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# Shareholders' Agreements : Some EU and English Law Perspectives

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Shareholders' agreements are sometimes regarded as inhabiting 'the sub-basement of company law'. They are seen as problematic as they can be instruments for groups of shareholders to circumvent the normal scheme of the company's legislation or the company's constitution in its Articles. English company law however prides itself on its flexibility, deference to party autonomy and freedom of contract, so one could perhaps expect the objection to shareholder agreements to be less than in other European countries.

Shareholders' agreements may be part of the arrangements of the incorporation. It is often a matter of convenience whether an issue should be regulated in a company's Article or in a shareholders' agreement. The choice between amend-

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ing the Articles, or adopting any other formal resolution by the board or shareholders' meeting, may turn up at any point in the life of a company. The agreement can serve many purposes, from guaranteeing the control of a majority or securing the rights of a minority.

The company may be party to the agreement. The company may be restricted in its capacity to enter into such agreements in different ways, and this may give rise to questions about whether the agreement then is binding between the shareholders.

The shareholders' agreement may be between shareholders only, all or two or more of them. One question is the extent to which the company has to take the agreement into account, for instance if one of the shareholder-parties does act in breach of the contractual duties.

The subject matter of the contract can be anything relating to the company and the shareholders. The exercise of voting rights is a practically important subject for shareholders' agreements. Appointment of directors and other aspects of the governance of the company may be regulated in this way.

The company and shareholders may be under a duty to disclose shareholders' agreements. This can follow as an extension of the duty to disclose major shareholdings, for instance through rules about consolidation of shareholdings under certain conditions. Some listing regimes require much more : companies whose shares are listed on a stock exchange or traded on a public trading system may have to disclose materially important shareholders' agreements. It is important to note that this disclosure duty will include agreements between shareholders that the company is not itself a party to.

In this paper I will look at some aspects of shareholders' agreements that have a practical impact on English law.

## 1. The Different Views on Shareholders' Agreements and Contractual Nature of Company

The views among English company law scholars[2] differ between a restrictive view[3] and a liberal view accepting an unfettered contractual freedom between shareholders and between shareholders and the company as a party to agreements with and between them.[4] I will turn to these issues in Sections 3 and 5 below.

There are two main kinds of issues that shareholders' agreements give rise to. In addition to the relationship between companies legislation and Articles and shareholders' agreements, there are several disclosure issues. Shareholders' agreements can in effect change the statutory rules or provisions in the Articles about voting, appointment of directors, transfer of shares etc. This may be material changes in a company's governance and require disclosure.

Before turning to the discussion of shareholders' agreements, it may be useful to look at the contractual basis for company law.

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2) There is not any extensive literature on shareholders' agreements. There are some extensive handbooks for practitioners, and they give a good impression of how shareholders' agreements are used in practice. Scholarly analysis is more limited.

3) See for instance, K Schmitthoff 'House of Lords Sanctions Evasion of Companies Act' (1970) 1 Journal of Business Law 1.

4) See, E Ferran 'The Decision of the House of Lords in *Russell v Northern Bank Development Corporation Limited*' (1994) 53 Cambridge Law Journal 343, which this paper draws extensively on.

In English company law one discusses[5] how far the Memorandum of Association and the Articles of Association (the company's constitution) has the character of a binding contract between a company and its members on the one hand, and between its members directly on the other hand. The question is considered to be one of great difficulty and not altogether clear.[6] In the case law it has been held that the contractual force given to the Articles of Association is limited to those provisions which apply to the relationship of members in their capacity as members. The contractual force does not extend to those provisions which govern the relationship of a company and its directors as such.[7]

The Articles constitute a contract between the company and a member in respect of his rights and liabilities as a shareholder. A company may sue a member and a member may sue a company to enforce and restrain breaches of the regulations contained in the Articles dealing with such matters. The purpose of the Articles is to define the position of the shareholder as a shareholder, not to bind him in his capacity as an individual. The Articles do not constitute a contract between the company and a member in respect of rights and liabilities which he has in a capacity other than that of member, whether he was a member originally or later becomes one. Where such rights and liabilities are the subject of a written agreement, the Articles will not be imported unless they are referred to.

