REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

WINDING-UP CAUSE NO 12 OF 1977

IN RE GARNETS MINING CO LTD

JUDGMENT

Mrs Beth Wambui Mugo, the petitioner, asked this Court on 14th October 1977 to winding up Garnets Mining Co Ltd ("Garnets") under the provisions of the Companies Act ("the Act") or to make any other order which the Court thought just (but none was suggested in the entire proceedings) and, finally, to provide the costs of the petition to her in priority out of the assets of the company.

The petitioner was supported by eight alleged creditors of Garnets, namely:

- Mr George Nicholas Monnas Shs 145,622/80
- Mr George Nicholas Chege Shs 4,427
- Mr Henry ole Rupasi Shs 6,630
- Mr Moses Lakson Shs 6,800
- Mr Daniel Eza Shs 9,500
- Mr Andrew Kibathi Shs 10,547
- Livingstone Registrars Ltd Shs 39,326/70
- Total Shs 222,853/50

Garnets vehemently opposed this and asked the Court to dismiss the petition with costs.

The petitioner's grounds for her prayers were that (i) the affairs of the company were being conducted in a manner which is oppressive to her; (ii) its substratum had gone; and (iii) it was just and equitable that the company be wound up. The Court made her set out her interests in having Garnets wound up and her counsel reluctantly did so in her amended petition on 9th February 1978 and they were that (a) a full investigation be carried out as to the manner in which the mining produce of Garnets was sold prior to April 1976 and, in particular, as to the prices obtained; (b) a full investigation be carried out as to the management of Garnets and, in particular, the keeping of the accounts by Mr Kroussaniotakis and Mr Tsatsaronis which would result in Messrs Papaeliopoulos, Kroussaniotakis and Tsatsaronis being liable to pay substantial sums of money to the company; and (c) the other directors (Mr Kroussaniotakis and Mr Tsatsaronis) wish to continue running the company of which the petitioner is a shareholder and director without considering her wishes as to its working, business to be engaged in or any other matter at all (which should be halted).

The procedure for winding-up a company does not provide for an answer or a defence or any pleading in reply to all this; but Garnets made its position clear in affidavits from Mr Kroussanitakis, Mr Tsatsaronis, about whom more later, and employees or partners of its London solicitors, Mrs Rayment and Mr Wellings, and, of course, its Kenya advocates' submissions. Garnets denied the oppression, vanished

substratum, justness or equitableness of winding it up, the alleged interests of the petitioner and, instead, declared the petitioner was guilty of breaches of her fiduciary duty to the company and should resign her position in it, and/or sell her share in it, or just grit her teeth and endure the legitimate moves of Messrs Papaeliopoulos, Kroussanitakis and Tasatsaronis to restore to the company its former property, funds and position in Kenya which the petitioner had almost or temporarily wrecked. Her petition should be dismissed on various technical grounds and/or because she had failed to make out her case in it, and/or because she came to this Court with very unclean hands.

The overall issue, then, in the Court's judgment, was where it was just and equitable to order that Garnets should be wound up under the Act.

The petitioner alleged that it was; and at the end of the day she had to prove that it should be. The standard of proof she had to attain in this was the usual one in a civil matter, namely she had to show, on the balance of probabilities, that this order should be made.

The material which the Court had to answer the issue included: the (amended) petition, verifying affidavit, and [Kneller J then listed the affidavits which had been sworn, their dates and the names of the deponents].

The relevant law is this. A company may be wound up by this Court if, among other things, the Court is of the opinion that it is just and equitable that the company should be wound up: section 219(f) of the Companies Act. The application to the Court for the winding-up of a company is by petition presented by the company, or by any creditor, or contributor, or by all of them together, or separately: section 221(1). A contributor is not entitled to present a winding-up petition unless certain conditions are fulfilled. They have been fulfilled in this matter, so I need not set out those conditions. The Court may not refuse to make a winding-up order on the ground only that the company has no assets: section 222(1).

Only two East African decisions were cited. One is binding: *Sverre Haug v Buhemba Mines Ltd* (1953) 20 EACA 28 and the other persuasive, *Mohamed Mitha v Ibrahim Mitha* [1967] EA 575.

Many English ones were read out and those reported before 12th August 1897 are binding: section 3(1)(c) Judicature Act. Later ones are persuasive because the Companies Act (and its Winding-Up Rules) of Kenya are based on parallel legislation in England.

There is a proviso: section 3(1)(c) of the Judicature Act provides:

> ... the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.

I can find no circumstances or qualifications which this country and its inhabitants possess sufficient to persuade this Court to exclude the application of the pre 12th August 1897 English Common Law, doctrines of equity and statutes of general application.

A winding-up order is made without further ado if the company appears and asks for it, or consent to it, or does not oppose it. Should the company not appear, or appears and opposes it, then the order is only made where the correct circumstances are shown to exist, including obvious insolvency, danger to the assets (embracing misappropriation or waste by those in control), or the public interest demands it, or for any other good cause.

No-one has suggested, so far, that 'the public interest' is touched by this petition or the company and its troubles.

The application is usually made by the creditors who want the company to pay its debts, and it is uncommon for it to be made by the shareholders because the legislation for companies is designed to permit the members of a company to manage its own affairs including winding it up.

The phrase “just and equitable’ used to be confined to circumstances similar to or *ejusdem generis* with the others set out in various subsections of the same section of the various Acts that have dealt with companies in the English legislation. Cottenham LC said so in *Ex parte Spackman* (1899) 1 Mac & G 170, 174; and the Courts and practitioners in England duly followed him in doing so.

