IN THE COURT OF APPEAL

AT NAIROBI

(Coram:Kneller, Hancox & Nyarangi JJA)

CIVIL APPEAL NO.92 OF 1983

BETWEEN

JITENDRA BRAHMBHATT.....APPELLANT

AND

DYNAMICS ENGINEERING LTD.....RESPONDENT

(Appeal from the High Court at Nairobi, Sachdeva J)

JUDGMENT OF HANCOX JA

This appeal arises from a decision of Sachdeva J, on an application by chamber summons dated September 12, 1983, to strike out, remove and/ or dismiss a petition to wind up the company registered as Dynamics Engineering Ltd, and incorporated on April 16, 1974. The application was preceded by an application for a temporary injunction to restrain the petitioner, Jitendra Brahmbhatt, from proceeding further with the winding up petition which he had filed in the High Court on August 25, 1983, until September 27, and continued by Sachdeva J, until the hearing of the application.

The application to strike out the petition was not heard until September 30 and October 3, 1983, but as I understand him, (despite his detailed reference to *Bryanston Finance Ltd v de Vries (No 2)* [1976] 1 All ER 25) Mr Englehart, who now leads the case on this appeal on behalf of the petitioner, had no quarrel with the temporary injunction granted, which clearly had the effect of preserving the status quo until the hearing of the main application before Sachdeva J. This situation was recognised in the course of his ruling by the learned judge, who did not specifically rule on an earlier application by Mr D N Khanna, then appearing for the petitioner, that the injunction should be regarded as discharged.

After full argument and a consideration of a number of the authorities cited to him, Sachdeva J held, on October 5, 1983, that Mr Brahmbhatt had effective alternative remedies available to him for the purpose of rectifying the numerous matters of which he complained, that he had acted unreasonably in all circumstances in seeking the winding up of Dynamics Engineering Ltd, and that it was too drastic a remedy for the purpose of preserving his rights. Consequently he acceded to the application to strike out the petition with costs, and ordered that it be expunged from the register of winding up proceedings. He also gave leave to the company to publish dismissal of the winding up petition by way of not more than two advertisements in any Kenya newspaper.

Expanding on the reasons given by Sachdeva J for his decision he held that Mr Brahmbhatt's application,

involving as it did the effective freezing of the company's assets of over 11 million shillings, and the possible dismissal of its large labour force, could 'by no stretch of the imagination' be regarded as reasonable, and that the course the petitioner had taken did not appear to him to be for the purpose of genuinely ventilating his grievances before the court. In other words it was brought for the purpose of embarrassing the company and that to let it go forward would cause irreparable damage to the company. The alternative remedies available to the petitioner which Sachdeva J canvassed, were a common law action for damages, rectification of the register, an action for appropriate declarations, and finally, a petition under section 211(1) of the Companies Act, cap 486 under which statutory provision protection can be given if any members of a company complain that the company's affairs are being conducted oppressively, in effect, to any member of that company. This section and its counterpart in the English Companies Act 1948, section 210 featured quite considerably in the submissions of Mr Englehart before this court and in many of the authorities which he cited to us.

In his ruling the learned judge was clearly conscious of the fact that the application then before him could not be decided on a consideration of the opposing affidavits, but that, having regard to those affidavits, it was a proper case, both under the Rules of Civil Procedure invoked under the court's inherent jurisdiction, for the striking out of the petition.

I do not think the judge went quite so far to say that the presentation of the petition was an abuse of the process of the court, but he referred to one or two cases, for instance *Re Bellador Silk Ltd* [1965] 1 All ER 667 in which it was held that the bringing of a petition for the collateral purpose of exerting pressure on a company, in other words for an oblique motive, amounted to an abuse of such process.

The proposed amended memorandum of appeal was abandoned by virtue of a consent order in September 1984, and so we are left with that which is still a substantial memorandum containing seven main grounds of appeal and numerous subsidiary grounds the learned judge's decision, together with one matter contained in the notice of grounds for affirming the decision, filed under rule 91(1) of the Court of Appeal Rules, namely that the petition should have been dismissed for lack of compliance with rule 23 of the Companies (Winding Up) Rules in relation to the advertisement of the petition.

This was advertised on the same day as service was effected on the company, that is to say August 31, 1983, whereas, as Mr Englehart pointed out at the beginning of his submissions, the requirement by the then recently introduced amendment to rule 23, (by Legal Notice 14 of 1983 dated January 28, 1983), is that a winding up petition shall be advertised not less than seven days after service and at least seven days before the hearing, in the manner therein prescribed.

This last aspect of the appeal was dealt with, as it were, in anticipation by Mr Englehart as the last head of his argument, which after taking us through the history of the events which had taken place over the years and which resulted, in his submissions, in not only reducing Mr Brahmbhatt's influence and position in the company, but also effectively excluding him from any further participation in its affairs, were divided into six main headings. I hope I may be forgiven for expressing my views in this judgment in relation to these headings, and in relation to the submissions thereto in reply by Mr Lakha, who had led the case for the respondent company, rather than dealing seriatim with, to borrow the phrase used in *Wenlock v Molony* [1965] 1 WLR 1238, the numerous sub-paragraphs in the long, inartistic and wandering document which forms the memorandum of appeal and which overlaps each other in several respects.

