Der Gleichbehandlungsgrundsatz im Gesellschaftsrecht

Herausgegeben von
PETER JUNG

Gesellschaft für Rechtsvergleichung e.V.

Rechtsvergleichung und Rechtsvereinheitlichung
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Verhandlungen der Fachgruppe für vergleichendes Handels- und Wirtschaftsrecht anlässlich der 37. Tagung für Rechtsvergleichung vom 19. bis 21. September 2019 in Greifswald

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Vorwort

Die 37. Tagung der Gesellschaft für Rechtsvergleichung vom 19. bis 21. September 2019 in Greifswald stand unter dem Generalthema „Gleichheit". Der vorliegende Band enthält sämtliche Referate, die in der Arbeitssitzung der Fachgruppe für vergleichendes Handels- und Wirtschaftsrecht zum Thema „Der Gleichbehandlungsgrundsatz im Gesellschaftsrecht" gehalten wurden.

Der Gleichbehandlungsgrundsatz gehört zu den wichtigsten allgemeinen Prinzipien nicht nur des deutschen Gesellschaftsrechts. Gleichwohl sind viele Grund- und Teilfragen noch ungeklärt. Das ließ eine rechtsvergleichende Betrachtung dieses insbesondere für den Minderheitenschutz wichtigen Grundsatzes interessant und lohnend erscheinen. Die fünf in diesem Band abgedruckten Landesberichte und der Generalbericht beschäftigen sich zunächst mit den Grundlagen (Verankerungen im Gesetz, Verhältnis zum verfassungsrechtlichen Gleichbehandlungsgebot und zu den allgemeinen Rechtsgrundsätzen, inhaltliche Rechtfertigung, Verhältnis zur Vertrags- und Wirtschaftsfreiheit) sowie mit dem objektiven und subjektiven Anwendungsbereich des gesellschaftsrechtlichen Gleichbehandlungsgrundsatzes. Ferner werden der Inhalt und die Rechtsnatur des Gleichbehandlungsgebots sowie die Rechtsfolgen eines Verstoßes rechtsvergleichend behandelt. Schließlich bleibt noch Raum für die Untersuchung von aktuellen bzw. praktisch besonders relevanten Spezialfragen wie die Bevorzugung von Groß- oder Ankeraktionären im Rahmen der Informationspolitik der Gesellschaft oder die Zulässigkeit der Ausgabe sog. Loyalitätsaktien.

Den Landesberichten zum englischen Recht (*Prof. Christopher Hare*, University of Oxford), französischen Recht (*Prof. B*énédicte François, Université Paris-Est Créteil Val-de-Marne), litauischen Recht (*Prof. Virginijus Bit*ė, Mykolo Romerio universitetas, Vilnius), schweizerischen Recht (*Prof. Dr. Peter V. Kunz*, Universität Bern; *Prof. Dr. Peter Jung*, Universität Basel) und US-amerikanischen Recht (*Prof. James D. Cox*, Duke University, Durham) folgt der Generalbericht von *Prof. Dr. Hanno Merkt* (Albert-Ludwigs-Universität, Freiburg i. Br.). Den Landesberichten und dem Generalbericht liegt ein vom Herausgeber in Abstimmung mit dem Generalberichterstatter erarbeiteter Fragenkatalog zugrunde, der in englischer bzw. deutscher Sprache der Gliederung des Landesberichts Litauen bzw. des Generalberichts zu entnehmen ist.

Ich danke der Referentin und den Referenten ganz herzlich für ihre Mitwirkung an der Tagung und für die Veröffentlichung ihrer Beiträge in diesem Band.

Für ihre Mithilfe bei der Drucklegung bin ich Frau *Esther Jundt* sowie Herrn *David Ballmer* zu Dank verpflichtet. Herr *Dr. Tizian Troxler* hat mich als Fachgruppensekretär bei der Vorbereitung der Tagung unterstützt, wofür auch ihm herzlich gedankt sei.

Basel, im September 2020 *Peter Jung*

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Equal Treatment of Shareholders in English Law

Christopher Hare

I. Introduction

When faced with the question of whether shareholders should be treated equally, one's innate sense of fair play usually impels one to provide a positive answer to that enquiry. Whilst there is undoubtedly a natural inclination in any legal system towards achieving outcomes that are consistent with notions of equality and fairness, accepting equality as an underling or organising idea is not the same as recognising equality as an enforceable legal principle. This distinction was made clear by Advocate-General Trstenjak in *Audiolux SA v Groupe Bruxelles Lambert SA* ("*Audiolux*"),[1] which raised the issue of whether a minority shareholder in a public company was entitled to have its shares purchased on the same terms as other shareholders in circumstances where the purchaser had acquired effective control of the company. In rejecting the possibility of inferring from primary and secondary EU legislation a general principle that shareholders should be treated equally, the Advocate-General stated:[2]

"The notion of equal treatment of shareholders runs as a leitmotif through company law in the Community and its Member States and evidently represents an essential ideal in that area of the law. However, it cannot claim to have acquired constitutional status in any legal order thus far. In national law, as in Community law, its codification is restricted to individual rules in ordinary law. … Whilst some authors assume the existence of a 'fundamental *legal principle* of company', others describe the notion of equal treatment of shareholders merely as a '*basic idea*' or a 'simplified *ideal* to prevent arbitrary differences in treatment by company bodies'. Many authors even see it as a 'corollary of the general *principle of justice*', whose origins are not in statute, but are non-legal, supra-positive."

Whilst the Advocate-General's language suggests that a notion of equal shareholder treatment might be a useful organising idea, or even an aspirational ideal, she does not recognise its crystallisation into a legal principle, let alone a fundamental constitutional norm of the Community legal order. Indeed, whilst the

[1] Opinion of Advocate-General *Trstenjak*, *Audiolux SA v Groupe Bruxelles Lambert SA C-101/08*, 30 June 2009.

[2] Ibid, [88]–[89] (emphasis in original).

Advocate-General accepted that there are particular legal manifestations of this underlying notion,[3] she doubted whether the notion of equal shareholder treatment could be defined with sufficient precision to operate as a generally applicable principle with clear legal consequences.[4] The Court of Justice of the European Communities ("ECJ") in *Audiolux* endorsed the Advocate-General's views, indicating that a generalised principle of equal shareholder treatment could not be derived from the mere fact that there were particular legislative provisions that were consistent with that underlying ideal.[5] Rather, the particular manifestations of shareholder equal treatment were limited to the specific legislative context in which they arose.[6] According to the ECJ, "it must be held that the provisions of secondary Community law to which the national court refers do not provide conclusive evidence of the existence of a general principle of equal treatment of minority shareholders".[7] Nor did the general Community principle of equal treatment assist in that regard.[8]

In light of the statements in *Audiolux*, this chapter is not concerned with the issue of whether English law recognises equality of treatment as an organising ideal that underlies the development of the law generally and company law specifically. Manifestly, such an underlying aim forms part of the backbone of English law from the constitutional recognition of citizens' equality before the law in the Bill of Rights 1688[9] to the development of a distinct system of private law designed to produce fair outcomes when legal formality and rigidity pointed in the opposite direction. Indeed, the growth of the Chancery courts in medieval times and the distinct system of equitable principles that those courts developed were premised on an underlying notion of equal and fair treatment. Indeed, one of the central maxims that guided the courts of Equity in reaching their legal determinations was that "Equity is equality".[10] Given that English company law grew out of that equitable jurisdiction, it can be stated confidently that equality of treatment for shareholders is a strong impelling idea underlying the development of legal principle in company law.

Rather, this chapter concerns whether this underlying idea of equal treatment can be said to have crystallised into a legal principle of equal treatment of shareholders in English law. This legal principle could take one of two forms. Section II will consider whether it is possible to identify a *general* legal principle of equality that also happens to manifest itself in the English company law area or

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[3] Ibid, [84]–[87].

[4] Ibid, [96]–[98].

[5] *Audiolux SA v Groupe Bruxelles Lambert SA, C-101/08* [2010] 1 CMLR 39, [34]. See also *Periscopus AS v Oslo Bors SA* [2011] 2 CMLR 40, [40].

[6] Ibid, [38], [40], [42], [50].

[7] Ibid, [52].

[8] Ibid, [54]–[61].

[9] Bill of Rights 1688. See also *Entick v Carrington* (1765) 95 ER 807.

[10] *McPhail v Doulton* [1971] AC 424, 445–446.

whether English company has itself developed such a *general* principle. It will be seen that such a high-level principle does not form part of English company law. In the absence of a generalised legal principle, Section III considers to what extent there are specific manifestations of an underlying commitment to equal shareholder treatment in the legal principles applicable to companies and corporate groups (for which there is no separate regime in English law). As the Advocate-General made clear in *Audiolux*, this more fragmented legal approach represents the position in both Community law and the domestic laws of Member States. English law is no exception. Any analysis concerning how equal shareholder treatment manifests itself in particular instances is, however, complicated by the lack of precision regarding the meaning of that term. It is submitted that the equal treatment of shareholders has two aspects:[11] first, a requirement that shareholders be treated equally by the company, which for the purposes of English law equates to equal treatment by the board of directors;[12] and, secondly, a requirement that minority shareholders be treated equally and fairly by the majority or controlling shareholders. Whilst the former aspect is relevant to both public and private companies, the latter is more likely to arise in the context of closely held companies, although (as the takeover context highlights) it is not limited to such companies. There is also a variety of different legal consequences that flow from these legal examples of equal shareholder treatment. Section IV provides some concluding comments.

II. Foundations of the Principle of Equal Shareholder Treatment in English Law

1. Constitutional Foundations

In terms of identifying a general principle of shareholder equality, or at least the foundation for such a generalised legal principle, it is unlikely to be derived from any higher constitutional norm recognised by English law. Unlike Germany, England does not have a basic or higher law against which "ordinary" legislation can be tested and, unlike the US, England has no written constitution that clearly sets out a generalised principle of equality. Rather, the English constitution generally operates by way of conventions and ordinary legislation that set out constitutional principles. As these constitutional principles are contained in the ordinary acts of the legislature (such as the European Communities Act 1972 and the Human Rights Act 1998 ("HRA 1998")), they are subject to amendment or repeal in the same way as any other legislative act. Whilst there

[11] *Mucciarelli*, Equal Treatment of Shareholders and European Union Law, [2010] ECFR 158.

[12] *Automatic Self-Cleansing Filter Syndicate Co Ltd v Cuninghame* [1906] 2 Ch 34.

is a long history of English law respecting the equality of its citizens before the law, as contained in the Magna Carta 1215 and Bill of Rights 1688, neither document explicitly establishes a general principle of equality of treatment. Similarly, whilst there exist leading cases that have established a requirement of equal treatment in particular contexts, such as the impact of executive action on private citizens,[13] none can really be generalised into a more widely applicable principle of English law. This is reinforced by the fact that even the Equality Act 2010, which is the United Kingdom's most wide-reaching piece of legislation securing freedom from discrimination and equality of treatment in accessing services, premises, employment, associations and employment, is limited to the "protected characteristics" of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.[14]

Although matters could feasibly have changed with the United Kingdom's accession to the European Community and then the European Union, this has not in fact been the case. As the ECJ made clear in *Audiolux*,[15] Community law itself has not derived a general principle of equal treatment of shareholders from its general principle of equality. Nor have things altered significantly by virtue of the UK's ratification of the European Convention on Human Rights ("the ECHR"), which has been implemented into English domestic law by the HRA 1998. The HRA 1998 now requires all English primary and secondary legislation (including the Companies Act 2006) to be interpreted in light of the "convention rights" contained in the ECHR,[16] as well as requiring "public authorities" to act in accordance with its provisions.[17] The "convention rights" that are most likely to provide a foundation for any general principle of shareholder equal treatment are the prohibition against discrimination[18] (which could theoretically encompass corporate conduct that is targeted at particular shareholders who are consequently especially prejudiced by that action) and the protection of individual property rights (which could potentially cover corporate conduct that has the effect of expropriating shares).[19] In reality, however, neither right provides a basis for recognising a general principle of shareholder equality in English law. Those rights are limited to certain closely defined acts of discrimination or interference. Furthermore, the English courts have refused to give the ECHR so-called direct "horizontal effect",[20] although the English courts as "public authorities" might have to give some consideration to a party's

[13] *Entick v Carrington* (1765) 95 ER 807.
[14] Equality Act 2010, s 4.
[15] *Audiolux SA v Groupe Bruxelles Lambert SA, C-101/08* [2010] 1 CMLR 39.
[16] Human Rights Act 1998, s 3.
[17] Ibid, s 6.
[18] Ibid, Sch 1, Art 14.
[19] Ibid, Sch 1, First Protocol, Art 1.
[20] *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816.

convention rights when enforcing pre-existing causes of action that are already recognised by domestic law.[21] Accordingly, whilst a shareholder might potentially use the HRA 1998 as a means of enforcing standards of equal treatment in the context of state-owned enterprises or public utility companies,[22] the relevant convention rights would provide little assistance to a shareholder in an ordinary trading company when formulating such a claim against other private parties, whether the company itself or its directors or shareholders. Accordingly, there is little constitutional or public law basis for a general principle of equality of treatment for shareholders in English law.

2. Private Law Foundations

Given that there does not appear to be any general constitutional mandate or foundation for the principle of equal shareholder treatment in English Law, the issue arises as to whether there may be some basis for such a principle in English private law. There is certainly no such explicit private law principle of equal shareholder treatment that has general application, particularly as English tort law operates on the basis of distinct and closely defined torts rather than an overarching principle of delictual liability, as in French law. Moreover, English contract law has generally eschewed any general principle of good faith regarding the formation or performance of contracts,[23] although there are signs that this might be changing at least in the context of long-term relational contracts.[24] Nor is there any general principle of equal treatment articulated in the Companies Act 2006 ("CA 2006"). Despite this absence of any tortious, contractual or statutory basis for the principle of equal treatment, it is possible to find an underlying desire to attain results consistent with notions of equality between private actors in the development of a separate equitable jurisdiction in England.

a) Development of the Courts of Equity

The development of Equity can be traced back to the administration of justice in medieval England. At that time, justice was administered either at local level by the feudal barons or by the King's courts in a manner that was consistent across the whole country, so that it was a "common law". Local justice was intended to predominate, with the three royal courts (the King's Bench Court, the Common

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[21] Human Rights Act 1998, s 6(3)(a).

[22] *Foster v British Gas plc, C-188/89* [1991] 2 AC 306.

[23] *Walford v Miles* [1992] 2 AC 128, 138.

[24] *Yam Seng Pte Ltd v International Trading Corp Ltd* [2013] EWHC 111; *Compass Group UK and Ireland Ltd v Mid Essex Hospital Services NHS Trust* [2013] EWCA Civ 200 [105]; *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2016] EWCA Civ 396 [67]–[68]. See also *Ilkerler Otomotiv Sanayai ve Ticaret Anonim Sirketi v Perkines Engines Co Ltd* [2017] 4 WLR 144; *Nehayan v Kent* [2018] EWHC 333 (Comm); *Astor Management AG v Atalaya Mining plc* [2018] EWCA Civ 2407.

Pleas and the Court of Exchequer) designed to intervene only occasionally. As the King's courts expanded their reach and influence, the local barons objected, which in turn led to the "forms of action" available in the "common law" being frozen. Two factors led to the creation of the courts of Equity. The first was that the local courts were not able to cope with the large number of claims that might otherwise have previously been dealt with by the royal "common law" courts. The second was the inflexible and rigid nature of the "common law", which required, amongst other things, that claimants bring their pleas within certain, specific, closely circumscribed causes of actions, known as writs. Each writ (or form of action) prescribed certain specific elements of the claim, all of which had to be satisfied in order for the claimant to succeed. There also operated strict rules of pleading and proof. This meant that if an aggrieved party could not fit his claim within the stipulated formal requirements of a writ, no remedies would be available to him and he was bound to fail in his plea. The only antidote to the common law courts' rigidity in administering justice was by way of an appeal to the King in the form of a petition.[25] These petitions relied on the residual discretionary power of the King to provide redress and to do justice for his subjects where, for whatever reason, justice could not be obtained through the royal common law courts. As the King undoubtedly had more fascinating interests to pursue, this role was eventually delegated to the Lord Chancellor of the land who was able to exercise the required discretion in the King's stead.[26]

This exercise of discretion relied upon a litigant appealing to the Lord Chancellor's conscience,[27] from which developed the separate body of legal principles known as Equity. From the very outset and through its subsequent refinement, the principles of Equity were designed to supplement the common law, which continued with its characteristic rigidity and which could not be relaxed for fear of losing the certainty associated with its application. In its early days, however, the flexibility associated with the equitable jurisdiction resulted in a series of ad hoc decisions which, rather than relying on rules and principles, granted or withheld relief on a seemingly arbitrary basis. As was noted by Selden:[28]

> "Equity is a roguish thing. For law we have a measure … equity is according to the conscience of him that is Chancellor, and as that is longer or narrower, so is equity. 'Tis all one as if they should make the standard for the measure a Chancellor's foot."

Thus, early Chancery decisions were largely casuistic, with the circumstances of individual cases carrying great weight and the adjudication being highly contextual and pragmatic. There was no abstracting methodology, no doctrine of

[25] *Holdsworth*, History of English Law I (Methuen & Company), 402 et seq.

[26] *Maitland*, The History of English Law before the Time of Edward I (Liberty Fund Inc., 2010), 201.

[27] *Ewing v Orr Ewing (No 1)* (1883) 9 App Cas 34 at 40. See also *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1996] AC 669.

[28] *Selden*, Table Talk of John Selden (Cambridge University Press, 2015), 64.

strict binding precedent, and, accordingly, no commitment to the values of continuity, consistency, uniformity and predictability that supported and justified those doctrines developed at common law.[29] Subsequently, as a result of the overwhelming increase in the number of petitions, the Lord Chancellor was compelled to delegate his jurisdiction by establishing a fourth royal court, the Court of Chancery, in which the judges purported to exercise the same powers and discretion as the Lord Chancellor and the King. It was through the establishment of this more formal judicial administration that Equity gradually developed from a jurisdiction of fluid, pragmatic, conscience-based decision-making to one founded primarily upon the application of authoritative rules, maxims, principles and precedents.[30] It has been suggested that this was a natural judicial reaction to the arbitrariness of the early equitable jurisdiction, which attempted to make a virtue out of inconsistency.[31]

From 1557, decisions of the Court of Chancery began to be formally reported, which strengthened the basis for treating them as precedents to guide future courts in the application of equitable principles.[32] Indeed, one can see that modern-day equitable doctrines operate as much through principles as their common law counterparts and no longer rely upon an intuitive appeal to conscience.[33] Even as Equity was being organised into a somewhat more coherent body of law, the separate administration of equitable and common law principles and doctrines meant that there remained the possibility of a conflict between the different courts on the same issue. This conflict was famously resolved in Equity's favour in the *Earl of Oxford's Case*, in which *Lord Ellesmere* stated that "[t]he Cause why there is a Chancery is, for that Men's Actions are so divers[e] and infinite, [t]hat it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances."[34] The continued tension between the common law and equitable courts, however, only heightened the risk of inconsistent decision-making depending upon the jurisdiction invoked and the location of the relevant proceedings. Accordingly, in response to this conflict of administration, the common law courts and courts of equity were subsequently fused through the United Kingdom's Supreme Court of Judicature Acts 1873 and 1875, under which the Court of Chancery, King's Bench, Common Pleas, Exchequer, Admiralty, Probate, the Court of Bankruptcy, as well as the associated appellate courts, were consolidated to form a single Supreme Court of Judicature.[35] The creation of a unified system

[29] *Lau Siew Kim v Yeo Guan Chye Terence* [2008] 2 SLR(R) 108, [25]. See also *Gee v Pritchard* (1818) 2 Swan 402, 411.

[30] Ibid.

[31] Ibid.

[32] *Holdsworth*, History of English Law (Methuen & Company), 274–278.

[33] *Co-operative Insurance Society Ltd v Argyll Stores Ltd* [1998] AC 1, 11.

[34] *The Earl of Oxford's Case* (1615) 1 Chan Rep 1, 6; 21 ER 485, 486.

[35] *Tan Yong San v Neo Kok Eng and others* [2011] SGHC 30, [100].

for the administration of civil justice effectively abolished the two distinct court systems that were tasked with applying and developing common law and equitable principles in a separate manner. The fusion of common law and equity was, however, confined to the administration of the separate bodies of law; the substantive principles developed by the common law and chancery courts remain distinct, as does the historical distinction between common law and equitable forms of relief.[36]

b) Equity's Subjects: Trusts, Partnerships and Companies

As a result of the development of the courts of Chancery and general equitable principles, certain areas of private law became almost the exclusive preserve of equity. This included the law relating to trusts, partnerships and companies. In dealing with these areas, the Chancery courts also developed certain "maxims" to guide their conscience in achieving an equitable result in any given case. Such maxims were not, however, formal rules or principles, but simply overarching guidelines. Once such maxim was that "Equity is equality".[37] A particular manifestation of this maxim can be found in English partnership law, which provides as a "rule" for determining partners' rights and duties in relation to the partnership that "[a]ll the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm".[38] Moreover, partners are expected to treat one another fairly and English partnership law requires partners to act in each other's best interests by imposing fiduciary duties *inter se*.[39] Indeed, in *Blisset v Daniel*,[40] Page Wood VC recognised duties of good faith operating between partners. Although English company law has now been put on a strong statutory footing by the CA 2006, there is no doubt that at one time or another company law has been analogised to (or said to derive from) the English law principles relating to partnerships and trusts. This remains the case nowadays. For example, in the context of developing the principles relating to the unfair prejudice jurisdiction[41] and the jurisdiction to liquidate a company on just and equitable grounds,[42] *Lord Wilberforce* has drawn a strong link between the equitable principles applicable to the relationship between partners and the principles applicable to owner-operators in closely-held companies.[43] Indeed, in

[36] Ibid. See also *Salt v Cooper* (1880) 16 ChD 544, 549.
[37] *McPhail v Doulton* [1971] AC 424, 445–446.
[38] Partnership Act 1890, s 24(1).
[39] Ibid, s 24.
[40] *Blisset v Daniel* (1853) 10 Hare 493, 523–525.
[41] Companies Act 2006, s 994.
[42] Insolvency Act 1986, s 122(1)(g).
[43] *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 375.

O'Neill v Phillips,[44] *Lord Hoffmann* stated that "company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman *societas*, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law". Whilst the analogy with partnerships may be less perfect in publicly traded companies, the notion of equality of treatment underlying partnerships has long been a juristic reference-point for the development of company law principles.

Besides the development of partnership law, the great invention of Equity was the trust. In supervising the enforcement of trusts, the Chancery courts required a trustee to act in the best interests of the trust's beneficiaries by imposing fiduciary obligations on the former[45] and by requiring trustees to treat the beneficiaries in an even-handed manner.[46] In relation to this last duty, in *Re Pauling's Settlement Trusts (No 2)*,[47] Wilberforce J stated that "[t]he new trustees would be under the normal duty of preserving an equitable balance, and if at any time it was shown they were inclining one way or the other, it would not be a difficult matter to bring them to account". Accordingly, a trustee was under an enforceable duty to treat beneficiaries equally. Just as with the principles of partnership law, the English courts have drawn a close analogy between the role and duties of trustees, on the one hand, and those of directors, on the other. For example, the strict principle that a fiduciary cannot make a profit from his or her position as such was originally adopted as part of trusts law,[48] but then adopted as the principle applicable to directors by the House of Lords in *Regal (Hastings) Ltd v Gulliver*.[49] This in turn formed the basis for the leading modern decision on the trustee's duty not to make a profit from their position.[50] Although there have been some attempts to unpick this analogy by the courts,[51] the English courts have continued to draw a close link between the law applicable to trustees and directors. This link has even survived the enactment of the comprehensive statutory regime in the CA 2006, since, to a large extent, these equitable principles have been re-enacted in sections 171–177 of the CA 2006, which now set out the fiduciary duties of directors towards the company. These statutory duties reflect those recognised by Equity including the director's duty to act in good faith, not to make an unauthorised profit and not to put himself in a posi-

[44] *O'Neill v Phillips* [1999] 1 WLR 1092, 1098.
[45] *Keech v Sandford* (1726) Sel Cas t King 61.
[46] *Re Pauling's Settlement Trusts (No 2)* [1963] Ch 576.
[47] Ibid, 586. See also *Nestle v National Westminster Bank plc* [1993] 1 WLR 1260, 1279.
[48] *Keech v Sandford* (1726) 25 ER 223.
[49] *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134n.
[50] *Boardman v Phipps* [1967] 2 AC 46.
[51] *Murad v Al-Saraj* [2005] EWCA Civ 959.

tion conflicting with that of the company. Moreover, the CA 2006 does not purport to codify directors' duties: the legislation expressly provides that equitable principles (such as those applicable to partners and trustees) can still influence the development and interpretation of the directors' statutory duties by analogy[52] and may even provide a basis for recognising additional duties beyond those contained in the CA 2006.[53]

Accordingly, whilst neither the CA 2006 nor English private law more generally recognises a general legal principle of equal treatment (given its traditional hostility to either a general duty of good faith,[54] a general abuse of rights doctrine[55] or a general duty of care[56]), the equitable maxims relating to equal treatment underlying partnership and trusts law provide a justification for the specific manifestations of equal treatment of shareholders in English company law. As indicated above, however, an equitable maxim is little more than a guideline and lacks both the precision and force of a concrete legal principle.

III. Manifestations of the Principle of Equal Treatment of Shareholders in English Law

Despite the fact that no principle of equal shareholder treatment can be found in either English constitutional or private law, there are nevertheless particular manifestations of the underlying notion of equality between shareholders in various aspects of English company law. Most of the legal manifestations of shareholder equality apply to all companies, but there are particular manifestations that apply solely (or apply more forcefully) to either closely held or publicly traded companies. For example, the manifestations of shareholder equality that derive from the Second Company Law Directive and capital market laws are limited to publicly traded companies, whilst the equitable "*Allen* jurisdiction"[57] and the unfair prejudice jurisdiction,[58] although technically applicable to all companies, actually apply much more forcefully to closely held companies. Overall, *all* companies in English law are impacted by some manifestation of the shareholder equality principle, albeit that the scope and application of any particular manifestation may alter according to the particular context. This means that there is no single one-size-fits-all justification for the various legal manifestations of equal shareholder treatment: in the context of closely-held

[52] CA 2006, s 170(3)–(4).
[53] *Goldtrail Travel Ltd v Aydin* [2014] EWHC 1587 (Ch).
[54] *Walford v Miles* [1992] 2 AC 128.
[55] *Allen v Flood* [1898] AC 1.
[56] *Murphy v Brentwood District Council* [1991] 1 AC 398.
[57] *Allen v Gold Reefs of West Africa* [1900] 1 Ch 656.
[58] CA 2006, s 994(1).

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