Another factor that influenced their approach to whether or not it was “just and equitable” to wind up a company was that the phrase appeared in section 25 of the Partnership Act 1825 there (as it does here in Section 399(f) of the Partnership Act), for the dissolution of that form of association. So in analogous cases of partnerships and domestic or private companies much the same rules were applied.

Petitions were brought alleging that the substratum of the company had gone or that there was deadlock between one shareholder and another, or groups of them, or one was being oppressed by the other, or excluded from the management of the company, and they were dealt with under those headings to see if it were “just and equitable” to wind up that company.

It was clear that, if at the time of the petition it was beyond dispute that it was the intention of the company to carry on a business within the principal objects of its memorandum of association, it was then impossible to say that its substratum had gone; *per* Tucker LJ in *Re Kitson & Co Ltd* [1946] 1 All ER 435, 444. This meant the Court had to discover what the company opposing the petition intended to do, if it could do that, and whether that were within the objects of its memorandum. This quest involved finding an answer to a further question: was the company formed for the paramount purpose of dealing in or with some specific subjectmatter, such as to acquire and exploit a mine or a patent, or with wider and more comprehensive objects, such as the business of prospecting, mining or mechanical engineering? The answer might be the company was to exploit a mine or , instead, it was formed with the principal object of prospecting and mining. Now, if the mine did not exist, or could not be acquired, it was obvious the substratum had gone. Alternatively, it had not gone if the answers to these questions revealed the company was formed with the principal object of prospecting and mining and could carry on doing so.

Thus, where a company had carried on the business of one rubber estate for twenty-nine years (together with buying small quantities of rubber from other estates in Ceylon, processing it on its own estate and then selling it) and it was proposed to sell this estate, but there was no scheme for dealing with the proceeds, it was held the substratum had not gone because the objects for which the company was established, according to its memorandum, included the power to carry on all sorts of businesses (the draftsman went through them alphabetically) and this rubber estate was not mentioned as a specific venture, nor the first object of the company.

The various objects were to be regarded as independent ones and the very name of the company was not to be taken as restricting any of them: Re *Taldua Rubber Co Ltd* [1946] 2 All ER 763 (Wynn-Parry J).

The substratum has been held to have disappeared, however, where (i) the title to the mine the company was formed to work could not be obtained (*Re Haven Gold Mining Co* (1882) 20 Ch D 151); (ii) the patent it was to work was not granted (*Re German Date Coffee Co* (1882) 20 Ch D 169); (iii) the bulk of its property had been sold and its capital exhausted (*Re Diamond Fuel Co* (1879) 13 Ch D 400); (iv) there was no reasonable probability of obtaining the benefit of the contract it was formed to carry out (*Re Bleriot Manufacturing Air Craft Co* (1916) 32 TLR 253); and, for others, see (v) *Gore-Browne on Companies* (43rd Edn) (1977) by *Boyle and Sykes*, paragraph 31-12.

The test is not whether the company will be a successful commercial speculation, which is a business matter (for the shareholders can decide whether to engage in it or not), but whether or not it is impossible for the company to carry on the business for which it was formed, which can be and is a judicial decision: see Lord Cairns CJ in *Re Suburban Hotel Co* (1867) 2 Ch App 737, 750, 751, and Lord Greene MR in *Re Kitson & Co Ltd* [1946] 1 All ER 435, 439.

Deadlock did not have to be stated specifically because it might be obvious or common ground. Thus, if the directors quarrelled about everything and the company was in a state which the parties could never have contemplated when it was formed so that, were it a partnership, it would be dissolved, it would be

terminated if it were a company. There was the partnership analogy. The wishes of the creditors were material but, in matters concerning a domestic company, of minor importance: see *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426, 432, 434; *Re Davis and Collett Ltd* [1935] Ch 693, 702; *Re Modern Retreading Co Ltd* [1962] EA 57, 60.

Exclusion or oppression might occur under the same conditions, but it would not be called exclusion or oppression just because one director or shareholder was thwarted because the chairman had a casting vote under the company's articles (*Re Expanded Plugs Ltd* [1966] 1 All ER 877, 879) and, if it occurred, despite the fact that the chairman did not have a casting vote, a winding-up order was not inevitable: *per* Donovan LJ in *Re Davis Investments (East Ham) Ltd* [1961] 3 All ER 926.

There was a harder line taken, however, against this liberal use of the partnership analogy. Differences in a partnership association from that of a limited liability company, albeit a domestic one, were noted. The liability of a partner was unlimited so that he had a financial interest in bringing the partnership to an end, whereas a fully paid-up member's liability could not be increased by further trading by the limited liability company. The former could not be dissolved at the instance of the creditors and the latter could be wound up at their instigation.

There came a move to halt the march across this bridge build by equity with the phrase "just and equitable" between those two forms of association and, instead, a move began to emphasise that each company had its common law in the form of its memorandum and articles of association which should be sufficient for its disputes. So applications under the "just and equitable" subsection tended to be confined to instances where the deadlock, oppression or exclusion could be shown to be due to the *mala fides* or lack of *bona fides* of the opponents: see *Re Cuthbert Cooper & Sons Ltd* [1937] Ch 392; *Charles Forte Investments Ltd v Amanda* [1964] Ch 240; *Re K/9 Meat Supplies (Guildford) Ltd* [1966] 1 WLR 1112; *Re Expanded Plugs Ltd* [1966] 1 All ER 877; and *Mohamed Mitha v Ibrahim Mitha* [1967] EA 575, 582.