I shall set out these headings, at this stage and I will endeavour to paraphrase the various events to which reference is made in the record of appeal in order to relate the submissions to them and also in an attempt to place each in perspective.

The first main head of Mr Englehart's submissions was that the court considering the matter had to decide whether a *prima facie* case had been made out that the company should be wound up. This in turn had three aspects, first that the company, in whichever manner the shareholding was distributed, was in substance a partnership in corporate form, and Mr Englehart referred us to several cases in which the association (for want of a better word) between the parties began as a partnership and was subsequently incorporated as a company with a separate legal entity. In such cases it was most inappropriate to refuse a

winding up order, particularly *in limine*, for the basic reason, if no other, that, once the relationship had irretrievably broken down, it was obvious that it should be brought to an end and that each party should not be prevented from obtaining his fair share of the assets of the business. In the instant case, of course, the association between the parties took the form of a private company, and was therefore a corporate body, from its inception in April 1974, with an additional partner, if he may so be described, Mr Bhem Singh Bhangra, who had an equal one third of the shareholding with the other two. Notwithstanding the provisions of art 101, to which references was made in the argument, Mr Bhangra retired from the company on August 10, 1976.

As to the second aspect of the first head, Mr Englehart submitted that it was apparent from the record that the two remaining members of the company, Mr Panesar and Mr Brahmbhatt, had well before May 27, 1982, reached a position where neither could repose any confidence in the other. It took steps effectively to exclude Mr Brahmbhatt from any further participation in the affairs of the company by promulgating and passing the resolution removing him as a director of the company forthwith from that date. By that time Mr Amayo had joined the board of the company, though it would appear that at that stage he was not a shareholder.

As examples of the position in relation to this second aspect, we were referred *inter alia*, to the case of *Re Yanidje Tobacco Co Ltd* [1916] 2 Ch 426, and *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360. In the first of these cases it was recognised by the Court of Appeal that the company which had been formed by two tobacco manufacturers who had amalgamated their respective businesses could fairly be described as a partnership in the guise of a private company, though in fact there was no pre-existing partnership between them. In the second case a partnership existed between the two original associates for 13 years before they decided to incorporate it as a company in 1958 for the purpose of carrying on business as dealers in Persian and other carpets. No disagreement arose until 1969, by which time the personal respondent's son had acquired an interest which gave him and his father a controlling interest in the company. This led to serious disagreement and to a resolution to remove the petitioner (who had petitioned the court under both sections 210 of the Companies Act 1948, corresponding to section 211 of the Kenya Act, and under section 222(f), our section 219(f) as a director of the company. It will therefore be seen that in some respect the facts in the *Westbourne Galleries* case were parallel to those in the instant case, save that in that case that had been a long pre-existing partnership between the two original associates, a matter referred to, though not necessarily regarded as an essential characteristic of a 'quasi-partnership' or an 'in substance partnership', by Lord Wilberforce at page 380 of the report.

Although I am in the process of setting out the general pattern and the various heads of the respective submissions before us, there is one passage from the speech of Lord Wilberforce which is so useful as a statement of the principles to which we should in general pay regard in this appeal that I propose to set it out before continuing with the general pattern of this argument. After describing the Court of Appeal decision in *Re Yenidje Tobacco Co Ltd* (*supra*) as the leading authority on the 'deadlock' case, and, referring to the other authorities he cited as a 'sound and rational development in the law which should be endorsed', he continued:

> 'The words "meaning just and equitable" are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure. That structure is defended by the Companies Act and by the articles of association by which share-holders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations that is, 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. It would be impossible, and wholly undesirable to define the circumstances in which these

considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition 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) and agreement, or understanding that all, or some (for there maybe "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. It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves.'

The third aspect of the first head of Mr Englehart's submissions was that if it could be shown that there was a justifiable loss of confidence on the part of one associate in the conduct and management of the company's affairs, in regard to the company's business, which was grounded on some reprehensible conduct some conduct or a course of conduct showing a lack of probity on the part of the person or persons concerned in the management of the business, then this would bring into play the words 'just and equitable' in para (e) of section 219 and would lead to an order of winding up. Under this aspect Mr Englehart cited to us two cases in particular, *Loch v John Blackwood* [1924] AC 783 and *Re Lundie Brothers Ltd* [1965] 1 WLR 1051. The first of these appears to have been the earliest case outside the United Kingdom in which the question of the winding up of a company similar in nature to Dynamics Engineering Ltd was considered in depth, and it does indeed support the proposition which I have just stated as regards the conduct and probity of the directors of a small company, though it must be said that that company carried on a small family engineering business which had been started by the testator and which was left to his relatives with power to the trustees to convert the business into a company. On a petition for winding up the shareholders, who were not directors of the company the Privy Council allowed an appeal from the West Indian Court of Appeal and restored the original court's order winding up the company, basically on the grounds of the conduct of the directors to which I have referred and that any confidence in the management of the company had consequently come to an end. It may be observed that a common feature between *Loch v Blackwood* and one of the complaint in the instant case is that in *Loch v Blackwood* the director with the controlling interests had paid £2,000 to buy another party's shares out of a large sum which he and his wife had voted to themselves from the funds of the company. This no doubt was a factor leading to the lack of probity which the board found existed.