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5) An authoritative statement of the position in English company law can be found in *Halsbury's Laws of England* (London : LexisNexis Butterworths 2006) which has been made much use of for the purposes of this presentation.

6) See for instance *Hickman v Kent or Romney Marsh Sheep Breeders' Association* [1915] 1 Ch 881.

7) See *Hickman v Kent* and *Beattie v E & F Beattie Ltd* [1938] Ch 708 at 721, [1938] 3 All ER 214 at 218.

While the Articles regulate the rights of the members *inter se*, the older authorities support the view that they do not constitute a contract between the members *inter se*. They are only a contract between the company and its members. The rights and liabilities of members as members under the Articles may be enforced by or against the members only through the company. However, more recent authorities support the direct enforcement by members of rights as members conferred on by the Articles.[8)]

This is the contractual context within which shareholders' agreements find their place. The analysis above is highly traditional. The different concepts of a company could have an impact on the contractual analysis. The traditional analysis is based on a contractual paradigm which only includes shareholders. It is disputed to what extent wider stakeholder concepts have to be applied, and what consequences they may have. Market regulation, in particular with its emphasis on disclosure and on transferability of listed shares, also challenges the private contractual model. In the European Union(EU), free movement and the right of establishment in the Treaty of Rome, adds further dimensions to the challenge of the private contractual model, and to some extent strengthens the pressure to greater disclosure and transferability that follows from modern market regulation (and also for companies which are not so much operating in a market in the former sense, for instance applying similar considerations to non-listed companies).

It is uncontroversial in every one of these different perspectives that individual shareholders' agreements, whether made by all or some only of the sharehold-

8) *Hurst v Crampton Bros (Coopers) Ltd* [2002] EWHC 1375 (Ch), [2003] 1 BCLC 304 (transfer of shares by a member in breach of pre-emption requirements in Articles defeasible at the suit of another member).

ers, create personal obligations between themselves only. They do not become a regulation of the company (in the way that the provisions of the Articles are). Neither do they become binding on the transferees of the parties to it or upon new or non-assenting shareholders.

It is also uncontroversial that a provision in a company's Articles of Association which restricts the company's statutory power to alter the Articles or a formal undertaking by the company to that effect, would be invalid. Controversy begins with the following. An agreement outside the Articles between shareholders as to how they are to exercise their voting rights on a resolution to alter the Articles would not necessarily be invalid. This opens up for agreements that changes, or even distorts, the system of the Articles, and this is one of the questions that we will return to in the following.

## 2. Case Law and Statute Law Reform

In the English case law, the House of Lords judgment in *Russell v Northern Bank*[9] goes far in accepting shareholders' agreements. The restriction it maintains is this. A company cannot itself be party to an agreement which would restrict its powers as they are required by companies legislation. But this does not bar shareholders' agreements with the same effect from being enforceable by the courts.

Shareholders' agreements have not attracted much attention in the present company law reform. A new Companies' Bill was introduced in 2005 and is presently going though the stages toward parliamentary approval and adoption (on this point see the postscript given below). The Bill will allow certain provi-

9) *Russell v Northern Bank Development Corporation Limited* [1992] 1 WLR 588.

sions of the Articles to be entrenched by requiring a majority more than a special resolution including unanimity for amendment. This was proposed in the Company Law Review Steering Group *Final Report* (DTI, July 2001, in para 9.8) and taken up in the DTI's Consultative Document (March 2005, in para 5.1). This has been regarded as providing a remedy for creditors who may be adversely affected by shareholders' agreements. Lenders may place restrictions upon the company's ability to change the Articles of Association as a condition for continued lending. Lenders will usually have less practical possibility for restricting shareholders' private agreements affecting the operation of the Articles (or knowing about them). The new possibility of a unanimity requirement may remedy the problem.[10]