There was, consequently, the argument that the petitioner must establish that the matters of which he complains, if carried out within the framework of the articles, were not in the *bona fide* interests of the company (per Plowman J in *Re Expanded Plugs* [1966] 1 All ER 877, 885) or to ask the Court to make the company or its other shareholders buy his share at a proper price.

There was, from the outset, a requirement that a contributory petitioner must show that there will remain, when the company's debts and liabilities have been met, some tangible, sufficient interest for division among the shareholders if a winding-up order were made or else it would be a farce to wind it up on his petition since he would have no interest in such an operation because he is a paid-up shareholder. It was recognised there might be exceptions to this (*Re Rica Gold Washing Co* (1879) 11 Ch D 36, 42, 43, 44) so, if the contributory petitioner alleges the company is insolvent, it must be dismissed (*per* Wynn-Parry J in *Re S A Hawken Ltd* [1950] 2 All ER 408, 411) but Pennycuick J held that there is an implied qualification to this general rule, namely where the petition is based on a failure to supply accounts and information, with the consequence that the petitioner is unable to tell whether or not there will be a surplus available for the contributories, because, as he put it:

> It cannot really be the law that the petitioner is bound to allege and to verify on oath the statement that the company has surplus assets when, by reason of the company's own default, he is not in a position to tell whether or not that statement is true.

He referred to another qualification: where a petition is based on the allegation that there are matters in connection with the company which require an investigation (*Re Newman and Howard Ltd* [1962] Ch 257, 262) or there are urgent grounds for compulsorily winding-up the company to prevent the directors from destroying the evidence which might be used against them in proceedings, in which large sums of money might be recovered from them for the benefit not only for creditors but also of shareholders of the company (see *per* Cozens-Hardy J in *Re Haycraft Gold Reduction and Mining Co* [1900] 2 Ch 230) but this general rule of Sir George Jessel MR's in *Re Rica Gold Washing Co* (1879) 11 Ch D 36, 42, 43, 44, obtained in England despite the fact that since 1907 or 1908 when the predecessor of what became section 225(1) of the (English) Companies Act 1948 provided:

> ... the Court shall not refuse to make a winding-up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets or that the company has no assets.

See also *per* Buckley J in *Re Othery Construction Ltd* [1966] 1 All ER 145, 147; *per* Plowman J in *Re Expanded Plugs Ltd* [1966] 1 All ER 877, 884; and *per* Oliver J in *Re Chesterfield Catering Co Ltd* [1976] 3 All ER 294. A contributory will not succeed with a petition which alleges the affairs of the company require investigation (unless such an investigation will produce or is likely to produce a surplus, as in *Re Thomas Edward Brinsmead & Sons* [1897] 1 Ch 406) because he cannot show that he has any financial interest in the winding-up. He cannot act as a friend at Court for the creditors (who can petition for themselves) or merely bring to the notice of the Court a state of affairs in the company which scandalizes him: *per* Buckley J in *Re Othery Construction Ltd* [1966] 1 All ER 145, 149.

There is, with respect, a cogent article by Miss Gwyneth Pitt in the *New Law Journal*, 23rd June 1977, pages 619, 620, on how Sir George Jessel MR's rule should not be followed because it has been abrogated by section 225(1) of the (English) Companies Act 1948; it is not and never has been set out in a Companies Act (before or after 1879); the first-instance decisions to the contrary (*Re Daslo-Stolan Mining & Financial Corporation Ltd* [1910] WN 13; *Re S A Hawken Ltd* [1950] 2 All ER 408, 411; *Re Bellador Silk Ltd* [1965] 1 All ER 667; *Re Newman and Howard Ltd* [1966] Ch 257; *Re Othery Construction Ltd* [1966] 1 All ER 145; *Re Expanded Plugs Ltd* [1966] 1 All ER 877; *Re Chesterfield Catering Co Ltd* [1976] 3 All ER 294) are mistaken and there were respectable older decisions which stressed the fullness of the phrase "just and equitable" without overstressing the petitioner's need to have any financial interest in the assets available for distribution, eg *Re West Surrey Tanning Co* (1866) LR 2 Eq 737, *Re London Suburban Bank* (1871) 6 Ch App 641 and, finally, the speeches of Lord Wilberforece and Lord Cross of Chelsea in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 have made all those first-instance ones wrong.

At first blush it might be assumed the speeches changed much of what went before. The other judicial members of the House of Lords hearing that appeal agreed with all they said. Mr Shokrokah Ebrahimi, the appellant, and Mr Asher Nazar Achaury were partners in a business as dealers in Persian and other carpets. Mr Nazar formed it but, from 1945, they shared equally the management and profits. The company, Westbourne Galleries Ltd, was formed in 1958. It was a private company and took over the business of the appellant and Mr Nazar. They were the signatories to the memorandum and they were appointed its first directors.

Five hundred shares of £1 each were issued to each of them, and the appellant paid for his with his own money. Soon after the company was formed, Mr George Nazar, the son of Mr Nazar, was made a director and each shareholder transferred to him 100 shares. Mr Ebrahimi then had 400, Mr Nazar 400 and Mr George 200. All three remained directors until 12th August 1969, when an ordinary resolution was passed by the company in a general meeting by the Nazars removing the appellant from the office of director. The resolution was effective in law: section 184 of the Companies Act 1948 and article 96 of Part 1 of Table A. Plowman J made an order for the winding-up of the company under the "just and equitable" provision. The appellant had been a partner for a long time in the business, he had an equal share in its management and he joined in the formation of the company. He was lawfully removed from it because he ceased in law to be a director. The Nazars said he was perpetually complaining. Plowman J found that the faults were not all one side and, anyway, it was not sufficient justification for removing him. They did him a wrong. It was an abuse of power and a breach of the good faith which partners owe to each other to exclude one of them from all participation in the business upon which they have embarked on the basis that all should participate in its management. The Court of Appeal allowed an appeal by the Nazars against the winding-up order. This was reversed by the House of Lords.