Re Lundie Brothers was a case, as Plowman J found, involving an 'in substance partnership', in which there were concurrent petitions under section 210 (our section 211) and section 222(f) (our section 219) of the Companies Act 1948. Under the former section a shareholder is, as I said earlier, required to show that the affairs of the company are being conducted in a manner oppressive to himself or some other shareholder. Plowman J held that the petitioner had failed to show oppression against himself as a shareholder, in the sense of a lack of probity and fair dealing towards himself as a member of a class of persons namely shareholders with a propriety right in the company itself. Accordingly he refused to make an order under section 210 but he went on to hold that the petitioner had been effectively and unjustifiably excluded from the management of the business of the company (as in one of the complaints made in the instant case) and that it being, in effect a partnership, it was just and equitable that a winding up order should be made.

I now pass to the second head of Mr Englehart's case on behalf of the appellant, which was, as he maintained, that the learned judge's approach to the application to strike out the petition *in limine* was erroneous. In relation to this head Mr Englehart referred in depth to the relatively recent case of *Bryanston Finance Ltd v de Vries (No 2)* [1976] 1 All ER 25, and to the fairly extensive citations from the judgment of Buckley LJ by the learned judge in this case. Mr Englehart complained that the judge had failed to realise that the *Bryanston* case was concerned with an injunction brought to restrain shareholding with an admittedly minimal holding of shares (62 shares out of over 7 million shares) from presenting a

petition for winding up on the ground only that the company had failed to respond to a query he had made regarding an entry in the 1973 annual accounts. There had been a history of litigation between the parties involving allegations of conspiracy and defamation and one abortive petition for winding up. It was contended for the company that the evidence showed that the proposed second petition would clearly be an abuse of the process of the court. A passage from Buckley LJ's judgment was in fact referred to by the judge in this case and it is as follows:

> 'It has been recognised that the jurisdiction of the court to stay an action *in limine* as an abuse of process is a jurisdiction to be exercised with great circumspection, and exactly the same consideration must apply to a'*quia timet* injunction to restrain commencement of proceedings. These principles are, in my opinion, just as applicable to a winding up petition as to an action. The right to petition the court for a winding up order in appropriate circumstances is a right conferred by statute. A would-be petitioner should not be restrained from exercising it except on clear and persuasive grounds. I recognise that the presentation of a petition may do great damage to a company's business reputation, though I think that the potential damage in the present case may have been rather exaggerated."

The following passage from the judgment of Stephenson LJ seems greatly to have impressed the judge:

> 'It is the practice for a company which objects to a shareholder improperly presenting a petition to wind up to move for an injunction to restrain him. The court's jurisdiction to prevent an abuse of its process: *Charles Forte Investment Ltd v Amanda and Mann v Goldstein.*"

However three matters seem to have been overlooked in relation to that case. They are first that the applicability of *Charles Forte Investments Ltd v Amanda* [1963] 2 All ER 940, in which the petition contained very grave allegations against the character of the directors and in which the Court of Appeal, basing itself very largely on the much earlier case of *Re Cuthbert Cooper & Sons Ltd* [1937] 2 All ER 466, held that the petition would be an abuse of the process of the court and was not a relief which the intending petitioner could properly invoke, was considerably lessened by the express disapproval of *Re Cuthbert Cooper & Sons Ltd* in *Ebrahimi v Westbourne Galleries* (*supra*) by Lord Wilberforce and Lord Cross (who was a member of the Court of Appeal in the *Charles Forte* case). The second is that in *Bryanston Finance Ltd v de Vries* there was an express concession, 'an inevitable concession' it was said by Buckley LJ, that the defendant's petition might succeed. Once that concession was made then it seems to me obvious that if the true test, or the central question, as Mr Englehart put it, in considering a striking out application is whether the petition is bound to fail, as we stated in *Charles Forte Investment v Amanda*, the answer to that question must have been in the negative and the petition had therefore, to be allowed to go forward. Thirdly, in the *Charles Forte* case it was obvious that there was another more suitable remedy than a petition for winding up if the petitioner really desired the transfer of those shares, which would not in any way affect the rights of the other numerous shareholders. This case is also relevant to the third head of Mr Englehart's submissions. Before turning to that head I should just refer again to *Wenlock v Molony* (*supra*) in which it was held that the master had been quite wrong to try the issues raised in the action upon the affidavits before him and that, while the proposed action might well have failed, could not be said that it would inevitably have done so.

I therefore come to the third head of the appellant's submissions, which are the matters expressly enjoined to be considered under the latter part of section 222(2) of the Act, namely were there any effective alternative remedies available to Mr Brahmbhatt, an issue upon which the learned judge emphatically found in favour of the respondent. The first subsection provides for the course to be taken by the court on the hearing of a petition, whereas the second subsection may in some respect be regarded as an extension of para (e) of section 219, for the court's direction thereunder is only exercisable when a petition has been presented by members of the company under sub-para (e). Subsection (2) pre-suppose that this relief is available to the petitioner or petitioners both in the form of a winding up and by some other means. If the court then goes on to find that the petitioners are acting unreasonably in seeking to have the company wound up rather than pursuing the other means available, then the earlier and mandatory part of the subsection does not apply and the court is not obliged to make a winding up order. This was in effect the