In parallel with the domestic company law reform in the United Kingdom, the European Commission has adopted an Action Plan for Company Law.[11] One of the outcomes of this initiative was the adoption of the Thirteenth Company Law Directive on Takeovers which had been through a very long gestation period. The Directive includes a 'breakthrough rule'. This includes restrictions on shareholders' agreements. Article 11 of the Directive provides that voting restrictions shall not apply in the takeover situation.

Articles 10(1) and 10(2) of the EU Takeovers Directive require companies admitted to trading on a regulated market to provide, in their annual reports, detailed information (as set out in those articles) on the structure of the share

10) See for instance J Lowry and A Dignam *Company Law* (London : LexisNexis Butterworths 2003) 163 which is another source that this paper draws extensively on.

11) Communication from the Commission to the Council and the European Parliament *Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward* COM(2003) 284 final.

capital, restrictions on transfer of securities, significant shareholdings, shareholders with special controlling rights and a description of those rights, system of control of any employee share schemes and restrictions on voting rights. Special mention is made of agreements between shareholders which may restrict transfers of securities or voting rights and rules governing the appointment and replacement of board members and changes to the Articles. Mention is also made of significant agreements to which the company is a party which can take effect, alter or terminate upon a change of control of the company following a takeover bid. The disclosure requirements under Article 10 must be viewed in the light of the wider reporting requirements imposed on companies admitted to trading on a regulated market. There have been substantial recent initiatives in this field, both at the domestic level (in the form of the Operating and Financial Review) and within the EU context in the form of a Directive amending the 4th and 7th Directives on accounting. This includes a requirement for an annual corporate governance statement which includes elements of the disclosures required under Article 10 of the Takeovers Directive. Compliance costs in relation to the disclosures required under Article 10 was an issue discussed in the UK when these provisions were transposed, as was how best to avoid unnecessary duplication in company reporting and to simplify the presentation of information to shareholders.

In the process leading up to the 2003 Action Plan, the European Commission had appointed a High Level Group of Company Law Experts. Its Final Report[12] proposed a more radical break-through rule than the Commission proposed and which was further watered down before the final adoption of the Directive. It also

12) High Level Group of Company Law Experts *Final Report on a Modern Regulatory Framework for Company Law in Europe* (2002).

proposed full disclosure of shareholders' agreements which have an impact on a company or group's governance structure.

The remaining part of the paper will concentrate on the following issues : Section 3 will be on the legal nature of shareholders' agreements in English Company Law. Section 4 will address the use of shareholders' agreements in English corporate practice. Then, Sections 5 and 6 on current problems will address the issues left after *Russell v Northern Bank Development Corporation Limited* (formal distinctions undermining the legislative regime), and the different disclosure issues. Finally, Section 7 deals with some questions relating to minority shareholders' remedies, legitimate expectations and shareholders' agreements.

## 3. The Legal Nature of Shareholders' Agreements in English Company Law

By shareholders' agreements one usually refers both to agreements between shareholders and between shareholders and the company. The agreement can include all or some of the shareholders.

Shareholders' agreements which only have shareholders as parties fit neatly within the paradigms of contractual freedom and party autonomy. The shareholder parties can agree the matters they wish. They can alter their agreement as long as they all agree (or follow the procedures that the shareholders' agreement lays down).

In *Euro Brokers Holdings Ltd v Monecor (London) Ltd*[13] the Court of Appeal found that a unanimous informal agreement could alter procedures agreed in a shareholders' agreement.

The courts will grant orders to enforce shareholders' agreements. In *Puddephatt v Leith*[14] the court compelled a shareholder to vote as was agreed in a shareholders' agreement.