My reading of the speeches of Lord Wilberforce and Lord Cross of Chelsea yields these points. The phrase "just and equitable" should not be applied in any timorous way by the Courts, but given its full force. Categories and heads within or under which it should be applied are to be eschewed, but illustrations may be used. It is to be wielded as an equitable supplement to the common law for the company. It was not to be confined to proved cases of *mala fides* by those who controlled it. The

petitioner must qualify as a shareholder, if not a creditor or the company itself, or the Department of Trade; but thereafter could rely on any circumstances of justice or equity which might affect him in his relations with the company.

The basis of the company should be examined. Was the basis of the association commercial and no more? Was it formerly a partnership which became a limited liability company? The latter should be wound up if the petitioner persuaded the Court neither shareholder nor group of shareholders had any confidence in the other, so they could not work together in the way they thought they could at the outset. This was the test.

The House of Lords traced all this down through the judgments of Lord M'Laren in *Symington v Symington's Quarries Ltd* 1905 8 F 121; and Lord Cozens-Hardy MR in *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426, 432, and the opinion of the Privy Council in *Loch v John Blackwood Ltd* [1924] AC 783, 788, expressed by Lord Shaw of Dunfermline, and approved of it. The point was that though a company as a legal entity had a personality in law it must not be forgotten that there were individuals in it with rights, expectations and obligations. (See also *Bentley-Stevens v Jones* [1974] 2 All ER 653 and *Clemens v Clemens Bros* [1976] 2 All ER 268.)

Therefore, with an application based on the allegation that the minority shareholder was being excluded, the House agreed that, though this exclusion might be provided for in the company's articles of association, it could still be a ground for winding up the company despite a lack of *mala fides*, as Lord Frazer held in the Outer House in *Lewis v Haas* 1970 SLT (Notes) 67, because the right was subject to equitable relief for the excluded shareholder in this form of a winding-up order, as Plowman J held in *Re Lundie Bros Ltd* [1965] 1 WLR 1051.

There were other questions to be canvassed such as (a) was there an agreement or undertaking that all or only some shareholders should participate in the company business? (b) is there any restriction on the transfer of a member's interest? and (c) if this confidence is lost or if one shareholder is removed from the management of the company can he take out his share and go elsewhere? These were pertinent to the circumstances of the shareholders in *Ebrahimi's* case, and could be so in this winding-up cause.

It seems that after these two speeches in the House of Lords there is no set of rules to apply to the nature of the circumstances which have to be borne in mind when mulling over whether any application comes within the phrase "just and equitable".

Sir Hector Hearne CJ in *Haug v Buhemba Mines Ltd* (1953) 20 EACA 28, 30, said:

> Each case where relief is sought on the ground that it is just and equitable that a company should be wound up ... depends, of course, on its own facts.

He referred to the words of Lord Maugham in *Davis & Co Ltd v Brunswick (Ausutralia) Ltd* [1936] 1 All ER 299, 309, which were:

> [No] general rule [can] be laid down as to the nature of the circumstances which have to be borne in mind in considering whether the case comes within the phrase.

and Neville J in *Re Bleriot Manufacturing Air Craft Co* (1916) 32 TLR 253, 255:

> The words 'just and equitable' are of the widest significance and do not limit the jurisdiction of the court to any case ... It is a question of fact and each case must depend on its circumstances.

The basic thinking behind this is best put, in my view, by Lord Clyde, Lord President of the Court of Session, in *Baird v Lees* 1924 SC 83, 92, who said:

> A shareholder puts his money into a company on certain conditions. The first of them is that the business in which he invests shall be limited to certain definite objects. The second is that it shall

> be carried on by certain persons elected in a specified way. And the third is that the business shall be conducted in accordance with certain principles of commercial administration defined in the statute, which provide some guarantee of commercial profit and efficiency. If shareholders find these conditions or some of them are deliberately and consistently violated and set aside by the action of a member and official of the company who wields an overwhelming voting power, and if the result of that is that, for the extrication of their rights as shareholders, they are deprived of the ordinary facilities which compliance with the Companies Act would provide them with, then there does arise, in my opinion, a situation in which it may be just and equitable for the Court to wind up the company.

This is what the petitioner alleges has happened here. The company is really herself and Mr Papaeliopoulos. They were in effect partners, but associated in this private limited company. Their views and methods are incompatible. She has a justifiable lack of confidence in the conduct and management of its affairs, not only because she is dissatisfied at being ousted from the business affairs or domestic policy of this company but, also, she is certain that Mr Papaeliopoulos, Mr Kroussaniotakis and Mr Tsatsaronics have lacked probity in the conduct of its affairs. Mr Papaeliopoulos has treated the business as his own. It is all concentrated in his nominees, Mr Kroussaniotakis and Mr Tsatsaronis who have only a nominal interest in it, and the petitioner who has a real interest in it cannot remove them. There are matters to be investigated. The common order for a compulsory winding-up order should be made. The parallels are in *Re West Surrey Tanning Co* (1866) LR 2 Eq 737, 740, 741 (*per* Sir William Page Wood V-C), *Re Peruvian Amazon Co Ltd* (1913) 29 TLR 384, *Loch v John Blackwood Ltd* [1924] AC 783, 788, 793 and *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, 376.