situation in'*Charles Forte Investment v Amanda* (*supra*) and is plainly that which the learned judge conceived to be the situation in the instant case for he set out the alternative remedies which he said were available. These were subjected to close analysis by Mr Englehart, in the course of which he referred to *Loch v Blackwood* (*supra*) and also to *Re A & B C Chewing Gum Ltd* [1975] 1 WLR 579, in which extensive references were made to the *Westbourne Galleries* case, which was, unlike *A & B C Chewing Gum*, an expulsion case. The instant case is of course, also one of expulsion in view of the resolution, to which I have already referred, dated May 27, 1982, to remove Mr Brahmbhatt as a director. In the *A & B C Chewing Gum* case there was a shareholder's agreements that the petitioners were to participate in the day to day management of the company and it was the repudiation of this agreement, and of the petitioner's right to replace a director in order to secure the participation, which Plowman J held was so basic an obligation that if broken, the conclusion must be that the association should be dissolved. He held that the breach was analogous to an expulsion case and that a winding up order should be granted, notwithstanding that to do so would henceforth deprive the company of the benefit of the licence granted to it by the petitioning company to manufacture their chewing gum in the United Kingdom. *A & B C Chewing Gum* was not therefore realistically a case where any alternative remedy was pursued or considered.

The next case that was referred to under this head was *Re Lundie Brothers* which I have already dealt with. There the section 210 (section 211 in Kenya) remedy was seriously considered but, in the end, rejected in favour of a winding up order. However, in that case it must be noted that Plowman J, rightly or wrongly, held that something additional to the requirement under section 222(f) (section 219 (f)) had to be established so as to succeed under section 210.

The only other cases separately referred to under this head were *Re Swaledale Cleaners Ltd* [1968] 1 WLR 1710 and *Re Bellador Silk* (*supra*). The first concern the rectification of the share register of the company, and its only relevance seems to have been Danckwerts LJ, obviously forgetting that he had, tactically if not expressly, approved the *Re Cuthbert Cooper* decision in *Charles Forte Investments v Manda*, expressly disapproved of it in *Swalendale Cleaners*. The point was noticed by counsel for the respondents during his submissions in the *Westbourne Galleries* case. In *Re Bellador Silk* petition had been presented to the court under section 210 (section 211) on the grounds of oppression, whereas in the truth the object of presenting the petition was to enforce repayment of a loan made to the company by the petitioner's group of companies.

Mr Englehart submitted that if the various events to which he referred in the record of appeal and which were well documented, namely the gradual erosion of Mr Brahmbhatt's position and shareholding; the strange use of the supposed casting vote of Mr Panesar, the enormous increase in the remuneration of the managing director after Mr Panesar had replaced Mr Brahmbhatt in that capacity in early 1982; a similar large increase in the rent the company was expected to pay under its lease with one of Mr Panesar's companies form Shs 15,000 to Shs 55,000 per month; and the large sum that the company is said to have voted to Mr Panesar to enable him to buy shares; had any substance then it could not possibly be argued that Mr Brahmbhatt was acting unreasonably or from a collateral or oblique motive in seeking a winding up instead of another remedy.

With these considerations in mind I must now turn to the fourth head of the submissions which is specifically based on section 222(2) itself, rather than as a statutory precondition of relating to remedies alternative to a winding up. Naturally head four overlaps head three in some respects, and I have already dealt with part of Mr Englehart's submissions under this head.

Mr Englehart's main complaint under head four was that the judge had in effect reversed the wording and requirements in section 222(2) by describing it as an alternative remedy to a winding up, and that it was a hurdle which the petition claiming that it was just and equitable that the company should be wound up. It is true that in the course of his judgment, in the passage:

> 'In these circumstances the law provides alternative remedies in section 211 and 222(2) of the Act.'

the judge does not purport to regard sub-section (2) as 'an alternative remedy' to section 219(f). However he then went on to set out the subsection *in extenso*, and although Mr Englehart mentioned the fact that the learned judge had underlined the last and restrictive portion of it as being significant, I cannot see that, in the context of his judgment and the reference to it which counsel made, that there was really any misapprehension as to the wording or effect or sub-section (2) in the judge's mind. At all events it is perfectly clear from the wording of this part the statute, as I have already stated, that it can only come into operation once a winding up petition had been presented by a member who is also a contributory which, by section 214, means a person liable to contribute to the assets of the company in event of a winding up. In the course of his argument on this aspect Mr Englehart said that that which I have called the restrictive portion of sub-section (2) was meant to cater for a harsh case where winding up is not appropriate, such as where an order to compel registration of the transfer of a minority shareholding is the real relief required as in *Charles Forte Investments v Amanda* I note that in that case Cross J said, in relation to the suggestion that section 225(2) of the English Acts (which is the counterpart of section 222(2) of the Kenya Act) had altered the position with regard to a winding up and that the subsection only comes into play if and when the court is satisfied that the petitioner is entitled to a winding up order. This is exactly the position here and confirms that which I have just said. I have already covered the relevant passage in the other case to which reference was made under this head namely, *Re A & B C Chewing Gum Ltd*.

