provides an entirely conventional approach to determining when fiduciary obligations will arise, outside the well-established relationships. The key requirement is the existence of a relationship giving rise to an (objectively judged) expectation that the fiduciary will not use its position in a way that is adverse to those of its principal. This analysis treats in a comparable way the analogous situations of shareholders and joint venturers (see, eg *Ross River Ltd v. Waveley Commercial Ltd* [2013] EWCA Civ 910, [2014] 1 BCLC 545 (CA), at paras [35]–[38]).

Case details

- Court: High Court of Justice, Chancery Division, Bristol District Registry
- Judge: Paul Matthews (sitting as a High Court judge)
- Date of judgment: 1 May 2020

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