As mentioned, shareholders' agreements, whether made by all or some only of the shareholders, create personal obligations between themselves only. They do not become a regulation of the company (in the way that the provisions of the Articles are). Neither do they become binding on the transferees of the parties to it or upon new or non-assenting shareholders.

Shareholders' agreements are generally about the rights and obligations belonging to the shareholders involved. Since these rights concern the operation of the company, it can be helpful to have the company as one of the parties to the agreement. This can assist in the enforcement and it may also overcome the limitation of a contract between (a group of) existing shareholders. The company remains bound even if one of the shareholder parties to the contract sells out to a shareholder who does not become party to the agreement.[15]

A provision in a company's Articles of Association which restricts the company's statutory power to alter the Articles or a formal undertaking by the company to that effect, would be invalid. The Companies Act 1985 Section 9 [now Section 21 under the Companies Act 2006] allows the company to alter its Articles by spe-

13) *Euro Brokers Holdings Ltd v Monecor (London) Ltd* [2003] EWCA Civ 105 [2003] BCC 573, [2003] 1 BCLC 506.

14) *Puddephatt v Leith* [1916] 1 Ch 200.

15) In smaller and medium sized companies there may be little or no separation of ownership from control. Shareholders will often be directors. It may in practical terms be a short way from an agreement between shareholders to one which the company joins as a party.

cial resolution. In *Punt v Symons*[16] it was held that the company could not contractually abolish its right to alter its Articles.

There are conflicting decisions on the broad rule restricting the company's capacity to contract out of statutory powers. In *Bushell v Faith*[17] the Articles provided that a resolution to remove a director would multiply that director's shares by three. The director could as a consequence never be voted out. This could be regarded as a restriction on the competence that members have to remove a director for any reason whatsoever, see the Companies Act 1985 Section 303 [now Section 168 under the Companies Act 2006]. In this case the House of Lords held that it was not inconsistent with the statutory power to adopt such a provision in the Articles. The Companies Act specified the type of resolution required to remove a director. It was silent on the matter of how a company allocated voting rights for such resolutions.

An agreement outside the Articles between shareholders as to how they are to exercise their voting rights on a resolution to alter the Articles would not necessarily be invalid. An agreement between shareholders which in effect restricted the company's statutory power to alter the Articles would not be barred.

What about a shareholders' agreement with the company as a party?

This is the main issue in *Russell v Northern Bank*.[18] Here, the court held that the company cannot bind itself into such shareholders' agreements not to use the

16) *Punt v Symons & Co Ltd* [1903] 2 Ch 506.

17) [1969] 2 Ch 438, [1969] 1 All ER 1002, CA, see also [1970] AC 1099.

18) *Russell v Northern Bank Development Corporation Limited* [1992] 1 WLR 588.

company's statutory power to alter the Articles. However, the fact that the company is a party to the shareholders' agreement, and cannot be bound by it, does not mean that the other shareholders are not. I will turn to the further details of this case in a moment.

## 4. The Use of Shareholders' Agreement in English Corporate Practice

Agreements between shareholders are a common feature of English company law. They have several advantages compared to regulating an issue by provision in the company's Articles. Informality and confidentiality are two obvious advantages. Compared to altering or enforcing the company's Articles, a shareholders' agreement is a simple way to reach agreement and to provide for its enforcement. It may be easy to identify who one wishes to reach an agreement with, for instance a large shareholder. The privacy of a shareholders' agreement may give a shareholder control over the majority of votes without others knowing. It is obvious how this potentially creates a tension in relation to the needs of a public market. This is typically the kind of informational asymmetry that may lead to a regulatory disclosure requirement.

The incorporated vehicle for a joint venture between companies will often have most of its governance structure and rules about share transfers in such agreements. The governance structure is not in the formal company constitution that is found in the Articles. Shareholders' agreements are becoming an increasingly common feature for other forms of companies as well. Again, this may give rise to further issues, in particular if the company is a public company and even more so if it is a listed company.

As already discussed above, by 'shareholders' agreements' one can refer both to agreements between shareholders and between shareholders and the company. The agreement can include all or some of the shareholders.

A starting point is contractual freedom. Shareholders have full contractual freedom to agree on how to exercise rights attached to their shares. Practical examples include : (1) a shareholder agrees to sell his shares to another shareholder if he should decide to sell ; or, (2) a shareholder agrees with another shareholder how to vote in an election for the board of directors ('I will exercise my vote as a shareholder to vote for [shareholder A] as a Director').

## 5. When a Company is a Party to the Shareholders' Agreement

I turn first to the issues left after *Russell v Northern Bank*[19] which some claim maintain formal distinctions undermining the legislative regime. I then turn to some of the disclosure issues.

As noted above, the House of Lords judgment in *Russell v Northern Bank* goes far in accepting shareholders' agreements. The restriction it maintains is this. A company cannot itself be a party to an agreement which would restrict its powers as they are required by companies legislation. But this does not bar shareholders' agreements with the same effect from being enforceable by the courts.

The relevant facts were as follows. The five shareholders in Tyrone Bricks Limited and the company itself entered into agreement under which each undertook that the terms of the agreement should have precedence between the shareholders over the Articles of Association and that 'no further share capital shall be created or issued ... without the written consent of each of the parties hereto'.

19) *Russell v Northern Bank Development Corporation Limited* [1992] 1 WLR 588.

Some years later the board of Tyrone Bricks Limited gave notice of an extraordinary general meeting at which it was proposed to move a resolution that the share capital be increased from £1,000 to £4,000,000. Mr Russell, who was one of the shareholders, applied to the High Court of Northern Ireland for an injunction to restrain the other shareholders from considering or voting on the proposed resolution. At first instance Murray J ordered Tyrone Bricks Limited to be joined as a party and then dismissed the action on the ground that the relevant undertaking was invalid and ineffective in law because it was an attempt to fetter the company's statutory power to increase its share capital. By a majority, the Court of Appeal of Northern Ireland dismissed the plaintiff's appeal.

The issue before the House of Lords on appeal was this. Was the shareholders' agreement binding as between the shareholders? The respondents said that because a company could not forgo its right to increase its share capital, the voting restrictions in the shareholders' agreement were invalid between the shareholders because it was only by the votes of the shareholders that the share capital could be increased. Any agreement to restrict the freedom of the shareholders to vote as they pleased was a forgoing of the right to increase the share capital and invalid. The appellant said that although a company could not forgo its right to exercise its statutory powers, there was nothing in law to prevent the shareholders agreeing between themselves as to how they would cast their votes. It was common ground between the parties that Tyrone Bricks Limited could not be bound by the shareholders' agreement.

Lord Jauncey of Tullichettle (with whom the other Law Lords agreed) said :

> The issue between the parties in this House was whether Article 3 of the agreement constituted an unlawful and invalid fetter on the statutory power

of Tyrone Bricks Limited to increase its share capital or whether it was no more than an agreement between the shareholders as to their manner of voting in a given situation. Both parties accepted the long established principle that 'a company cannot forgo its right to alter its articles' : *Southern Foundries (1926) Ltd v Shirlaw* [1940] AC 701, 739, per Lord Porter. A principle that was earlier stated in *Allen v Gold Reefs of West Africa Ltd* [1900] 1 Ch 656, 671, per Lindley MR :

> 'the company is empowered by the statute to alter the regulations contained in its articles from time to time by special resolutions (Sections 50 and 51 [of the Companies Act 1862]) ; and any regulation or article purporting to deprive the company of this power is invalid on the ground that it is contrary to the statute' : *Walker v London Tramways Co* (1879) 12 Ch D 705.

It seems to have been accepted that the above judgments cited were authority for a rule of law that a company cannot validly agree not to alter its Articles. Further support for this was derived from a dictum of Russell LJ in *Bushell v Faith* who had referred to 'the well-known proposition that a company cannot by its articles or otherwise deprive itself of the power by special resolution to alter its articles or any of them'.

Lord Jauncey stated that

> 'while a provision in a company's articles which restricts its statutory power to alter those articles is invalid an agreement dehorns the articles between shareholders as to how they shall exercise their voting rights ... is not necessarily so'.

In support of this he referred to *Welton v Saffery*, in which Lord Davey had said that an agreement between shareholders as to how they would vote was valid as a personal obligation 'and would not become a regulation of the company, or be binding on the transferees of the parties to it, or upon new or non-assenting shareholders'.

Lord Jauncey then examined the Tyrone Bricks Limited agreement. This agreement provided that its terms should have precedence 'between the shareholders over the articles of association'. Having cited Russell LJ in *Bushell v Faith*, Lord Jauncey said that the significant words for the purposes of the appeal were 'articles or otherwise'. These, he said, 'appear to recognise that it is not only fetters on the power to alter articles of association imposed by the statutory framework of a company which are obnoxious'. Of the agreement between Tyrone Bricks Limited and its shareholders, he said : 'This was a clear undertaking by Tyrone Bricks Limited in a formal agreement not to exercise its statutory powers for a period which could, certainly on one view of construction, last for as long as any one of the parties to the agreement remained a shareholder and long after the control of Tyrone Bricks Limited had passed to shareholders who were not party to the agreement. As such an undertaking it is, in my view, as obnoxious as if it had been contained in the articles of association and therefore is unenforceable as being contrary to [the Northern Ireland equivalent of Section 121 of the Companies Act 1985]'.

It has since been discussed whether this passage was part of the reasoning which led to the decision of the House of Lords (the *ratio decidendi*)? The issue for the decision of the House was whether the shareholders' agreement was either an unlawful and invalid fetter on Tyrone Bricks Limited's powers or was no more than an agreement, as between the shareholders, as to how they would vote. The decision was that the shareholders' agreement was not an invalid and unlawful fetter on Tyrone Bricks Limited's powers but was no more than an agreement between the shareholders.

*Russell and Northern Bank* is not in support of a restrictive view.[20] It may also be problematic from a liberal view adopting an unfettered contractual freedom between shareholders and between shareholders and the company as a party to agreements with and between them. E Ferran has criticised the decisions as it relies on formalistic distinctions.[21] Instead of striking down the shareholders' agreements, E Ferran argues that one should instead accept that the company can bind itself in its future exercise of statutory powers through such shareholders' agreements.

## 6. Disclosure and Breakthrough

In addition to the relationship between companies legislation and Articles and shareholders' agreements, there are the many different disclosure issues. Shareholders' agreements can in effect change the statutory rules or provisions in the Articles about voting, appointment of directors, transfer of shares etc. This may mean material changes in a company's governance and require disclosure.

The transposition of the adoption of the Thirteenth Company Law Directive on Takeovers into national law now show the 'breakthrough rule' is affecting shareholders' agreements. Article 11 of the Directive provides that voting restrictions shall not apply in the takeover situation. This is a major intervention in the contractual freedom of shareholders. It is motivated by the functioning of the market

20) This follows from K Schmitthoff's article cited in the above note 3 about another case.

21) Ferran, supra note 4, p.343.

for corporate control and by the integration of the EU market.

The High Level Group of Company Law Experts Final Report[22] also proposed full disclosure of shareholders' agreements which have an impact on a company or group's governance structure. Most member states had in place different rules that required disclosure of material shareholders' agreements. This is today becoming more and more usual in listed companies. Stock exchange listing requirements, or other financial market regulation, now often mandate the publication of shareholders' agreements of material impact.

## 7. Shareholders' Agreements and Legitimate Expectations

Shareholders' agreements can create legitimate expectations which can have an impact on the rights of minority shareholders. Particular problems follow from the countervailing legitimate expectations that shareholders may have in terms of the formal constitution of a company in its Articles.

Section 459 of the Companies Act 1985 [now Section 994 under the Companies Act 2006] provides remedies against oppression by the majority. Section 459 is most often raised in the context of the breakdown of relationships in small private companies where there is no active market for a public company's shares (and a buy out of the petitioner's shares at fair price under Section 461 (2) (d) [now Section 996 (2) (e) under the Companies Act 2006] is a useful remedy). A Section 459 petition is also available for a shareholder in a public company but more unlikely.[23] When can Section 459 be invoked shareholders in public companies?

22) High Level Group of Company Law Experts *Final Report on a Modern Regulatory Framework for Company Law in Europe* (2002).

23) See *Leeds United Holdings Plc* [1996] 2 BCLC 545 at 559 per Rattee J.

In *Re Astec*[24] Jonathan Parker J based his analysis of the availability of a remedy under Section 459 on the judgment of Hoffmann LJ in *Re Saul D Harrison & Sons Plc*[25] He stated that legitimate expectations are founded on a personal relationship between the party seeking to exercise a legal right and someone seeking to restrain that right, such as will affect the conscience of the party seeking to exercise a legal right. If not, a shareholder could reasonably and legitimately expect no more than that the board of the company will act in accordance with its fiduciary duties and that the affairs of the company will be conducted on the basis of the Articles and any relevant legislation. There are broadly two types of legitimate expectation upon which shareholders rely. Hoffmann LJ is referring to only one of these : personal expectations based on an informal arrangement. These are the most common type of legitimate expectation and are traditionally raised by aggrieved shareholder in 'quasi-partnership' companies where the requirement of legitimate expectations can be satisfied by fundamental undertakings between the shareholders, such as the right to be a director, which form the basis of their relationship but have not been put into contractual form. It is easy to accept that these kinds of informal arrangements can have no place in public companies. This is the conclusion of Vinelott J in *Re Blue Arrow Plc.*[26] He determined the ability of a shareholder to protect his right to be president of a public company under Section 459. There was no room for any legitimate expectation founded upon some agreement between the directors and 'kept up their sleeves'. Jonathan Parker J's comments in *Re Astec* that 'for the market in a company's shares to have any credibility ... the public must, it seems to me, be entitled to proceed on the footing that the constitution of the company is as it appears in the

24) *In re Astec (BSR) Plc* [1998] 2 BCLC 556.

25) [1995] 1 BCLC 14.

26) [1987] BCLC 585.

company's public documents, unaffected by any extraneous equitable considerations and constraints' (at p. 589).

To this extent such legitimate expectations cannot arise in relation to listed or even to public companies. The impact of shareholders' agreements and other informal understandings may be stronger in private companies.

Courts do however seek standards by which to judge unfairness. In a private company, the existence of a formal or an informal agreement between the shareholders may offer assistance in various ways. In the private company context, when there is no such agreement, the courts seek to make use of some available established standards. In *Re a Company*[27] the court looked to the rules in the City Code on Takeovers and Mergers. Here the court found assistance in determining if behaviour within a private company was unfairly prejudicial to the members. Of course, the City Code does not apply to private companies. But such established standards also have the advantage of not being pulled from the directors' sleeves as in the case before Vinelott J (*Re Blue Arrow Plc*[28]). The parties in *Re a Company* may have had difficulty guessing that the City Code was relevant to their dealings at the time.

[Postscript]

Some progress after the lecture was delivered on 30 July 2006 should be noted here. The company law reform (particularly referred to in Section 2 of this paper) finally concluded in November 2006. The Companies Bill went through Royal Assent on 8 November 2006. The introduction of entrenched provisions which was discussed in the Company Law Review Steering Group and subsumed later in the DTI's Consultative Document has been realised under Section 22 of the new Companies Act.

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27) [1986] BCLC 382.

28) [1987] BCLC 585.