I accordingly pass to head five of Mr Englehart's submissions, under which he considered the question of *mala fides*, or malice, as it was referred to at one stage. It is suggested in ground 5 of the existing memorandum of appeal that the learned judge drew many wrong inferences from the facts in this respect. Mr Lakha, in his submissions to the High Court, asked rhetorically what could possibly be the motive of the petitioner, in view of his alleged unreasonable conduct, which he put forward, and there can be no doubt that the learned judge, basing himself upon this submission, impliedly found that the petitioner's motive in presenting the petition was to bring the company to ruin. It is also alleged in the affidavit of Mr Panesar in reply to the petition that the appellant was running another private company Richfield Engineering Co Ltd which was in competition with it in respect of another large contract, and that this also motivated him in petitioning for winding up. I do not find in the judgment any specific mention regarding this particular allegation beyond the fact that the appellant had repudiated it in his affidavit of October 3, 1983, thought the judge said:

> '… but nevertheless that does not alter his attitude towards the company.'

I apprehend that the correct starting point in the consideration of head five is what is the correct purpose of bringing a winding up petition. As was stated in *Mann v Goldstein* [1968] 1 WLR 1091:

> 'The legitimate purpose of such a process is to wind up a company on a ground specified in the Companies Act, which, so far as material to this case, is the ground that it is unable to pay its debts.'

It is equally a legitimate ground that is just and equitable to wind up the company, for which, Mr Englehart has submitted under the first head, a *prima facie* case existed in three separate respects. What therefore is the position if it is shown that a petitioner is actuated by collateral or improper motives in seeking a winding up? I consider that the law is well stated in this respect both in *Bryanston Finance Ltd v de Vries* and in *Mann v Goldstein*. In the latter case Ungoed-Thomas said:

> 'I come now to the allegation of lack of *bona fides* and to abuse of process. It seems to me that to pursue a substantial claim in accordance with the procedure provided in the normal manner, even though with personal hostility or even venom, and from some ulterior motive, such as the hope of compromise or some indirect advantage, is not an abuse of the process of the court or acting nala fide but acting *mala fide* but acting *bona fide* in accordance with the process.'

In *Bryanston Finance Ltd v de Vries*, Buckley LJ said, at 33:

> 'The learned judge, rightly in my opinion, thought that a petition could not be an abuse

> simply because the petitioner was actuated by malice. If a petitioner has sufficient ground for petitioning, the fact that his motive for presenting a petition, or one of his motives, may be antagonism to some person or persons cannot, it seems to me, render that ground less sufficient. If, on the other hand, he has no sufficient ground, his petition will be an abuse, whether he be actuated by malice or not. I personally feel no doubt that Mr de Vries (whether rightly or wrongly) is genuinely of the opinion that Mr Smith is conducting the affairs of the plaintiff company and of the group for his own personal advantage and in a manner oppressive to the shareholder. If Mr de Vries were able to make this good, he would be very likely to succeed in obtaining a winding up order. The fact that his belief was coupled with, or even fed or generated by, personal animosity against Mr Smith would not, I think, disentitle him to such an order.'

It would therefore seem that even if *mala fides*, or even malice, is established in this case, upon which it might be thought to be difficult to make a finding on affidavits alone in which there are allegations, counterallegations, and repudiations, all of which are untested in crossexamination, this should not affect the conclusion as to whether a *prima facie* case for winding up exists.

I accordingly come to the final ground, which was not, in fact, part of the appeal but represented Mr Englehart's answer to the notice of the additional ground for affirming the decision of the learned judge. It was, I think, common ground that at the time the petition was advertised, it did not comply with rule 23 as it was after the 1983 amendment, which requires advertisement not less than seven days after its service on the company and, in addition, at least seven days before the hearing, which in my view can have no other meaning than a reference to the hearing of the petition and not, for instance, to the hearing of an application such as that with which we are concerned in the present case. The consequence of a breach of the rule is that the hearing of the petition is cancelled. Mr Englehart drew our attention to rules 201 and 202 which gives a general power to extend time and to waive an irregularity which does not occasion substantial injustice. He submitted that a breach of rule 23 was not irredeemable, that it was not his wish to have the appeal decided on technicalities and that in any event the court would be reluctant to penalize a party for the mistake of his advocate which was obviously due to change in the law. Mr Lakha submitted on this aspect that it was obvious from the timing of the advertisement that the petitioner's intention was to cause serious harm to the company's reputation. He invited our attention to the Kenya case of *Cruisair Ltd v CMC Aviation Ltd (No2)* [1978] KLR 131, in which the petition was advertised before it was served on the company and which led to the appointment of receivers and did irreparable damage, and to the note in the All England reports of *Re Signland Ltd* [1982] 2 All ER 609 in which a breach of the similar English rule was regarded very seriously by Slade J and caused him to consider striking out the petition.

Having adopted the classification of the submissions advanced by Mr Englehart I now proceed to consider the replies made in respect of them by Mr Lakha in, if I may be permitted to say so, his admirably concise but lucid submissions, in which he very largely followed the pattern already set.

Mr Lakha began by referring to Mr Panesar's affidavit of September 23 in which he specifically refuted the suggestion that Dynamics Engineering Ltd was ever intended to be run as a partnership. Mr Panesar deponed that this was clear from the terms of the Memorandum and Articles of Association of the company, and from the passing of the resolution of April 4, 1977, after the retirement of Mr Bhangra, whereby art 8 of the Articles of Association was deleted. Article 8 had provided for the division of the share capital equally into three and had provided that this equality should be maintained at all times. Mr Lakha pointed out that this resolution a year earlier allocating to Mr Panesar double the number of management 'A' shares that were held by Mr Brahmbhatt, was signed by Mr Brahmbhatt. The relevance of the earlier resolution was passed, the equality provisions was still in force.