The company maintains that the petitioner is trying to strangle or supplant it by transferring its business to her own companies (which she formed to drain it) or those of her relatives. The parallel is to be found in *Re London and Manchester Industrial Association* (1875) 1 Ch D 466, 472, *per* Bacon V-C.

There was one more point underlined in *Ebrahimi v Westbourne Gallaries Ltd* [1973] AC 376, 387, by Lord Cross of Chelsea, who said:

> A petitioner who relies on the "just and equitable" clause must come to Court with clean hands, and if the breakdown in confidence between him and the other parties to the dispute appears to have been due to his misconduct he cannot insist on the company being wound up if they wish it to continue.

See also Macaulay J in *Ex parte Rhoprops Ltd*; *Re Piras Garden Properties (Pvt) Ltd* 1975 (3) SA 630, 632, who equates unclean hands with unreasonableness. This is, of course, an important maxim of equity.

Anyone whose conduct has been improper in any relevant way in some transaction who wants relief in equity will be refused it. The authors of *Equity: Doctrines Remedies* (1st Edn) (1975) by Meagher, Gemmow and Lehane, without referring to this speech in *Ebrahimi v Westbourne Gallaries Ltd* submit that unclean hands cannot successfully be pleaded as a defence to a winding-up petition because it is merely a statutory remedy (see page 69). See also *Meyers v Casey* (1913) 17 CLR 90, 101, 123, 124.

It is proper, however, in my view to pay due regard to whether or not the petitioner comes to Court with clean hands. Suppose the petitioner is one of two shareholders and each has unclean hands? This was touched upon by Plowman J in *Re Lundie Bros Ltd* [1965] 1 WLR 1051, 1056, who thought Lord Cozens-Hardy MR in *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426, 430, must have meant to preclude anyone *exclusively responsible* for the breakdown in confidence in domestic companies based on a partnership association from seeking to take advantage of it and not anyone who *contributed* to it.

There is another relevant statutory provision which must be set out and it is section 222(2) of the Companies Act, which reads:

> Where the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court, if it is of [the] opinion (a)

> that the petitioners are entitled to relief either by winding up the company or by some other means; (b) that in the absence of any other remedy it would be just and equitable that the company should be wound up, shall make a windingup order, unless it is also of the opinion both that some other remedy is available to the petitioners and that they are seeking to have the company wound up instead of pursuing that other remedy.

Other remedies were mentioned but not specified by Brightman J in *Re Leadenball General hardware Stores Ltd* (1971) 115 SJ 202; there was rectification of the two agreements in *Ex parte Rhoprops Ltd*; *Re Piras Garden Properties (Pvt) Ltd* 1975 (3) SA 630, 632, and an action to prove allegations of bad faith in having articles altered and consequent removal of a petitioner as a director quashed so he could resume his position as a director in *Tench v Tench Bros* [1930] NZLR 403, 411, *per* Smith J.

Normally, of course, it is the company that brings an action to redress a wrong done to it or to recover moneys or damages alleged to be due to it: *Foss v Harbottle* (1843), 2 Hare 461; *Mozley v Alston* (1847) 1 Ph 790: but there are exceptions to this, eg where the relief sought is against the majority shareholders who will not permit an action to be brought against the company, the minority will be allowed to bring an action in their own names if it is confined to one in which the acts complained are of a fraudulent character or beyond the power of the company (*Busland v Earle* [1902] AC 83), or though no fraud alleged, there was a breach of duty by directors and majority shareholders to the detriment of the company and the benefit of the directors: see *Daniels v Daniels* [1978] 2 WLR 73, *per* Templeman J.

The position of a director *vis-a-vis* the shareholders was laid down by Rigby LJ in *Alexander v Automatic Telephone Co* [1900] 2 Ch 56, 72 (and see *per* Martin J in *Re Straw Products Pty Ltd* [1942] VLR 222, 236). They are not trustees for the individual shareholders. They are not, however, justified in exercising the powers vested in them exactly as they please, claiming all the while that they are not violating the express terms of those powers. They are fiduciary donees of them, and, among other things, they must exercise them so as not to give themselves an advantage over other shareholders.

A shareholder, too (even one with 1501 shares to the other's forlorn one), must avoid any conduct which would reasonably lead to the inference that he fails to appreciate the fact that it is his duty to use his voting power in the interests of the company as a whole, and that he must not ignore the interests of the other shareholder or treat the company and its assets as if they were his own private property. Furthermore, he must avoid acting in such a way as might reasonably be held to make it impossible for the other shareholder to co-operate with him in the management of the company: *per* Lord Skerrington in *Thomson v Drysdale* 1925 SC 311, 316; Gavan Duffy J in *Re Straw Products Pty Ltd* [1942] VLR 222, 226.

Generally, of course, a petitioning contributory must be deemed to be aware from the outset of his position under the articles because (*per* Lord Selborne LC in *Oakbank Oil Co v Crum* (1882) 8 App Cas 65, 70, 71):

> Each party must be taken to have made himself acquainted with the terms of the written contract contained in the articles of association, and the Acts of Parliament, so far as they are important. He must also in law be taken (though that is sometimes different from what the fact may be) to have understood the terms of the contract according to their proper meaning; and that being so he must take the consequences, whatever they may be, of the contract which he has made.

This is not the end of it, however, where this legal foundation is impugned by the petitioning creditor, because there are the equitable principles established by the relevant section in the statute superimposed on it to consider: *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360.

Much of the battle in this cause has revolved round whether or not the company is a quasi-partnership. It has been found impossible to devise any precise test to answer this one way or the other. It would be one, if the members intended to participate in the company's business in just the same way as if they had been partners in one form or another. The existence of such an intention is a matter of fact. Other pointers would be a common intention to pursue the business for profit, equality of interest, the withdrawal of

profits as remuneration rather than as a dividend and equal participation in the day's work. The last might be decisive and the others would be factors to be weighed in the balance; see *Re North End Motels (Huntly) Ltd* [1976] NZLR 446.

A general meeting of shareholders cannot institute a board of harmonious directors or quell the troubles occasioned by the quarrels of the two directors and shareholders; *per* Warrington LJ in *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426, 435. So, in a quasi-partnership company, members owe a duty of good faith to one another which goes far beyond such duty as the members of an ordinary limited company otherwise owe each other and that is why there are petitions for winding up these domestic companies based on "deadlock" or on loss of confidence in the probity of one member or because one has come to regard the business as his own: *Loch v John Blackwood Ltd* [1924] AC 783; *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360. But a sense of frustration because of the legitimate exercise by other contributories of their rights will be an insufficient ground, though it becomes sufficient if due in part to the exercise of these dominant powers which are unwillingly and unwittingly vested in the other contributory by the petitioner because he has no independent advice, no business experience and, in all, there was at the outset an inequality in bargaining power: *Re North End Motels (Huntly) Ltd* [1976] NZLR 446, 451. After all, one director maintaining control of the board and conducting its affairs means the company does not have the collective wisdom of an independent board: *Re Cumberlnd Holdings Ltd* [1976] 1 ACLR.

An entitlement to management participation in such a company may be an obligation so basic that if it is broken the association has to be dissolved, eg where management participation secured by the petitioner's right to appoint and remove a director representing him is repudiated by the respondents: see *Re A&BC Chewing Gum Ltd* [1975] 1 WLR 579, 581, *per* Plowman J. Or, if there are directors in two different continents and one set tries to exclude those in the country where the business is run, the company should be wound up: see *Re Mason Bros Ltd* (1891) 12 NSW Eq 183 (I have not been able to read the report of this).

Other matters which are relevant include an offer to sell the business or the shares in it, which is rejected (see *Re North End Motels (Huntly) Ltd* [1976] NZLR 446, 448) and the two shareholders are not prepared to come to some arrangement between themselves by which they can prevent the company from being wound up (*Re Davis and Collectt Ltd* [1935] Ch 693, 703) or the very existence of a quarrel (without deciding which party is in the right) which has made it impossible for the company to be run in the manner in which it was designed to be run, or for the parties' disputes to be resolved in any other way than a winding-up. Finally, the wishes of the creditors of the company are material: see *Re Modern Retreading Co Ltd* [1962] EA 57, 60.

So a summary of the way to approach the issue of whether or no to wind up a company under the just and equitable rule is this. It is a matter for the discretion of the court. The discretion is a very wide one. It will be a matter of fact whether the company should be wound up or not under this rule. Each case will depend on its own circumstances: *Loch v John Blackwood Ltd* [1924] AC 783 and *Re Bleriot Manufacturing Air Craft Co* (1916) 32 TLR 253. There must be a sound induction of all the facts to justify the exercise of the discretion. There is no general rule for this *(Davis & Co Ltd v Brunswick (Australia) Ltd* [1936] 1 All ER 299) and categories should be avoided *(Re Straw Products Pty Ltd* [1942] VLR 222, *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360), though illustrations assist.

The discretion is a judicial one, so it must be judicially exercised; Lord Clyde in *Baird v Lees* 1924 SC 83, 90, said a nod to God and a good conscience would not be enough for this and grounds must be given which can be examined and justified. Lord Diplock has had the latest word on "judicial discretion": he said in *Cookson v Knowles* [1978] 2 WLR 978,981:

> ... like all discretions vested in judges by statute or at common law, it must be exercised judicially or , in the Scots phrase used by Lord Emslie in *Smith v Middleton* 1972 SC 30, in a selective and discriminating manner, not arbitrarily or idiosyncratically – for otherwise the rights of parties to litigation would become dependent on judicial whim.

Generally, where the petitioner can prove he has lost confidence in the management because it has shown lack of probity then, in the absence of any special circumstances, it is just and equitable to wind up the company: *Loch v John Blackwood Ltd* [1924] AC 783.

When it comes to quasi-partnership companies, it is just and equitable to wind them up when it would be so to dissolve a partnership. This would apply to a company with a small membership who have become associated as members in pursuance of an agreement or arrangement involving the creation of a personal relationship between them with restrictions upon the transfer of shares so that a member cannot transfer his interest: *Re Yenidje Tobacco Co Ltd* [1916]2 Ch 426, *Loch v John Blackwood Ltd,* and *Re Straw Products Pty Ltd* [1942] VLR 222.

It is not essential for these principles to be applied to such a company that there should be any agreement or understanding that all creditors or shareholders are to be entitled to take part always in the conduct of the company's business. Smith J analysed the figures in *Re Wondoflex Textile Pty Ltd* [1951] VLR 458, 466, as three substantial to two nominal in *Re Straw Products Pty Ltd* and *Loch v John Blakcwood Ltd*; four equal in *Tench v Tench Bros* [1930] NZLR 403; three to five in *Symington v Symington's Quarries Ltd* 1905 8 F 121; and one to one in *Wondoflex.* The articles may exclude one or more, making them "sleeping" partners or directors, or specify that only a certain number should conduct the business of the company.

