Publicly listed company wound up for loss of substratum (Re Klimvest plc)

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Restructuring & Insolvency analysis: For the first time in this jurisdiction, the court has ordered the winding up of a listed plc on the just and equitable ground under section 122(1)(g) of the Insolvency Act 1986 (IA 1986) for loss of substratum. In a reserved judgment handed down on 17 March 2022 (following a two-week trial in February 2022), the High Court has clarified and modernised English law in line with more recent Australian authorities. His Honour Judge Cawson QC (sitting as a High Court judge) held that the identification of a company's purpose or substratum is a matter of equity between the company—even a listed plc, and its shareholders, rather than a formalistic exercise in construing the corporate constitution. The purpose is lost, potentially triggering winding up by the court, not only where carrying it out is 'practically impossible' for the company, but also where it has been, or will be, abandoned. Written by Daniel Lightman QC and Max Marenbon, barristers at Serle Court Chambers.

Re Klimvest plc; Duneau v Klimt Invest SA and others [2022] EWHC 596 (Ch)

What are the practical implications of this case?

This judgment broadens the options available to minority shareholders—including in public companies, who oppose attempts by those in control of the company to fundamentally change its business.

This judgment clarifies that in identifying the main object or purpose for which shareholders are taken to have invested their money (often referred to as the 'substratum' of the company) the court may consider any material that was available to all investors prior to investing, although in some circumstances subsequent materials may also be relevant.

Minority shareholders are on the face of it entitled to have the company wound up where: (i) it is impossible or at least 'practically impossible' for the company to pursue the purpose identified above; (ii) that purpose has been abandoned; or (iii) the company proposes to embark on a fundamentally different activity (at para [245]).

Practitioners advising companies and shareholders should therefore be aware that even a company with broad or unrestricted objects in its memorandum and articles of association may not be free to abandon its previous activities and embark on a fundamentally different business, if the relevant material indicates that this is not a course of conduct to which all shareholders have agreed.

Though not forming part of the High Court's reasons for its decision, comments in the judgment (at para [269]) also open the door, in rare cases, to shareholders in listed public companies presenting an unfair prejudice petition and obtaining relief under section 996 of the Companies Act 2006 (CA 2006) on the basis of equitable (quasi-partnership) considerations.

What was the background?

Klimvest plc (Klimvest) was incorporated in 2002 and became a public listed company within the growth segment of the Euronext stock exchange in 2006. Until it sold its entire business and assets in January 2019 (the Asset Sale), Klimvest was a software publisher and consulting services company called Assima plc, although it carried on its business through a network of subsidiaries.

The co-founders and main shareholders had been proceeding on an underlying assumption that, following the Asset Sale, the proceeds of sale would be distributed to shareholders (para [249]). However, after the Asset Sale, one of the co-founders, Michel Balcaen, through his vehicle Klimt Invest SA (Klimt Invest), acquired majority voting control of Klimvest at shareholder level (para [289]). It then emerged that he intended to turn Klimvest into a private investment fund operating at his discretion, rather than liquidating it and returning the cash to shareholders (para [240]).

Another co-founder, and the second largest shareholder, Mr Eric Duneau, petitioned to wind up Klimvest principally on the ground that, following the Asset Sale, Klimvest's purpose had been achieved, and it was therefore just and equitable that Klimvest be wound up on the basis that minority shareholders were entitled to expect that their investments would be returned to them (para [165]).

Mr Balcaen contended that Klimvest was, at the time of the Asset Sale, an investment holding company, that this was evident from Klimvest's annual accounts and the offering circular produced prior to Klimvest's 2006 listing (para [209]) and that since it was proposed that Klimvest should pursue an investment strategy, it could not properly be said that Klimvest's purpose had been fulfilled (para [166]).

The alternative grounds of Mr Duneau's petition included that Klimvest was a quasi-partnership company as between him and Klimt Invest, and that Klimt Invest/Mr Balcaen was responsible for the breakdown in trust and confidence between them.

What did the court decide?

His Honour Judge Cawson QC concluded that Mr Duneau had made out the ground for winding up based upon loss of substratum or purpose, rejected the contention that he had unreasonably refused to pursue some alternative remedy, and, having considered the various discretionary considerations that arose, including rejecting the allegation of lack of clean hands, stated that he was satisfied that he ought to make an order that Klimvest be wound up.

The court followed (at para [214]) the dictum of Lord Parker of Waddington in *Cotman v Brougham* [1918] AC 514, who reasoned (at para 520) that identifying the purpose or substratum of a company is a question of equity between the company and its shareholders, which may necessitate looking beyond the terms of the company's memorandum and articles of association.

Both the 2006 offering circular and an information memorandum prepared by Mr Balcaen in 2018—which the court said provided an 'insight into the effect' of the offering circular on Klimvest's overall purpose (paras [233]–[235]), showed that Klimvest's purpose was and remained the development and distribution of certain types of software, and the delivery of related consultancy services.

Following the Asset Sale, it was 'at least practically impossible' for Klimvest to pursue that purpose. Even if, however, that purpose could still be pursued, Klimvest could still be wound up on the basis that, in line with the reasoning in *Re Tivoli Freeholds Ltd* [1972] VR 445, at 469 (Supreme Court of Victoria), its controllers had caused, or intended to cause, it to 'embark upon acts which are outside and different from what can fairly be regarded as having been within the general intention and common understanding of the members when they became members' (paras [228], [245]).

On the facts, the judge found that Klimvest was not one in which equitable (quasi-partnership) considerations had arisen, so it was not necessary to determine whether *Re Astec* (BSR) plc [1999] BCC 60 (not reported in LexisLibrary)—which held that such considerations can never arise in a public listed company, was correctly decided. However, the judge expressed the view that, even in a listed public company, there might be rare

circumstances where such considerations could ‘found the basis for some limited form of relief’ under CA 2006, s 996 (paras [269]–[270]).

Case details

- Court: Business and Propert Courts of England and Wales, Insolvency and Companies List (ChD)Judge: His Honour Judge Mark Cawson QC (sitting as a High Court judge)
- Date of judgment: 17 March 2022

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