Mr Lakha was therefore submitting, in effect, that once it was recognized that the composition and conduct of the affairs of the company were such that it did not fall into the class of quasi partnerships, or in substance partnerships to which Lord Wilberforce referred, then matters would be seen in their true light and the supposed relationship and duties that would exist in such cases were inapplicable to this one. The two authorities on which Mr Englehart had relied were both distinguishable from and inapplicable to

the instant case. Dealing with *Ebrahimi v Westbourne Galleries* Mr Lakha laid considerable emphasis on the fact that there had been a pre-existing partnership for about 13 years, and there were otherwise many characteristics of a partnership in *Westbourne Galleries Ltd*. It is certainly true that counsel for the petitioners conducted the case on that basis, see for instance, the submissions of Mr Rymond Walton QC (as he then was) where he says:

'It is always a serious breach of partnership duties to exclude a partner from the management of the firm.'

followed by a reference to the standard week on this subject namely *Lindley on Partnership* (13th Edn). Is equally true that the House of Lords recognised that *Westbourne Galleries* was a quasi-partnership, and this is evident form the citation from the speech of Lord Wilberforce that I set out earlier in this judgment, in which the accent is on personal rights expectation and relationships. Moreover, Mr Lakha said that in *Westbourne Galleries* the petition was presented promptly and not after a 15 month delay form the excluding event, as in the instant case.

As regards the *Yenidje Tobacco Co* case, it is equally clear that the Court of Appeal proceeded on the basis that the facts were analogous to a partnership, because Lord Cosens-Hardy MR said:

> "In those circumstances, supposing it had been a private partnership, an ordinary partnership between two people having equal shares, and there being no other provision to terminate it, what would have been the position?'

and this passage again followed by a reference to the law of partnership and to the Partnership Act. However the main distinguishing feature between that case and this, Mr Lakha urged, was that the decision was made after a winding up petition had been presented to which totally different considerations would apply than to an application to strike out a petition *in limine*. The *Yenidje* case was, of course, a case in which, to coin a phrase, a state of the utmost animosity and deadlock had been reached, but it is equally obvious in this case that by May 1982, matters had reached such a pitch that neither party could be expected to continue to work amicably with the other.

Mr Lakha then dealt with the alleged reprehensible conduct of Mr Panesar in some detail. He did not seek to go away from the fact that resolutions had been passed removing Mr Brahmbhatt successively from the offices of managing director, in January 1982, and as a director in May 1982 but he specifically refuted the charges of reprehensible conduct on the part of Mr Panesar. In particular the circumstances leading to the upward revision of the rent were set out in para 16(b) of Mr Panesar's affidavit of September 23, 1983 and were that the proposed figure of Shs 55,000 was in line with rents prevailing in the market and was, in any event, approved by a proper though informal, board meeting, the resolution for which was, however not signed by Mr Brahmbhatt. Mr Lakha pointed out that his client had in the same affidavit freely admitted the withdrawal of Shs 1,192,000 as detailed in the petition, but he claimed that the amounts it comprised were withdrawn under agreement reached between the parties in accordance with draft accounts prepared by the appellant for the year 1978, and that some of them represented the re-payment of *bona fide* loans to the company. Moreover, Mr Panesar said in his affidavit, equally large sums of money had been withdrawn from the company by the appellant and that he had given himself large credit facilities without any supporting document or authority whatsoever. If the withdrawal was seen to be for the purchase of shares, then Mr Lakha said, as this would be a clear contravention of section 56(1) of the Companies Act, it was strange that although the withdrawal was mentioned, it formed no part of the petition that this was used or intended for the purchase of shares in the company. As counsel for the company said in the *Westbourne Galleries* case, therefore the appellant should be tied to the allegations in his petition.

Mr Lakha also distinguished the *A & B C Chewing Gum* case, which was decided on the basis that it fell into the same class as the other partnership cases, because in that case there had been express repudiation of the shareholder's agreement and the articles, and therefore of the relationship between the two parties, and that this was the reason why Plowman J made the winding up order. Mr Englehart replied to this by saying that the key to the *A & B C Chewing Gum* case was that the order was made after a full hearing and that there was no attempt to decide disputed questions of fact on a preliminary application.

Passing to the second head, Mr Lakha maintained that the learned judge's approach to the application was perfectly proper and that he twice directed himself that the matter could not be resolved on affidavit evidence alone, the second occasion being an emphasis of the first. Mr Lakha referred us to four passages in the judgment which showed that the judge was fully alive to the necessity to exercise great circumspection before acceding to an application to strike out a petition twice, citing, as I have earlier said, the same passage from Buckley LJ's judgment in the *Bryanston* case. This showed, Mr Lakha claimed, that the judge was fully aware of the need for caution before making a striking out order. Mr Lakha again emphasised that which I have already mentioned in relation to the *Bryanston* case, namely that there was an 'inevitable' concession that the petition might succeed and, as Mr Lakha said, Buckley LJ immediately after dealing with this concession continued:

> 'I consequently reach the conclusion that the supposed petition has not been shown to be such as would be an abuse on the ground that it could not possibly succeed.'