The analogy of the partnership will not help the petitioner, however, if the petitioner's grumbles are based on the other members' valid exercise of powers conferred in the terms of the articles (see *Re Cuthbert Cooper & Sons Ltd* [1937] Ch 392 and *Re Straw Products Pty Ltd* [1942] VLR 139, 141) but only if they have been exercised in good faith for the members of the company as a whole (See *Re Yenidje Tobacco Co Ltd* [1916] 2 Ch 426, *Re Davis and Collect Ltd* [1935] Ch 693, *Thomson v Drysdale* 1925 SC 311, 315, 316, and *Re Wondoflex Textiles Pty Ltd* [1951] VLR 458).

There are one or two matters about the evidence with which I must deal so that it cannot be said I have overlooked them. The statutory affidavit is sufficient to support such a petition, though it is strictly no proof of anything for it is hearsay as to almost everything in it. Its validity was challenged in 1882 in *Re New Callao Ltd* (1882) 47 LT 175 but Sir George Jessel MR said that the Court could not throw away doubt on it because it had been acted on for twenty years. It is sufficient to require an answer *(Re Gold Hill Mines* (1883) 23 Ch D 210, 214, *per* Lindley LJ) and the legislature in England has not seen fit to replace it with anything: *Re SA Hawken Ltd* [1950] 2 All ER 408. English practice seems to allow hearsay and submissions and argument in these affidavits and those in reply *Re A & BC Chewing Gum Ltd* [1975] 1 WLR 579) but only real evidence, relevant evidence and submissions on the facts and the law have been considered by me and I have ignored hearsay and irrelevancies in the affidavits, testimony and even submissions in both and, dare I say it, in the submissions of the advocates if they were guilty of such lapses.

An affidavit in interlocutory proceedings cannot be relied upon by either party at a trial for its full contents as evidence but the other side can rely on any admissions to be found in it, just as reliance can be placed on any other document which contains such an admission: *Campbell v Rothwel* (1877) 38 LT 33; *Re Cohen* [1924] 2 Ch 515; *Clemens v Clemens Bros* [1976] 2 All ER 268, 277.

Suppose a party or a material witness gives affidavit evidence and no more, or declines to give evidence; what is the correct approach to evaluating that evidence or the uncontradicted evidence of the other side?

Lord Greene MR said in *Re Smith and Fawcett Ltd* [1942] Ch 304, 308:

> Speaking for myself, I strongly dislike being asked on affidavit evidence alone to draw inferences as to the *bona fides* or *mala fides* of the actors. If it is desired to charge a deponent with having given an account of his motives and his reasons which is not the true account, then the person on whom the burden of proof lies should take the ordinary and obvious course of requiring the deponent to submit himself to cross-examination. That does not mean that it is illegitimate in a proper case to draw inferences as to *bona fides* or *mala fides* in cases where there is on the face of

> the affidavit sufficient justification for doing so, but where the oath of the deponent is before the Court, as it is here, and the only grounds on which the Court is asked to disbelieve it are matters of inference, many of them of a doubtful character, I decline to give those suggestions the weight which is desired.

On the other hand, the fact that someone elects to give no evidence at all does not entitle the Court when drawing inference to take the worst view of that reluctant deponent or witness: see *Phillips v Manufacturer's Securities Ltd* (1917) 116 LT 290, 300 and *Clemens v Clemens Bros* [1976] 2 All ER 268, 277.

The petitioner is confined to the heads of complaint set forth in his petition.

The evidence may amplify and explain these matters or complaints but he cannot rely on any new head not covered by the petition: see *Re Cuthbert Cooper & Sons Ltd* [1937] Ch 392, 399, *Re Lundie Bros Ltd* [1965] 1 WLR 1051, 1058 and *Re Fildes Bros Ltd* [1970] 1 WLR 592.

Finally, the question whether it is just and equitable to wind up the company is one which must be answered on the facts which exist at the time of the hearing; subsisting facts and not past history: see *Re Fildes Bros Ltd* [1970] 1 WLR 592, 597.

[Kneller J, after reviewing the evidence at length, concluded:] It is clear, in my view, that there are seven creditors who want Garnets would up. Their views are relevant but of minor importance.

The objects for which Garnets was formed, according to its memorandum, included the power to carry on all sorts of businesses (the draftsman has, also, included one or two under each letter of the alphabet) and the ruby corundum mine is not mentioned as a specific venture, nor the first object of it. They are to be taken as independent ones. Garnets intends, however, to recoup all its financial losses, if it can, by prolonged heavy litigation, and then re-open the mine and burrow away for more ruby corundum.

The evidence suggests the main vein has been lost and it was not clear if there was any prospect of recovering it or discovering another. The subsidiary ones are not lucrative. It will probably not be a successful commercial speculation but it is for the shareholders to decide whether or not to engage in it. It will have to achieve a reconciliation with the petitioner, or oust her, to carry on any business for which it was formed, or employ (with or without her agreement if she is an active shareholder and director in it) more staff to conduct that business because Mr Papaeliopoulos, Mr Kroussaniotakis and Mr Tsatsaronis will probably not return to Kenya for some time. There was no indication that Garnets wanted to do any other business. A sensible practical view of all these circumstances in this matter reveals, in my judgment, that the substratum of Garnets has gone.

The contributory petitioner has shown that there will probably remain, when Garnets' debts and liabilities have been met, some tangible sufficient interest for division among the shareholders if a winding-up order were made.

There certainly are matters in connection with Garnets which require an investigation, both as to the export of its produce in the days when Mr Papaeliopoulos and his nominees were responsible, and as to what happened to it when the petitioner and her supporters took it over. Their drawings on Garnets' coffers also require some astute accountant's probing and unravelling. It is probable that large sums of money might be recovered for the benefit not only of the creditors but also the shareholders of Garnets.

Anyway, if there were not likely to be any tangible sufficient interest and or a need for an investigation which would probably rake in it, I would take a deep breath and hold that this case was one where the Court would not refuse to make a winding-up order on the ground only that the company had no assets.

Garnets, I am persuaded, was, at first, the creation of Mr Papaeliopoulos, but he persuaded the petitioner (and her husband) to join him in its early infancy so that, relatively early in its life, it became a company which was analogous to a partnership. He had the money and experience, and she had the local

knowledge of the right people and approaches to make to them. It is not correct, in my view, or realistic to say any Kenyan would have been able to accomplish what she did for Garnets in its early and middle life. Other Kenyans would not have the entree to the departments and officials or know the latter and, if they did, would not have been accorded the same prompt successful attention. There are some matters in which some Kenyans are more Kenyan than others and it would be naive to find otherwise. Mr Papaeliopoulos knew this to be so, or else he would not have asked members of the petitioner's family, in turn, to join him. He is too percipient, I am sure, to have believed they would join as anything but active co-equals in its management. Each needed the other for this company.

The petitioner has succeeded in showing that she is excluded from all participation in the business upon which they embarked on the basis that she and Mr Papaeliopoulos, through Mr Karoussaniotakis, should participate in its management. The articles of association of Garnets permit such exclusion and it is, with the voting power in Mr Papaeliopoulos's control, impossible to reverse the result. The faults have not been all on one side and it is an abuse of this power and a breach of good faith for the petitioner to be so excluded.

Mr Papaeliopoulos made the suggestion at one point that the petitioner should have no executive powers of management and no official standing and, in May 1976, sought an early meeting with her in London to discuss the management of Garnets and the responsibilities of its "partners" which is, in my judgment, not only a commentary on what occurred after Mr Kroussaniotakis and Mr Tsatsaronis left, but a reflection of what the position was before they did so. Besides, I cannot see the petitioner joining any venture on terms other than that she should have an equal share in its control and profits.

The fact is, of course, that neither shareholder has any confidence in the other and so they cannot work together in the way they thought that they could at the outset. Their views and methods are incompatible.

The petitioner could have sold her share, but articles 6 and 7 restrict this right in favour of the board and/or other members, which are Mr Kroussaniotakis and Mr Tsatsaronis and so, behind them, Mr Papaeliopoulos.

I have come to the conclusion, too, that the petitioner is probably correct when she claims that Mr Papaeliopoulos and Mr Kroussaniotakis lacked probity in the conduct of its affairs. Mr Papaeliopoulos has treated the business as his own. It is all concentrated in his nominees, Mr Kroussaniotakis and Mr Tsatsaronis, who have only a nominal interest in it, and the petitioner cannot reverse this. Garnets no longer has the benefit of the collective wisdom of an impartial board.

Now, if my finding ended there, the common order for a compulsory winding-up order would be made without further ado. There is, however, the added fact that I find the petitioner's hands are not clean and, although this is a statutory remedy that she is seeking, I do not feel strong enough to ignore the opinion of Lord Cross of Chelsea in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 that, if the breakdown in the confidence between the petitioner and the other parties to the dispute appears to have been due to her misconduct, she cannot insist on the company being wound up if they wish to continue.

Let me go back a little, however, and indicate why I find that she has unclean hands in this matter. I believe that when she discovered that Mr Papaeliopoulos, Mr Kroussaniotakis and Mr Tsatsaronis would not let her have at least an equal share in the management of Garnets and its profits she decided to press for more and, frustrated in that, she tried, as Garnets claims, to strangle or supplant it (legally, at first, and later by any means) by transferring its businesses to companies which she did not prevent her relatives from forming to knock down Garnets.

The breakdown in confidence then between the petitioner and the others, especially Mr Papaeliopoulos, appears to have been also due to her misconduct. She has contributed to it, but she is not exclusively responsible for it.

Each has unclean hands, then, which would seem to make Garnets riper still for a winding-up order. The petitioner or Mr Papaeliopoulos might not be able to insist on Garnets being wound up, but this does not

prevent the Court now that the petition is before it on insisting that it should be wound up. I do not see any other appropriate remedy available to the petitioner or the company. These two main shareholders are not prepared to come to some arrangement between themselves by which they can prevent the company being wound up or for their dispute to be resolved in any other way.

The official receiver and his staff are capable of winding up Garnets. It was suggested that they would not pursue the petitioner and other parties or likely parties or pursue them as rigorously as Garnets would to recover such sums as Garnets could prove was due to it from them; but this was not backed up by any facts and it was submitted that they had been very fierce in recovering money from the Government for the former East African Airways Corporation. They may, also, of course, have to proceed against Mr Papaeliopoulos and or Mr Kroussaniotakis and or Mr Tsatsaronis, too. They seem to be in the right position (midfield) for pondering all this and deciding what to do about it for the sake of the company, its members and creditors.

On all the facts existing at the time of the hearing then, weighing one thing with another and doing the best I can, I hold that it is just and equitable that Garnets should be wound up. This is the answer to the overall issue I set out at the beginning of this judgment. The petitioner has discharged the burden laid upon her when this litigation began and, in the exercise of my discretion, I make the first order sought by her.

Order accordingly.

Dated and delivered at Nairobi this 23rd day of November 1978.

A.A. KNELLER

JUDGE