Mr Lakha said that there was no question here that the judge had attempted to decide the issue upon the principles laid down in relation to interlocutory injunctions in *American Cyanamid Co v Ethicon* Ltd [1975] 1 All ER 504, in which Lord Diplock had said that the party seeking such an injunction had merely to show that there was a serious question to be tried. Mr Lakha maintained that the judge was amply justified in reaching

the conclusion that the petition could not possibly succeed for the four main reasons to which reference has already been repeatedly made, namely:

1. The breach of the advertisement rule which was fundamental;

2. The appellant clearly had alternative remedies;

3. The judge made a clear and justifiable finding under the latter part of section 222(2) of the Act that the appellant was acting unreasonably in seeking a winding up, and

4. From the material on record the appellant's lack of good faith in presenting the petition was manifest, in particular, in relation to the timing of the advertisement.

Coming to the question of alternative remedies the judge had plainly considered the remedies, other than winding up, available to the petitioner and having done so, had answered this issue affirmatively and reached the conclusion he did. He had found that a winding up petition was too drastic a remedy in all the circumstances of the case. As a part of this aspect Mr Lakha referred us to the petition which contains prayers for 26 forms of relief of which 22 are for declarations. As far as I can see there are actually only 14 declarations sought in the prayers in the petition, but at any rate it is sufficient to say that there are several such prayers and that Mr Lakha points to their inclusion in the petition as showing that the appellant was perfectly well aware of his alternative remedies, even though the prescribed form of a petition in the schedule to the Winding Up Rules has not been adhered to.

In short Mr Lakha submitted that the judge had not decided disputed questions of fact upon the affidavits filed, that he had properly directed himself on all the issues and the principles to be applied, particularly with regard to section 222(2), which, as was clear from the concluding portion of the judgment of Sir John Pennycuick in *Charles Forte Investments v Amanda*, only came into play once a petition had been presented by a contributory, as was this case here. After addressing his mind to all these matters the judge had properly arrived at the conclusion that the petition was bound to fail and had, accordingly, struck it out.

As regards the question of *mala fides*, Mr Lakha doubted whether this was properly a ground of appeal, but upon a true reading of para 5(b) and (c) of the memorandum of appeal, it does seem to me that the appellant is challenging the judge's findings as regards his motives in presenting the petition and, accordingly, that we are properly seized of this issue on the appeal. The timing of the advertisement was not only unfortunate but evidence of malice on the part of the petitioner, coming as it did after Mr Panesar

had been away from Kenya and on the very day that he returned from Japan. Moreover the addition of the word''Bankruptcy' in the heading of the petition when this had plainly been deleted by the amending legal notice in January 1983, was a further instance of the spite which actuated the petitioner in taking the course he did.

Taking the aggregate of all the facts on record, including the 15 month delay after the expulsion resolution, Mr Lakha submitted that the learned judge was amply justified in deciding as he did that as Lord Cross said in the *Westbourne Galleries* case, the petitioner had not come to the court with clean hands, that the petition was an abuse of the court's process, such as should be visited with an order to strike out. He accordingly asked us to dismiss the appeal with costs.

Having considered all the submissions on behalf of the appellant/petitioner and on behalf of the respondent company, it is my view that this is a petition which ought to have been heard and that the parties should have had an opportunity to have the disputed questions of fact resolved. This was not a plain and obvious case for striking out, and neither could it be said, on all the material, a great deal of which was disputed on the facts or if not directly disputed, at least regarded in a different light by each party, that the petition was bound to fail. This was the test adopted in *Charles Forte Investment Ltd v Amanda,* a test which even though the decision was wrong as regards that part of it which applied the *Cuthbert Cooper* case, has been referred to in most of the subsequent authorities, and I have no doubt that it is the correct test. As Lord Diplock said in the *American Cyanamid* case:

> 'This [ie balancing the relative disadvantage to each party] however, should be done only where it is apparent on the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking on anything resembling a trial of the action on conflicting affidavits in order to evaluate the strength of either party's case.'

It is true that passage was referring to the question of whether the party concerned could be compensated in damages on an interlocutory injunction, but it is in my view an admirable statement of the correct approach to an application to strike out a winding up petition. Finally, in regard to the principles to be observed on applications to strike out, I would refer to an earlier East African case in which Ainley J as he then was said in *Jamdadas Sodha v Gordandas Hemraj* (1952) 7 Uganda Reports at 11:

> 'The nature of the action should be considered the defence if one has been brought to the notice of this court, however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court.'

I have reached my conclusion having paid regard to the arguments for and against the appeal, on head one to four, since I think there was arguably a *prima facie* case for a winding up, that the striking out order was premature, and that it was not satisfactorily shown that the appellant had effective alternative remedies to a petition for winding up. In my view heads three and four were different aspects of one issue and were interrelated.

In regard to the head five, the issue of *mala fide*s, I have had the advantage of reading in draft the judgment of Kneller JA. I entirely agree with the reasoning and conclusion of Nyarangi JA, whose judgment I have also had the advantage of reading in draft, as regards head six.

For all the foregoing reasons, then, I would allow the appeal, I would set aside the learned judge's order striking out the winding up petition and I would order that the petition should proceed to hearing subject to the Rules being complied with. I would not make any order regarding prayer five in the memorandum of appeal as regards the proposed further advertisements, and I agree that the notice of grounds for affirming the decision should be dismissed. As however in all other respects of appeal has, in my judgment, succeeded, I would award the costs of this appeal and of the proceedings of the High Court to the appellant.

Nyarangi JA. Before preparing this short judgment I have had the advantage of reading in draft the judgments of Kneller and Hancox JJA. So fully have they covered aspects of the law and the facts of this case which they have dealt with that I can, at no great length, express a view on grounds 16 and 17 of the amended memorandum of appeal which state as follows:

> Ground 16 "The court below erred in granting liberty to publish two advertisements of the order of dismissal at the expense of the appellant."
>
> Ground 17 "Publishing of the advertisement after dispute on the contents of it, before the court settled the dispute on the form of it, was contempt. Alternatively – The court below erred in settling the format of the advertisement without reference to the appellant."

The respondent filed a notice of grounds for affirming the decision under rule 91 of the Rules of this court and contended that the trial judge ought to have dismissed the petition for want of compliance by the appellant of rule 23 of the Companies (Winding Up) Rules as amended by LN 14 of 1983. Mr Lakha for the respondent argued that the advertisement was an infringement of the rules, not an irregularity and fatal to the petition. Counsel pointed out that after the delivery of the judgment the subjectmatter of this appeal, the rules were amended in January1983, that no application was made to the trial judge for the exercise of his discretion, no leave sought to advertise, that breach of a rule designed to prevent incalculable harm cannot be regarded as formal or just irregular, and that the court should adopt the reasoning of Slade J in *Re Signland Ltd* [1982] 2 All ER 609, give effect to the mandatory rule and strike out the petition. Mr Englehart preferred to put the appellant's case on a comparatively narrow ground and said the fallacy behind the question is that the trial judge wasn't hearing a petition but was hearing the respondents' application to strike out the petition before it could be heard. There was no valid advertisement in accordance with the Winding Up Rules.

Until January 1983, every petition had to be advertised at least seven days before the hearing otherwise the appointment for hearing would be cancelled unless the petitioner or his advocate appeared before the registrar to satisfy him that the petition had been duly advertised (rule 28). Under the Companies (Winding Up) (Amendment) Rules 1983 (LN 14 of 1983), except where the court gives leave to advertise before service, every petition shall be advertised not less than seven days after service on the company and at least seven days before hearing. The fact of the matter is that the petitioner could not have complied with rule 23 after September 12, 1983; he was already restrained *inter alia* from advertising by an injunction. If the appeal were to succeed, the petition would have to be advertised in accordance with rule 23. The petition got nowhere near seven days before hearing. Furthermore, if the petitioner does not duly advertise the petition in the manner prescribed by rule 23, a judge or the registrar has discretion to direct otherwise. Besides and perhaps more to the point, under rule 201 the court may, in a fit case, extend or abridge the time set by the rules or fixed by any order of the court:

> 'these Rules shall be invalid by reason of formal defect or any irregularity'

unless the court seized of the matter is of the opinion that substantial injustice has been caused and that the injustice is irremediable.

Under the two rules the court has the widest possible discretion which discretion the trial judge exercised in the appellant's favour and I am not persuaded that he acted on wrong principle. There was no complaint that the company suffered any prejudice or any injustice.

In my opinion, therefore the failure to comply with rule 23 is not fatal to the petition and I would dismiss the notice of grounds for affirming the decision. I too would allow the appeal and I would make the orders proposed by Hancox JA including orders on costs.

Kneller JA. I do not wish to deal with the points which Hancox JA has. I agree with his findings and conclusions on all those matters. I will, however briefly touch upon the issue of *mala fide*s which (pace Mr Lakha) is the substance of para 5(b) and (c) of the memorandum of appeal. It would not be right for this court to take any final view of the motives of the petitioner because this will be a matter of evidence

and submissions which the learned judge of the High Court will have to consider and in the end decide whether or not the petition was an abuse of the process of the court. So the fact that the advertisement appeared in the newspaper the same day that Mr Panesar returned from Japan might or might not be more than coincidence, whether or not the word bankruptcy in the heading of the petition was the error of the advocate for the petitioner or was deliberately included in the instructions of the petitioner and the delay of 15 months before the petitioner moved after he had been expelled from the management and day to day running of the company would probably have been sifted by the High Court. In short, this issue in the High Court will be whether or not the petitioner has a sufficient ground for petitioning? The fact that he is vexed by the manoeuvres of Mr Panesar would not jeopardise the answed. See Buckley LJ in *Bryanston Finance Ltd v de Vries (No 2)* [1976] 1 All ER 25, 33.

I agree with Nyarangi JA in his reasoning and conclusion relating to the petitioner failure to comply with (the amended) rule 23 and with rules 201 and 202. As Nyarangi JA also agrees with all that has fallen from Hancox JA, the orders of the court are that the judge's order striking out the petition is set aside, the petition is to be restored to the lists for hearing as soon as the rules have been complied with, there will be no further advertisement of the petition, the notice of grounds for affirming the decision is dismissed and the costs of the appeal and of the proceedings in the High Court will be paid to the appellant by the respondent. Orders accordingly.

Dated and delivered in Nairobi this 11th day of August 1986.

A.A.KNELLER.

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JUDGE OF APPEAL

A.R.W.HANCOX

.....

JUDGE OF APPEAL

J.O.NYARANGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR