# *360 Ebrahimi Appellant v Westbourne Galleries Ltd. and Others Respondents

Positive/Neutral Judicial Consideration

**Court**
House of Lords

**Judgment Date**
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[1972] 2 W.L.R. 1289
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ICLR

House of Lords

Lord Wilberforce , Viscount Dilhorne , Lord Pearson , Lord Cross of Chelsea and Lord Salmon

1972 March 8, 9, 13, 14; May 3

[On Appeal from In Re Westbourne Galleries Ltd.]

*Company—Winding up—'Just and equitable grounds for—Company formed by former partners—Subjection of legal railways to equitable considerations based on underlying personal relationship—Considerations applicable—Whether 'just and equitable ground confined to circumstances affecting shareholder in capacity as such—Whether confined to proved cases of mala fides —'Bona fide in the interests of the company'—'Quasi—partnership' 'In substance partnership'—Whether valid concepts—Companies Act 1948 (11 & 12 Geo. 6, c. 38), s. 222 (f)*

From about 1945 the appellant and N were partners in a business. In 1958 a private company was formed to take the business over. The appellant and N were its first directors. Under the articles of association the company in general meeting had an express power to remove a director by ordinary resolution. Soon afterwards, N's son G was made a director; by virtue of their share holdings N and G had a majority of the votes in general meeting. The company made good profits all of which were distributed as directors' remuneration. No dividends were ever paid. In 1969, after disagreement between the appellant and N and G, an ordinary resolution was passed by the company in general meeting by the votes of N and G removing the appellant as director. The appellant petitioned for an order under section 210 of the Companies Act 1948 that N and G should purchase his shares in the company or sell their shares to him on such terms as the court should think fit, alternatively for an order under section 222 (f) [1] that the company be wound up. At the hearing, an assurance was given in evidence that the practice of not paying dividends would not be continued. Plowman J. refused to make an order under section 210 but held that N and G had done the appellant a wrong in that it had been an abuse of power and a breach of the good faith which partners owed to each other to exclude one of them from all participation in the business on which they had embarked on the basis that all should participate in its management, and that, accordingly, the appellant had made out a case for a winding up order under section 222 (f). The Court of Appeal allowed an appeal by the respondents, holding that in the case of a quasi-partnership company the exercise by a majority in general meeting of the power under the articles or section 184 of the Act of 1948 to remove a director from office and consequently to exclude him *361 from participation in the management and conduct of the business did not form a ground for holding that it was just and equitable that the company should be wound up unless it was shown that the power had not been exercised bona fide in the interests of the company or that the grounds for exercising the power were such that no reasonable man could think that the removal was in the interest of the company,

 

and that, on the facts, the appellant had failed to show that his removal had not been justified and in the best interests of the company or that no man could have thought so.

On appeal by the appellant:-

Held, allowing the appeal, that a limited company was more than a mere legal entity and the rights, expectations and obligations of the individuals behind it inter se were not necessarily merged in its structure (post, p. 379B-C); that, while the 'just and equitable' provision did not entitle a party to disregard the obligation which he assumed by entering a company, it enabled the court to subject the exercise of legal rights to equitable considerations of a personal character arising between individuals which might make it inequitable to insist on legal rights or to exercise them in a particular way (post, pp. 379D, 386H - 387A); that, in the present case, the appellant and N had joined in the formation of the company on the basis that the character of the association viz., inter alia, that the appellant was entitled to participate in the management, would, as a matter of personal relation and good faith, remain the same; and that, N having in effect repudiated that relationship and the appellant having lost his right to a share in the profits and being in that respect at the mercy of N and G and being unable to dispose of his interest without their consent, the proper course was to dissolve the association by winding up the company (post, pp. 380G, 381C-F, 386E - 387A).

*Symington v. Symington's Quarries Ltd. (1905) 8 F. (Ct. of Sess). 121* ; *In re Yenidje Tobacco Co. Ltd. [1916] 2 Ch. 426* , C.A.; *Loch v. John Blackwood Ltd. [1924] A.C. 783* , P.C.; *In re Straw Products Pty. Ltd. [1942] V.L.R. 222* ; *In re Wondoflex Textiles Pty. Ltd. [1951] V.L.R. 458* and *In re Lundie Brothers Ltd. [1965] 1 W.L.R. 1051* approved.

*Blisset v. Daniel (1853) 10 Hare 493* applied.

*In re Cuthbert Cooper & Sons Ltd. [1937] Ch. 392* and dictum of Plowman J. in *In re Expanded Plugs Ltd. [1966] 1 W.L.R. 514* , 523 disapproved.

*Per curiam.* (1) It is wrong to create categories or headings under which cases must be brought if the 'just and equitable' clause is to apply (post, p. 374H).

(2) Where the petitioner is a shareholder, the words are not confined to such circumstances as affect him in his capacity as such (post, pp. 375A-B, 385H - 386A).

(3) Elements which give rise to the superimposition of equitable considerations may include one, or probably more of the following: (i) an association formed or continued on the basis of a personal relationship involving mutual confidence; (ii) an agreement, or understanding, that all, or some, of the shareholders, shall participate in the conduct of the business; (iii) restriction on the transfer of the members' interest in the company. The fact that the company is a small one, or a private company, is not enough (post, p. 379E-G).

(4) The expressions 'quasi-partnership' or 'in substance partnership' may be confusing, for a company, however ***362** small, however domestic, is a company, not a partnership or even a quasi-partnership, and the members of it have accepted new obligations (post, pp. 379H - 380B).(5) The formula 'bona fide in the interests of the company' should not become little more than an alibi for a refusal to consider the merits of the case; in a situation such as the present it seems to mean little more than 'in the interests of the majority.' To confine the application of the 'just and equitable' clause to proved cases of mala fides would be to negative the generality of the words (post, pp. 381F-H, 386C-D).

*Per* Lord Cross of Chelsea. A petitioner who relies on the 'just and equitable' clause must come to court with clean hands (post, p. 387G).

*Decision of the Court of Appeal [1971] Ch. 799; [1971] 2 W.L.R. 618; [1971] 1 All E.R. 561* reversed.

The following cases are referred to in their Lordships' opinions:

 

*Baird v. Lees, 1924 S.C. 83* .
*Blisset v. Daniel (1853) 10 Hare 493* .
*Bushell v. Faith [1970] A.C. 1099; [1970] 2 W.L.R. 272; [1970] 1 All E.R. 53* , H.L.(E.).
*Concrete Column Clamps Ltd., In re [1953] 4 D.L.R. 60* .
*Const v. Harris* (1824) Tur. &; Rus. 496.
*Cooper (Cuthbert) & Sons Ltd., In re [1937] Ch. 392; [1937] 2 All E.R. 466* .
*Davis & Collett Ltd., In re [1935] Ch. 693* .
*Elder v. Elder & Watson, 1952 S.C. 49* .
*Expanded Plugs Ltd., In re [1966] 1 W.L.R. 514; [1966] 1 All E.R. 877* .
*Fildes Bros. Ltd., In re [1970] 1 W.L.R. 592; [1970] 1 All E.R. 923* .
*Forte (Charles) Investments Ltd. v. Amanda [1964] Ch. 240; [1963] 3 W.L.R. 662; [1963] 2 All E.R. 940, C.A.*
*K/9 Meat Supplies (Guildford) Ltd., In re [1966] 1 W.L.R. 1112; [1966] 3 All E.R. 320* .
*Leadenhall General Hardware Stores Ltd., In re* (unreported), *February 4, 1971, Brightman J.*
*Lewis v. Haas, 1970 S.L.T. (Notes) 67* .
*Loch v. John Blackwood Ltd. [1924] A.C. 783, P.C.*
*Lundie Brothers Ltd., In re [1965] 1 W.L.R. 1051; [1965] 2 All E.R. 692* .
*Modern Retreading Co. Ltd., In re [1962] E.A. 57* .
*Spackman, Ex parte (1849) 1 Mac. &; G. 170* .
*Straw Products Pty. Ltd., In re [1942] V.L.R. 222* .
*Swaledale Cleaners Ltd., In re [1968] 1 W.L.R. 1710; [1968] 3 All E.R. 619, C.A.*
*Sydney and Whitney Pier Bus Service Ltd., In re [1944] 3 D.L.R. 468* .
*Symington v. Symington's Quarries Ltd. (1905) 8 F. 121* .
*Tench v. Tench Bros. Ltd. [1930] N.Z.L.R. 403* .
*Thomson v. Drysdale, 1925 S.C. 311* .
*Wondoflex Textiles Pty. Ltd., In re [1951] V.L.R. 458* .
*Yenidje Tobacco Co. Ltd., In re [1916] 2 Ch. 426, C.A.*

The following additional cases were cited in argument:

*Burland v. Earle [1902] A.C. 83, P.C.*
*Furriers' Alliance, In re (1906) 51 S.J. 172* .
*Goodman v. Whitcomb* (1820) 1 J. &; W. 589. ***363**
*Langham Skating Rink Co., In re (1877) 5 Ch.D. 669, C.A.*
*North-West Transportation Co. Ltd. v. Beatty (1887) 12 App.Cas. 589, P.C.*
*Othery Construction Ltd., In re [1966] 1 W.L.R. 69; [1966] 1 All E.R. 145* .
*Rica Gold Washing Co., In re (1879) 11 Ch.D. 36, C.A.*
*Rowe v. Wood* (1822) 2 J. &; W. 553.
*Shuttleworth v. Cox Brothers & Co. (Maidenhead) Ltd. [1927] 2 K.B. 9, C.A.*
*Witt v. Corcoran (1872) 21 W.R. 47* .
*Wood v. Woad (1874) L.R. 9 Ex. 190* .

APPEAL from the Court of Appeal.

This was an appeal by Shokrollah Ebrahimi by leave of the Court of Appeal (Russell, Megaw and Buckley L.JJ.) from their decision on December 16, 1970, by which they allowed an appeal by the respondents, Westbourne Galleries Ltd. ('the company') and Asher Nazar Achoury ('Nazar') and George Alexander Nazar Achoury ('George Nazar'), directors of the company, from an order of Plowman J. on July 14, *1970 [1970] 1 W.L.R. 1378* by which, on a petition by the appellant, he wound up the respondent company.

By his petition, the appellant sought an order that Nazar and George Nazar should purchase his shares in the company, alternatively sell their shares in the company to him, on such terms as the court should think fit, alternatively that the company be wound up. Plowman J. refused to order a purchase of the appellant's shares but made an order winding up the company under section 222 (f) of the Companies Act 1948 .

The Court of Appeal allowed an appeal by the respondents against that order.

The appellant appealed.

 

The facts are stated in the opinions of Lord Wilberforce and Lord Cross of Chelsea, further facts may be found in the judgments of Plowman J., at pp. 1380-1383, 1389-1390, and the Court of Appeal.

*Raymond Walton Q.C.* and *Hedley Marten* for the appellant. This appeal raises for the first time in this House the question of an incorporated partnership: does one apply the partnership rule or the strict company rule of majority? It is now established that the power of the court under section 222 (f) of the Companies Act 1948 is not in any way limited by the other paragraphs of the section.

The appellant submits: (1) In a partnership the utmost good faith is required from all the partners, particularly where the other partners have the right to expel a partner from the business. They may only do so after giving him the fullest notice of the charges against him and an opportunity to refute them. If it is a question of his conduct of which they are complaining, they must give him an opportunity of mending his ways. In the present case, no reasons were given for the appellant's removal. The Court of Appeal *[1971] 1 Ch. 799* , 810-812 said that there was nothing to back up Plowman J.'s finding of fact that there was no sufficient justification for his removal and that the onus of showing that the other partners had not behaved properly was on the person complaining of their acts. That ***364*** was a wrong attribution of the onus. An 'incorporated partnership' is still suffused with the duty of utmost good faith. (2) Exclusion from participation in the conduct of the business of the partnership is always a most serious breach of the partnership obligations. (3) Where the partners have used the machinery of the Companies Act for the conduct of their business organisation the same rules and duties apply as if the business had remained a partnership, so that even though under the general law and the construction of any power conferred to remove minority shareholders from participation in the firm that power may only be exercised bona fide. (4) To remove a working partner or a director from his directorship in a case such as the present, which means in practice to exclude him from participation in the bulk of the profits of the company, is a serious breach of the partnership obligations unless there is justification for such removal. (5) Plowman J. has rightly found as a fact that there was no sufficient justification. A winding up could hardly be inequitable where, if the company were a partnership, it would be wound up.

It is easy to recognise a partnership company when one sees it but difficult to formulate a test. The nub is: is it really a working partnership in the guise of a company? Alternatively, its essential character may be said to be that of a small company in which there is a relationship between the shareholders and the working directors, the basis being remuneration for work rather than investment. The company here has never paid a dividend, all the profits being paid out by way of salary. There is no factual dispute except, as a matter of emphasis, as to how far the appellant was ever really recognised as a partner.

If the House finds that this was a working partnership in the guise of a company it would be unduly restricted by matters of form if it did not take the view that the partnership rule of good faith applied. There is no suggestion that the Companies Act does not apply, but the whole of the obligations of everybody in the company is suffused by the obligations of that rule.

It is always a serious breach of partnership duties to exclude a partner from the management of the firm: see *Lindley on Partnership,* 13th ed. (1971), p. 331, supported by *Goodman v. Whitcomb* (1820) 1 J. & W. 589; *Rowe v. Wood* (1822) 2 J. & W. 553; and *Const v. Harris* (1824) Tur. & Rus. 496. Even a wholly unrestricted power of expulsion in a partnership agreement must be used fairly: see *Blisset v. Daniel (1853) 10 Hare 493* . The principle there was approved in, inter alia, *Wood v. Woad (1874) L.R. 9 Ex. 190* . If one starts with uberrimae fidei, natural justice is not far away.

Coming to the partnership company cases, Lord Dunedin in *Symington v. Symington's Quarries Ltd. (1905) 8 F. 121* , 129 enunciated the true and correct principle. It might have been possible to decide *In re Yenidje Tobacco Co. Ltd. [1916] 2 Ch. 426* on the narrow ground that there was complete deadlock, but Lord Cozens-Hardy M.R. went out of his way to say that whether that was so or not the circumstances were such that the court should apply partnership law. Pickford L.J. agreed; Warrington L.J. perhaps took a narrower view, but he recognised clearly the application of the partnership concept. *In re Yenidje Tobacco Co. Ltd.* was approved by the Privy Council in *Loch v. John Blackwood Ltd. [1924] A.C. 783* , not ***365*** strictly a partnership case. See, in particular, *per* Lord Skerrington in *Thomson v. Drysdale, 1925 S.C. 311* , 316, who uses the word 'suffused' with the obligation of good faith, saying that the partner in question must avoid acting in such a way as to make it impossible for the other shareholder to co-operate with him. That can only be read into the Companies Act from the partnership aspect of the matter. The words of Simonds J. in *In re Cuthbert Cooper & Sons Ltd. [1937] Ch. 392* , 398 were in relation to the facts of the particular case, where the younger sons were not members of the company and therefore not within the partnership concept; even so, on the facts, the case has not commanded universal approbation: see *per* Danckwerts L.J. in *In re Swaledale Cleaners Ltd. [1968] 1 W.L.R. 1710* , 1716 and *In re Lundie Brothers Ltd. [1965] 1 W.L.R. 1051* .

 

With regard to what the Court of Appeal say in their judgment *[1971] Ch. 799* , 808B, it is difficult to think that ordinary partners converting their business into a limited company would be so suspicious of each other that they would provide for something so far from the thoughts of any of them as that one would seek to exclude the other from the management of the company. The vast majority of companies are incorporated without reference to a solicitor.

The appellant in the Court of Appeal was not really going as far as he is represented in the judgment *[1971] Ch. 797* , 810B as having submitted. What he intended to say throughout was that there were really two things: (1) the excluding partner must have reasonable grounds for exclusion; (2) his action must be bona fide, which is easy to establish if there are reasonable grounds. Continual complaints might in certain circumstances be a reason for exclusion, but there would have to be something more than that the business would get on better without the partner in question.

As to onus, one starts with *Blisset v. Daniel, 10 Hare 493* ; see at p. 522, which puts it in the right place, as does also *Witt v. Corcoran (1872) 21 W.R. 47* ; see also *In re Lundie Brothers Ltd. [1965] 1 W.L.R. 1051* , 1057. In *In re Expanded Plugs Ltd. [1966] 1 W.L.R. 514* , which was not a case of an attempt to exclude a partner from taking part in the business of the company but the contrary, Plowman J. said no more than that one must bring oneself, in either case, within the just and equitable principle.

The evidence shows that neither Nazar nor George Nazar thought of their relationship with the appellant in the partnership context at all but regarded him as a mere employee. Their actions followed naturally from their view of him as an employee, but were not bona fide in the context of good faith as partners.

As to the propositions discussed by the Court of Appeal *[1971] Ch. 799* , 810-812, the test whether an action is bona fide in the interests of a company as a whole was evolved with regard to special resolutions to change articles: see *Buckley on the Companies Acts,* 13th ed. (1957), pp. 38-39. It does not mean in the interests of the company as distinct from the corporators, but in the interests of the corporators considered as a body. The test comes in for the purpose of dealing with the general principles of law and equity dealing with the limitation of the powers of all majorities. It is a pure company law test, not applicable to relationships between partners who owe each other the utmost good faith. The language of the ***366** Court of Appeal at *[1971] Ch. 799* , 811F, comes perilously close to requiring fraud.

No doubt the same consequences as those for which the appellant contends for here in the case of a partnership company should apply in the case of a similar company where there was not actually a partnership before. One tests the partnership nature of a company by looking at the current circumstances of the company, and the previous history is irrelevant.

*A. J. Balcombe Q.C.* and *William Stubbs* for the respondents. The appellant is tied by his allegations in his petition. In this appeal he has gone beyond the facts found by Plowman J., and he is not entitled to do this. The respondents do not seek to do so.

A misapprehension underlies the appellant's approach to this appeal. There is a division between the owners of a company and the people who work in it. There is no such division in a partnership.

The respondents submit: (1) No shareholder in a company can get a winding up order unless his position as a shareholder is affected. (2) There are no special rules applicable to 'quasi-partnership' companies (this point was not open to the respondents in the Court of Appeal). (3) Whether or not there is such a thing as a 'quasi-partnership company,' the removal of a director by itself never justifies a just and equitable winding up. 'By itself' includes those consequences which necessarily flow, including the fact that the director no longer gets director's fees. (4) In any event, a person in the position of the appellant in this case must both allege and prove lack of bona fides. (5) The court will not substitute its own judgment for that of the shareholders of the company unless no reasonable man could have formed the view which the shareholders formed.

As to (1), see those classes of persons who are entitled to petition for a winding up order: Companies Act 1948, s. 224 . It is notorious by its absence that a director has no such right. A contributory is only entitled to petition in right of his position as a contributory, and only if his position as a contributory is affected: see the proviso (a) to section 224 (1) ; *In re Expanded Plugs Ltd. [1966] 1 W.L.R. 514* and *Elder v. Elder & Watson, 1952 S.C. 49* , parallel decisions under section 210. This is also the basis of the rule that a fully paid up shareholder petitioning for a winding up must allege and prove that there is a surplus of assets available. [Reference was made to *In re Rica Gold Washing Co. (1879) 11 Ch.D. 36* ; *In re Othery Construction Ltd. [1966] 1 W.L.R. 69* ; and *In re Lundie Brothers Ltd. [1965] 1 W.L.R. 1051* .]

As to (2), there is nothing in the Act of 1948 which talks about there being two types of company. This is odd, since the Registrar-General's figures show that there are some 519,000 private companies and only some 15,000 public companies; the

 

great majority of companies would thus inferentially fall under the quasi-partnership head. When normal adult people choose to associate themselves together under one of the heads of company or partnership they do so with their eyes open. There are advantages and disadvantages either way. [Reference was made to the Partnership Act 1890, ss. 24 (5) and 25 .] It is not right to say that there is some sort of association halfway between the two to which the rules of partnership as opposed to company law are applicable. One can on the just and **367* equitable ground take into account the domestic nature of a small company, but one cannot apply the *law* of partnership. This would be an unwarranted gloss on the Companies Act . One should simply look at the Companies Act and ask whether, in all the circumstances, it is just and equitable to wind the company up.

*In re Yenidje Tobacco Co. Ltd. [1916] Ch. 426* was a case of deadlock and it would in any case have been just and equitable to wind up the company there. In the present case, difficulties of cooperation and so on can be solved simply by getting rid of the director involved. It is conceded that a lack of probity is always regarded as a ground for winding up.

The very difficulty in deciding what is a quasi-partnership supports the view that no such animal exists. One should consider the difficulty which Brightman J. found in *In re Leadenhall General Hardware Stores Ltd.* (unreported), February 4, 1971, of finding a suitable test for determining what was a quasi-partnership. One should have a reasonably certain test. The test which Brightman J. applied of whether the directors were working directors would produce astonishing results. Often there are sleeping partners in companies which would otherwise be partnership companies.

Although all the cases cited by the appellant refer to quasi-partnership principles, they can all be justified on the just and equitable principle without reference to partnership at all. *Symington v. Symington's Quarries Ltd., 8 F. 121* was decided on the just and equitable principle, alternatively the deadlock principle. *Loch v. John Blackwood Ltd. [1924] A.C 783* was a case of lack of probity. So was *Thomson v. Drysdale, 1925 S.C. 311* , decided under the *Loch v. John Blackwood* principle: see especially at p. 324, where reference is made to the fact that the partners go into a company knowing that there is power under the Companies Acts to remove directors. In *In re Cuthbert Cooper & Sons Ltd. [1937] Ch. 392* no order was made and the petition was dismissed, so no great reliance can be placed on the case. The appellant says that *In re Cuthbert Cooper & Sons Ltd.* did not have the approval of Danckwerts L.J. in *In re Swaledale Cleaners Ltd. [1968] 1 W.L.R. 1710* , but see *Charles Forte Investments Ltd. v. Amanda [1964] Ch. 240* where the Court of Appeal of which he was a member expressly followed it: Danckwerts J.J. must have forgotten that. The decision of Plowman J. in *In re Lundie Brothers Ltd. [1965] 1 W.L.R. 1051* was wrong. He does not seem to have appreciated the problem, and seems to have assumed that a winding up order could be made under section 222 even where the director was not affected in his position qua shareholder. It is wrong to assume that because the appellant was removed as a director of the company he will also be prejudiced as a shareholder by not receiving dividend.

As to (3), a gloss should not be put on section 184 of the Act of 1948. In the vast majority of cases this section would not be taken literally at all. It would have been easy for Parliament to say that section 184 should not apply to exempt private companies (introduced by the Act of 1947, s. 54) if it had wanted to do that; the fact that it did not indicates that section 184 was intended to be of universal application.

On points (2) and (3), a further essential difference between a partnership and a company is that the proprietary interest in a company is transmissible **368* A partnership is characterised by the fact that it is dissolved by the death or bankruptcy of any of the partners. This highlights the essential difference between a company and a partnership: that in a company the ownership and the management are separate.

If the members of a company join together in the context of the constitution of the company to remove a director under section 184 it is prima facie neither unfair nor inequitable that the power is exercised. If it got as far as being simply a desire to ruin the director in question one might get into the field where one would commit a legal wrong by deliberately harming him.

Further on (3), see *Bushell v. Faith [1970] A.C. 1099* , *per* Lord Upjohn, at p. 1108E. The converse question may be posed: is there an obligation. when a director retires by rotation according to the articles, to re-elect him? See *Lindley on Partnership,* at p. 331: an agreement not to continue him as director is perfectly competent within partnership law. See also *In re Cuthbert Cooper & Sons Ltd. [1937] Ch. 392* , 398: the bargain in the present case was that there should be the right to remove a director; see also *In re Expanded Plugs Ltd. [1966] 1 W.L.R. 514* , *per* Plowman J., at p. 522D. A shareholder can vote his shares as he wishes: *North-West Transportation Co. Ltd. v. Beatty (1887) 12 App.Cas. 589* and *Burland v. Earle [1902] A.C. 83* ; his motive is irrelevant unless it amounts to fraud or oppression, etc. Where, therefore, partners enter into an association on the basis of articles, the question of bona fides becomes irrelevant. *Lewis v. Haas, 1970 S.L.T. (Notes) 67* stresses the point about association on the terms of the articles and also refers to the refusal to reappoint a director when he retires by rotation. [Reference was made to *Elder v. Elder & Watson, 1952 S.C. 49* .]

 

As to (4), see *Wood v. Woad, L.R. 9 Ex. 190* and *In re Cuthbert Cooper & Sons Ltd. [1937] Ch. 392* . The point that, if it was not exercised in good faith, the removal might have been invalid has not been taken before. It was not taken in the petition, so it is neither alleged nor proved, and it must be proved, the onus being on the appellant. The right test is found in *In re Expanded Plugs Ltd. [1966] 1 W.L.R. 514* . Plowman J.'s finding of fact in the present case *[1970] 1 W.L.R. 1378* , 1389F, cannot be interfered with: see also the judgment of the Court of Appeal *[1971] Ch. 799* , 811G. In *Blisset v. Daniel, 10 Hare 493* Page Wood V.-C. was not directing himself to the onus of proof. In *Witt v. Corcoran, 21 W.R. 47* Bacon V.-C. was considering the case as if the defendant had to establish something; he was looking at it the wrong way round. Again, that was a partnership case and again the court was not being asked to deal with the question of onus of proof: see at p. 50. In *In re Cuthbert Cooper & Sons Ltd. [1937] Ch. 392* , *Wood v. Woad, L.R. 9 Ex. 190* and *In re Expanded Plugs Ltd. [1966] 1 W.L.R. 514* onus was in issue.

On (5), see *Shuttleworth v. Cox Brothers & Co. (Maidenhead) Ltd. [1927] 2 K.B. 9* , followed by the Court of Appeal in *Greenhalgh v. Arderne Cinemas Ltd. [1951] Ch. 286* (not cited). The mere fact that there is a difference of opinion as to whether the removal is for the benefit of the company is not a ground for a just and equitable winding up. In *In re Yenidje Tobacco Co. Ltd. [1916] Ch. 426* the machinery of the company ***369** provided no way out of the deadlock; that distinguishes that case from the present. See also *In re Langham Skating Rink Co. (1877) 5 Ch.D. 669* and *In re Furriers' Alliance (1906) 51 S.J. 172* .

This has been extremely expensive litigation. No dividend has been declared by the company for some years, and the company itself may have to pay a considerable sum by way of costs. The House might think that a good reason for not paying any dividend.

*Stubbs* following. The words of section 222 (f) are ex facie unlimited in scope. There are five considerations which should be borne in mind in construing it. (1) The court's jurisdiction under section 222 (f) has always been cautiously applied when invoked at the instance of a shareholder. (2) Particularly in view of the historical context in which section 184 of the Act was enacted it is inconceivable, reading section 184 in conjunction with section 222 (f), that the intention of the legislature can have been that a company like that in the present case should be wound up as a result of the exercise of the statutory power under section 184. (3) It is an accepted principle of our law that pacta sunt servanda, and when one is construing even words as wide as 'just and equitable' that principle should be borne in mind; it would follow that, certainly in the absence of bad faith. the majority of the shareholders should not be punished for carrying out a power which, as well as being in the Act, is part of the express contract between the parties. (4) It is a basic principle of company law that where a general meeting acts in good faith the shareholder does not have any cause of action consequent upon that. (5) If this appeal should succeed the result on the commercial community will not merely be something which the legislature never intended but will have effects which will be disastrous.

As to (1), see *Buckley on the Companies Acts,* 13th ed., p. 454. The courts initially held that they should apply the ejusdem generis rule to 222. This is no longer the law, nevertheless, at the instance of the shareholder the jurisdiction has in practice been exercised under specific heads. The present case does not fall under any specific head.

As to (2), see the arguments for counsel for the respondent in *Bushell v. Faith [1970] A.C. 1099* , 1103, in substance accepted by Lord Upjohn, at p. 1108E. The loss of income suffered by a director removed from office is expressly provided for by section 184 (6) . If the director wishes to protect himself against loss of income on removal from office, he will insist on a service agreement which gives him security of tenure. In such a case nothing in section 184 will take away the right to damages which he will have on removal from office.

As to (3), in the absence of agreement to the contrary the tenure of a director's office is determined by reference to the company's articles of association. The director may resign merely by giving notice in writing to the company, and in such event neither the company nor the other directors will have any legal ground for complaint. This is inconsistent with any suggestion that there is any breach of faith or duty or that it is unjust or inequitable if a director is removed under section 184 or not re-elected.

As to (4) this applies whether the company be small or large. There is no reported case to the contrary. The principle binds together many of the authorities cited, e.g., *Shuttleworth v. Cox Brothers & Co. (Maidenhead) Ltd. [1927] 2 K.B. 9* and *North-West Transportation Co. Ltd. v. Beatty, 12 App.Cas. 589* . The judgment of the Court of Appeal in the present case is in accordance with that long-standing principle and body of authority.

As to (5), this company is not particularly untypical. There are many thousands of small, three-, four-, five-men companies where the shareholders also constitute the board. It is a frequent occurrence in such companies that members of the board fall out. There may well be faults not only on one side, as Plowman J. said in the present case, but if the majority shareholders are

 

not entitled to restore harmony to the board without raising the spectre of litigation this will have the most extraordinary result. Each time a director is removed or not re-elected there will be a winding up, or, at the very least, depending on how the House frames its opinions in the present case, every removal from office would be reviewed by the Companies Court in the context of a winding up petition. That would not only be contrary to the principle that the courts will not interfere with the bona fide decisions of business men but will be positively disastrous to many thousands of small companies. [Reference was made to *In re Leadenhall General Hardware Stores Ltd.* (unreported).]

*Walton Q.C.* in reply. That the appellant made life impossible for the second and third respondents is not what Plowman J. found: see especially *[1970] 1 W.L.R. 1378* , 1381B-D.

As to the respondents' submission (1), this does not mean that so long as the appellant holds shares in the company he cannot get a winding up order. The court must in all these matters be entitled to look at all the circumstances. It cannot do that against the settled pattern of distribution of the profits of the company and say that this is irrelevant. The respondents submitted that there were a large number of cases where it was decided that there should be no winding up where there was insolvency on the part of the shareholder. The answer to that is simply that it would be a pointless exercise. Of course, this contrasts with partnership, where there has to be a winding up because the partners are personally liable.

The parallel which the respondents sought to draw with section 210, where undoubtedly only the shareholder can petition, is not exact or proper because the language of section 210 is different: see *per* Lord Keith in *Elder v. Elder & Watson, 1952 S.C. 49* , 58-59. Under section 210 the shareholder is petitioning qua shareholder; under section 222 the petition is on a wider basis.

As to the respondents' submission (2), the distinction between owners and managers which does not occur in the case of a partnership is interesting and provides a clue to the nature of the 'quasi-partnership company.' It is the test which should be applied and is what Warrington L.J. meant in *In re Yenidje Tobacco Co. Ltd. [1916] 2 Ch. 426* . The appellant is not suggesting that any special principles are applicable to quasi-partnership companies, but when considering what is just and equitable in the context of a small domestic company the owners and managers of which are the same persons the court can find in the partnership concept a much better guide than that provided by the articles.

As the company in *In re Cuthbert Cooper & Sons Ltd. [1937] Ch. 392* was a private company there had to be restrictions on transfers - one of the essential conditions of private companies - and on new members being allowed in. The court could not simply rely on the fact that new members were not allowed in for making a winding up order. The appellant only cited *In re Swaledale Cleaners Ltd. [1968] 1 W.L.R. 1710* to show that *In re Cuthbert Cooper & Sons Ltd.* had not escaped without criticism; they were not saying that it had been overruled.

As to the respondents' submission (3), equally part of the contract was that there should be the power under section 222 (f) to wind the company up if it became just and equitable to do so. So far as voluntary resignation is concerned, shareholders are entitled to cast their votes as they think fit, but the court can look and see whether what they have done is not just and equitable so that a winding up order should be made. No doubt a director can resign, but if he does so it may be in circumstances which it would be just and equitable to have the company wound up. He could not successfully oppose the winding up of the company if his resignation resulted virtually in the repudiation of his obligation; he might, of course, want to resign as director but be prepared to continue his work. As to rotation, if nothing is done a director is automatically re-elected. There is therefore no onus on the other shareholders to do anything except refrain from opposing the re-election. As to *Bushell v. Faith [1970] A.C. 1099* and the background to section 184 of the Act of 1948, a typical case to which section 184 was directed was the case where the director had little or no real interest in the company. It was that that was thought to be an injustice.

*In re Expanded Plugs Ltd. [1966] 1 W.L.R. 514* was a very special case. It was not a case of expulsion. All the acts were for the benefit of the company. The case does not, however, get one very far at all: all that Plowman J. said has to be read against the background of the case: that there was no expulsion or serious breach of partnership obligation.

The appellant does not challenge such cases as *North-West Transportation Co. Ltd. v. Beatty, 12 App.Cas. 589* or *Burland v. Earle [1902] A.C. 83* : they go not to the validity of the shareholder exercising his votes but to the consequences in law of the exercise; not to the validity of the resolution but to its consequences. The maxim is not that a person is presumed to know the law but that ignorance of the law is no excuse. *Lewis v. Haas, 1970 S.L.T. (Notes) 67* is distinguishable in that there was there no question of expulsion.

 

As to the respondents' submission (4), a person must be presumed to intend the consequences of his own acts, and in the present case Nazar must be presumed to have intended the consequences of his acts in excluding the appellant from any share in the conduct of the business or taking an effective share in its profits. There is no doubt at all that the Nazars were determined to get the appellant out of the company. There was no good reason for removing him apart from that. What the Court of Appeal say *[1971] Ch. 799* , 811G is based on the test of what no reasonable man could have considered. It is important to note Plowman J.'s finding *[1970] 1 W.L.R. 1378* , 1389 that 'the faults were not all on one side.' If the faults had all been on the appellant's side he could not have obtained a ***372** winding up order. There is no difference here between the interests of the company and the interests of the remaining shareholders. It is difficult really to see what bona fide in the interests of the company means in this context.

One must see what the findings of fact of Brightman J. in *In re Leadenhall General Hardware Stores Ltd.* (unreported) were to see the basis on which he was proceeding, right or wrong. He said that it was not a case where he ought to apply the quasi-partnership concept, so the case is not of great force. The appellant accepts, however, that one does not know from the transcript of the judgment without going into the evidence what was behind Brightman J.'s statement that the petitioner was appointed as manager. There, there was no previous partnership.

What the appellant had to allege and prove here were facts rendering the making of a winding up order just and equitable. He has done this by pointing to acts done to him and the serious financial consequences, those acts being done in the context of a small domestic company in which he and Nazar were working in equal partnership within the framework of a company. The suggestion that he must allege and prove lack of bona fides is misplaced. He must allege and prove the facts on which he relies. 'Bona fide in the interests of the company,' in relation to special resolutions, has a meaning in the context of a large company, but not in a case such as the present where 'the company' for practical purposes means 'the majority.' The gravamen of the appellant's charge is the damage done to him. [Reference was made to *In re Lundie Brothers Ltd. [1965] 1 W.L.R. 1051* .] A variety of views were expressed in *Wood v. Woad, L.R. 9 Ex. 190* , but at least two judges thought that it was sufficient for the plaintiff to plead the facts on which he relied.

The respondents said that the Court of Appeal put a correct gloss on the facts here when they said *[1971] Ch. 799* , 811G that it could not be said that no reasonable men could have considered the appellant's removal justified. That cannot conceivably be the test, because: (a) it has always been put forward as the test for the validity of a special resolution: see *Shuttleworth v. Cox Brothers & Co. (Maidenhead) Ltd. [1927] 2 K.B. 9* . That being so, naturally the test is a very stringent one because the question is whether the resolution has been properly passed. The test is in no way directed to the consequences of the special resolution, and a petition based on the just and equitable principle is put forward on the basis of the *consequences* of what happens when the resolution is passed. It is not seen through the eyes of reasonable men, but from the point of view of the person affected. (b) The test ignores the question of where the blame lies. The Court of Appeal makes no differentiation on this question. The just and equitable test must make allowance for it. (c) The true test must depend on all the circumstances of the case, including the pacta sunt servanda principle and conduct of the parties generally.

As to the respondents' submission (5), that principle being directed to the validity of a special resolution, the court does not, indeed, substitute its own judgment. What the respondents are really trying to do under the guise of it is to do the reverse: to substitute the judgment of Nazar and George Nazar as to whether the appellant should be removed for the judgment ***373** of the court as to whether it is just and equitable to wind up the company. The cases cited do not carry the matter any further. In *In re Langham Skating Rink Co., 5 Ch.D. 669* where the shareholders were apprehending insolvency - a different case from the present - all that the Court of Appeal decided was that the minority were not entitled to opt out. The basis of the petition in *In re Furriers Alliance, 51 S.J. 172* was absolute deadlock.

As to junior counsel's submission (1), the jurisdiction will be exercised whenever the court finds it just and equitable to do so. In *Symington v. Symington's Quarries Ltd., 8 F. 121* a winding up order *was* made.

As to (2), this is pure assertion without any logic to support it.

As to (3), all that pacta sunt servanda means is that if a person goes blindly into a private company the less the court safeguards him. It must be read in the light of section 222, which provides a longstop. Section 184 (6) covers the case where one has a service contract as managing director and so the service comes to an end before the end of the period for which it was initially fixed. That does not give the appellant here - who had no service contract - any rights at all.

 

As to (4), this was a wide proposition. *Shuttleworth v. Cox Brothers Co. (Maidenhead) Ltd. [1927] 2 K.B. 9* simply laid down a test with regard to the validity of a special resolution, and *North-West Transportation Co. Ltd. v. Beatty, 12 App.Cas. 589* merely said that in ordinary circumstances if a contract which a director was seeking to foist on the company was fair then a resolution might be passed by the majority ratifying it.

As to (5), the proof of the pudding is in the eating. *In re Lundie Brothers Ltd. [1965] 1 W.L.R. 1051* was decided in 1965. It was the first case in which the simple exclusion of a director as a working partner was held sufficient to justify a winding up. It stood until the present case. There was no flood of cases. Normally one side buys the other out at a fair price - a desirable practice which ought to be encouraged.

A winding up order can, if necessary, be stayed.

*Balcombe Q.C.* If the House were to consider reaching a decision of fact other than that found by Plowman J. it should first read the whole of the affidavits and the transcript of evidence. With regard to the suggestion that the appellant should be bought out, in practice such negotiations are common, and they took place here.

Their Lordships took time for consideration. May 3.

LORD WILBERFORCE.

My Lords, the issue in this appeal is whether the respondent company Westbourne Galleries Ltd. should be wound up by the court on the petition of the appellant who is one of the three shareholders, the personal respondents being the other two. The company is a private company which carries on business as dealers in Persian and other carpets. It was formed in 1958 to take over a business founded by the second respondent (Mr. Nazar). It is a fact of cardinal importance that since about 1945 the business had been carried on by the appellant and Mr. Nazar as partners, equally sharing the management and the profits. When the company was formed, the signatories to its memorandum were the appellant and Mr. Nazar and they were ***374** appointed its first directors. Of its issued share capital, 500 shares of £1 each were issued to each subscriber and it was found by the learned judge, after the point had been contested by Mr. Nazar, that Mr. Ebrahimi paid up his shares out of his own money. Soon after the company's formation the third respondent (Mr. George Nazar) was made a director, and each of the two original shareholders transferred to him 100 shares, so that at all material times Mr. Ebrahimi held 400 shares, Mr. Nazar 400 and Mr. George Nazar 200. The Nazars, father and son, thus had a majority of the votes in general meeting. Until the dispute all three gentlemen remained directors.

The company made good profits, all of which were distributed as directors' remuneration. No dividends have ever been paid, before or after the petition was presented.

On August 12, 1969, an ordinary resolution was passed by the company in general meeting, by the votes of Mr. Nazar and Mr. George Nazar, removing Mr. Ebrahimi from the office of director, a resolution which was effective in law by virtue of section 184 of the Companies Act 1948 and article 96 of Part I of Table A. Shortly afterwards the appellant presented his petition to the court.

This petition was based in the first place upon section 210 of the Companies Act 1948 , the relief sought under this section being an order that Mr. Nazar and his son be ordered to purchase the appellant's shares in the company. In the alternative it sought an order for the winding up of the company. The petition contained allegations of oppression and misconduct against Mr. Nazar which were fully explored at the hearing before Plowman J. *[1970] 1 W.L.R. 1378* . The learned judge found that some were unfounded and others unproved and that such complaint as was made out did not amount to such a course of oppressive conduct as to justify an order under section 210. However, he made an order for the winding up of the company under the 'just and equitable' provision. I shall later specify the grounds on which he did so. The appellant did not appeal against the rejection of his case under section 210 and this House is not concerned with it. The company and the individual respondents appealed against the order for winding up and this was set aside by the Court of Appeal. The appellant now seeks to have it restored.

My Lords, the petition was brought under section 222 (f) of the Companies Act 1948 , which enables a winding up order to be made if 'the court is of the opinion that it is just and equitable that the company should be wound up.' This power has existed in our company law in unaltered form since the first major Act, the Companies Act 1862 . Indeed, it antedates that statute since it existed in the Joint Stock Companies Winding up Act 1848. For some 50 years, following a pronouncement by Lord Cottenham L.C. *[Ex parte Spackman (1849) 1 Mac. & G. 170* , 174] in 1849, the words 'just and equitable' were interpreted so as only to

 

include matters ejusdem generis as the preceding clauses of the section, but there is now ample authority for discarding this limitation. There are two other restrictive interpretations which I mention to reject. First, there has been a tendency to create categories or headings under which cases must be brought if the clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular **375* instances. Secondly, it has been suggested, and urged upon us, that (assuming the petitioner is a shareholder and not a creditor) the words must be confined to such circumstances as affect him in his capacity as shareholder. I see no warrant for this either. No doubt, in order to present a petition, he must qualify as a shareholder, but I see no reason for preventing him from relying upon any circumstances of justice or equity which affect him in his relations with the company, or, in a case such as the present, with the other shareholders.

One other signpost is significant. The same words 'just and equitable' appear in the Partnership Act 1892, section 25 , as a ground for dissolution of a partnership and no doubt the considerations which they reflect formed part of the common law of partnership before its codification. The importance of this is to provide a bridge between cases under section 222 (f) of the Act of 1948 and the principles of equity developed in relation to partnerships.

The winding up order was made following a doctrine which has developed in the courts since the beginning of this century. As presented by the appellant, and in substance accepted by the learned judge, this was that in a case such as this the members of the company are in substance partners, or quasi-partners, and that a winding up may be ordered if such facts are shown as could justify a dissolution of partnership between them. The common use of the words 'just and equitable' in the company and partnership law supports this approach. Your Lordships were invited by the respondents' counsel to restate the principle on which this provision ought to be used; it has not previously been considered by this House. The main line of his submission was to suggest that too great a use of the partnership analogy had been made; that a limited company, however small, essentially differs from a partnership; that in the case of a company, the rights of its members are governed by the articles of association which have contractual force; that the court has no power or at least ought not to dispense parties from observing their contracts; that, in particular, when one member has been excluded from the directorate, or management, under powers expressly conferred by the Companies Act and the articles, an order for winding up, whether on the partnership analogy or under the just and equitable provision, should not be made. Alternatively, it was argued that before the making of such an order could be considered the petitioner must show and prove that the exclusion was not made bona fide in the interests of the company.

My Lords, I must first make some examination of the authorities in order to see how far they support the respondents' propositions and, if they do not, how far they rest upon a principle of which this House should disapprove. I will say at once that, over a period of some 60 years, they show a considerable degree of consistency, and that such criticism as may be made relates rather to the application of accepted principle to the facts than to the statements of principles themselves.

The real starting point is the Scottish decision in *Symington v. Symington's Quarries Ltd. (1905) 8 F. 121* . There had been a partnership business carried on by two brothers who decided to transfer it to a private limited company. Each brother was to hold half the shares except for a small holding for a third brother to hold balance for voting. A resolution was passed in general meeting by the votes of one brother together **376* with other members having nominal interests that he should be sole director. The other two brothers petitioned for a winding up under the just and equitable provision and the court so ordered. The reasons for so doing, given by some of their Lordships of the First Division, are expressed in terms of lost substratum or deadlock - words clearly used in a general rather than a technical sense. The judgment of Lord M'Laren, which has proved to be the most influential as regards later cases, puts the ground more generally. He points out, at p. 130, that the company was not formed by appeal to the public: it was a domestic company, the only real partners being the three brothers:

> 'In such a case it is quite obvious that all the reasons that apply to the dissolution of private companies, on the grounds of incompatibility between the views or methods of the partners, would be applicable in terms to the division amongst the shareholders of this company, ...'

In England, the leading authority is the Court of Appeal's decision in *In re Yenidje Tobacco Co. Ltd. [1916] 2 Ch. 426* . This was a case of two equal director shareholders, with an arbitration provision in the articles, between whom a state of deadlock came into existence. It has often been argued, and was so in this House, that its authority is limited to true deadlock cases. I could, in any case, not be persuaded that the words 'just and equitable' need or can be confined to such situations. But Lord Cozens-Hardy M.R. clearly puts his judgment on wider grounds. Whether there is deadlock or not, he says, at p. 432, the circumstances

 

> 'are such that we ought to apply, if necessary, the analogy of the partnership law and to say that this company is now in a state which could not have been contemplated by the parties when the company was formed ...'

Warrington L.J. adopts the same principle, treating deadlock as an example only of the reasons why it would be just and equitable to wind the company up.

In 1924, these authorities were reviewed, approved and extended overseas by the Judicial Committee of the Privy Council in an appeal from the West Indian Court of Appeal (Barbados), *Loch v. John Blackwood Ltd. [1924] A.C. 783* . The judgment of the Board delivered by Lord Shaw of Dunfermline clearly endorses, if not enlarges, the width to be given to the just and equitable clause. The case itself was one of a domestic company and was not one of deadlock. One of the directors had given grounds for loss of confidence in his probity and (a matter echoed in the present case) had shown that he regarded the business as his own. His Lordship quotes with approval from the judgments of Lord M'Laren in *Symington v. Symington's Quarries Ltd., 8 F. 121* and of Lord Cozens-Hardy M.R. in *In re Yenidje Tobacco Co. Ltd. [1916] 2 Ch. 426* .

I note in passing the Scottish case of *Thomson v. Drysdale, 1925 S.C. 311* where a winding up was ordered under the just and equitable clause at the instance of a holder of one share against the only other shareholder who held 1,501 shares, clearly not a case of deadlock, and come to *In re Cuthbert Cooper & Sons Ltd. [1937] Ch. 392* , a case which your Lordships must consider. The respondents relied on this case which carries the authority ***377** of Simonds J. as restricting the force of the just and equitable provision. The company was clearly a family company, the capital in which belonged to a father and his two elder sons. After the death of the father leaving his shares to his younger sons and appointing them his executors, his elder sons, exercising the powers given to directors by the articles, refused to register the executors as shareholders and dismissed them from employment. The executors' petition for winding up of the company was dismissed. My Lords, with respect for the eminent judge who decided it, I must doubt the correctness of this. Whether on the facts stated a case of justice and equity was made out is no doubt partly a question of fact on which, even though my own view is clear enough, I should respect the opinion of the trial judge; but, this matter apart, I am unable to agree as to the undue emphasis he puts on the contractual rights arising from the articles, over the equitable principles which might be derived from partnership law, for in the result the latter seem to have been entirely excluded in the former's favour. I think that the case should no longer be regarded as of authority.

There are three recent cases which I should mention since they have figured in the judgments below. *In re Lundie Brothers Ltd. [1965] 1 W.L.R. 1051* was, like the present, a decision of Plowman J. This was a case where the petitioner, one of three shareholders and directors, was excluded from participation in the management and from directors' remuneration. Plowman J. applying partnership principles made a winding up order under the just and equitable clause. If that decision was right it assists the present appellant. The Court of Appeal in the present case disagreed with it and overruled it, in so far as it related to a winding up. The respondent argues that this was the first case where exclusion of a working director, valid under the articles, had been treated as a ground for winding up under the just and equitable clause and that as such it was an unjustifiable innovation.

*In re Expanded Plugs Ltd. [1966] 1 W.L.R. 514* was, on the other hand, approved by the Court of Appeal in the present case. The case itself is a paradigm of obscure forensic tactics and, as such, of merely curious interest; its only importance lies in the statement, contained in the judgment, at p. 523, that since the relevant decisions were carried out within the framework of the articles the petitioner must show that they were not carried out bona fide in the interests of the company. I shall return, in so far as it limits the scope of the just and equitable provision, to this principle but I should say at once that I disagree with it.

In *In re K/9 Meat Supplies (Guildford) Ltd. [1966] 1 W.L.R. 1112* there was a company of three shareholder/directors one of whom became bankrupt; the petitioner was his trustee in bankruptcy. It was contended that the company was a quasi-partnership and that since section 33 of the Partnership Act 1890 provides for dissolution on the bankruptcy of one of the partners a winding up order on this ground should be made. Pennycuick J. rejected this argument on the ground that, since the 'partnership' had been transformed into a company and since the articles gave no automatic right to a winding up on bankruptcy, bankruptcy of one member was not a ground for winding up of itself. He then proceeded to consider whether the just and equitable provision should be applied. In my opinion, this procedure was correct and I need not express an opinion whether, on the facts, it was right to refuse an order.

 

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Finally I should refer to the Scottish case of *Lewis v. Haas, 1970 S.L.T. (Notes) 67* where the two main shareholder/directors each held 49 per cent. of the shares, the remaining 2 per cent. being held by a solicitor. Lord Fraser, in the Outer House, while accepting the principle that exclusion from management might be a ground for ordering a winding up, did not find the facts sufficient to support the use of the just and equitable clause.

This series of cases (and there are others: *In re Davis & Collett Ltd. [1935] Ch. 693* ; *Baird v. Lees, 1924 S.C. 83* ; *Elder v. Elder & Watson, 1952 S.C. 49* ; *In re Swaledale Cleaners Ltd. [1968] 1 W.L.R. 1710* ; *In re Fildes Bros. Ltd. [1970] 1 W.L.R. 592* ; *In re Leadenhall General Hardware Stores Ltd.* (unreported), February 4, 1971), amounts to a considerable body of authority in favour of the use of the just and equitable provision in a wide variety of situations, including those of expulsion from office. The principle has found acceptance in a number of Commonwealth jurisdictions. Though these were not cited at the Bar I refer to some of them since they usefully illustrate the principle which has been held to underlie this jurisdiction and show it applicable to exclusion cases.

In *In re Straw Products Pty. Ltd. [1942] V.L.R. 222* Mann C.J. said, at p. 223:

> 'All that Hinds has done in the past in exercise of his control has been within his legal powers. The question is whether he has used those powers in such a way as to make it just and equitable that Robertson should be allowed by the court to retire from the partnership. The analogy of a partnership seems to me to clarify discussion.'

*In re Wondoflex Textiles Pty. Ltd. [1951] V.L.R. 458* was a case where again the company was held to resemble a partnership. The petitioner, owner of a quarter share, was removed from office as director by the governing director exercising powers under the articles. Thus the issue, and the argument, closely resembled those in the present case. The judgment of Smith J. contains the following passage, at p. 467:

> 'It is also true, I think, that, generally speaking, a petition for winding up, based upon the partnership analogy, cannot succeed if what is complained of is merely a valid exercise of powers conferred in terms by the articles: ... To hold otherwise would enable a member to be relieved from the consequences of a bargain knowingly entered into by him: ... But this, I think, is subject to an important qualification. Acts which, in law, are a valid exercise of powers conferred by the articles may nevertheless be entirely outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company; and in such cases the fact that what has been done is not in excess of power will not necessarily be an answer to a claim for winding up. Indeed, it may be said that one purpose of [the just and equitable provision] is to enable the court to relieve a party from his bargain in such cases.'

The whole judgment is of value. In New Zealand, the Court of Appeal has endorsed the potential application of the principle to exclusion cases: *Tench v. Tench Bros. Ltd. [1930] N.Z.L.R. 403* ; see also *In re Modern Retreading Co. Ltd. [1962] E.A. 57* , also a case of exclusion from management, and cf. *In re Sydney and Whitney Pier Bus Service Ltd. [1944] 3 D.L.R. 468* and *In re Concrete Column Clamps Ltd. [1953] 4 D.L.R. 60* (Quebec).

My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words 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 defined by the Companies Act and by the articles of association by which shareholders 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 very 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) an agreement, or understanding, that all, or some (for there may be '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. To refer, as so many of the cases do, to 'quasi-partnerships' or 'in substance partnerships' may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words 'just and equitable' sum these up in the law of partnership itself. and in ***380** many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in.

My Lords, this is an expulsion case, and I must briefly justify the application in such cases of the just and equitable clause. The question is, as always, whether it is equitable to allow one (or two) to make use of his legal rights to the prejudice of his associate(s). The law of companies recognises the right, in many ways, to remove a director from the board. Section 184 of the Companies Act 1948 confers this right upon the company in general meeting whatever the articles may say. Some articles may prescribe other methods: for example, a governing director may have the power to remove (compare *In re Wondoflex Textiles Pty. Ltd. [1951] V.L.R. 458* ). and quite apart from removal powers, there are normally provisions for retirement of directors by rotation so that their re-election can be opposed and defeated by a majority, or even by a casting vote. In all these ways a particular director-member may find himself no longer a director, through removal, or non-re-election: this situation he must normally accept, unless he undertakes the burden of proving fraud or mala fides. The just and equitable provision nevertheless comes to his assistance if he can point to, and prove, some special underlying obligation of his fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved. and the principles on which he may do so are those worked out by the courts in partnership cases where there has been exclusion from management (see *Const v. Harris* (1824) Tur. & Rus. 496, 525) even where under the partnership agreement there is a power of expulsion (see *Blisset v. Daniel (1853) 10 Hare 493* ; *Lindley on Partnership,* 13th ed. (1971), pp. 331, 595).

I come to the facts of this case. It is apparent enough that a potential basis for a winding up order under the just and equitable clause existed. The appellant after a long association in partnership, during which he had an equal share in the management, joined in the formation of the company. The inference must be indisputable that he, and Mr. Nazar, did so on the basis that the character of the association would, as a matter of personal relation and good faith, remain the same. He was removed from his directorship under a power valid in law. Did he establish a case which, If he had remained in a partnership with a term providing for expulsion, would have justified an order for dissolution? This was the essential question for the judge. Plowman J. dealt with the issue in a brief paragraph in which he said *[1970] 1 W.L.R. 1378* , 1389:

> '... while no doubt the petitioner was lawfully removed, in the sense that he ceased in law to be a director, it does not follow that in ***381** removing him the respondents did not do him a wrong. In

> my judgment, they did do him a wrong, in the sense that 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 main justification put forward for removing him was that he was perpetually complaining, but the faults were not all on one side and, in my judgment, this is not sufficient justification. For these reasons, in my judgment, the petitioner, therefore, has made out a case for a winding up order.'

Reading this in the context of the judgment as a whole, which had dealt with the specific complaints of one side against the other, I take it as a finding that the respondents were not entitled, in justice and equity, to make use of their legal powers of expulsion and that, in accordance with the principles of such cases as *Blisset v. Daniel, 10 Hare 493* , the only just and equitable course was to dissolve the association. To my mind, two factors strongly support this. First, Mr. Nazar made it perfectly clear that he did not regard Mr. Ebrahimi as a partner, but did regard him as an employee. But there was no possible doubt as to Mr. Ebrahimi's status throughout, so that Mr. Nazar's refusal to recognise it amounted, in effect, to a repudiation of the relationship. Secondly, Mr. Ebrahimi, through ceasing to be a director, lost his right to share in the profits through directors' remuneration, retaining only the chance of receiving dividends as a minority shareholder. It is true that an assurance was given in evidence that the previous practice (of not paying dividends) would not be continued, but the fact remains that Mr. Ebrahimi was thenceforth at the mercy of the Messrs. Nazar as to what he should receive out of the profits and when. He was, moreover, unable to dispose of his interest without the consent of the Nazars. All these matters lead only to the conclusion that the right course was to dissolve the association by winding up.

I must deal with one final point which was much relied on by the Court of Appeal. It was said that the removal was, according to the evidence of Mr Nazar, bona fide in the interests of the company; that Mr. Ebrahimi had not shown the contrary; that he ought to do so or to demonstrate that no reasonable man could think that his removal was in the company's interest. This formula 'bona fide in the interests of the company' is one that is relevant in certain contexts of company law and I do not doubt that in many cases decisions have to be left to majorities or directors to take which the courts must assume had this basis. It may, on the other hand, become little more than an alibi for a refusal to consider the merits of the case, and in a situation such as this it seems to have little meaning other than 'in the interests of the majority.' Mr. Nazar may well have persuaded himself, quite genuinely, that the company would be better off without Mr. Ebrahimi, but if Mr. Ebrahimi disputed this, or thought the same with reference to Mr. Nazar, what prevails is simply the majority view. To confine the application of the just and equitable clause to proved cases of mala fides would be to negative the generality of the words. It is because I do not accept this that I feel myself obliged to differ from the Court of Appeal.

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I would allow the appeal and restore the judgment of Plowman J. I propose that the individual respondents pay the appellant's costs here and in the Court of Appeal.

VISCOUNT DILHORNE.

My Lords, I have had the advantage of reading the opinion of my noble and learned friend, Lord Wilberforce. I agree with all he has said, and he has dealt with the matter so comprehensively that there is nothing I wish to add.

I agree that the appeal should be allowed and that the individual respondents should be ordered to pay the appellant's costs here and in the Court of Appeal.

LORD PEARSON..

My Lords, I have had the advantage of reading the opinion of my noble and learned friend Lord Wilberforce, and for the reasons given by him I would allow the appeal and restore the judgment of Plowman J.

I agree that the individual respondents should be ordered to pay the appellant's costs here and in the Court of Appeal.

 

LORD CROSS OF CHELSEA.

My Lords, the 'just and equitable' clause first appeared in section 5 of the Joint Stock Companies Winding Up Act 1848 . Subsections (1) to (6) of that section gave the court jurisdiction to wind up a company in various circumstances indicative of insolvency; subsection (7) gave jurisdiction if the company had been dissolved or should have ceased to carry on business or should be carrying on business only for the purpose of winding up its affairs; and subsection (8) added: 'or if any other matter or thing shall be shown which, in the opinion of the court, shall render it just and equitable that the company should be dissolved.' The meaning of the subsection was considered by Lord Cottenham L.C. in 1849 in *Ex parte Spackman 1 Mac. & G. 170* . In that case the company, which was a cattle insurance company, was not insolvent and was carrying on business; but the petitioners who held shares which were not fully paid up considered that its prospects were bad and that it might well become insolvent. The fact that some shareholders in a company take a pessimistic view of its prospects does not make it 'just and equitable' to wind it up against the wishes of the majority who take a more optimistic view and it is not surprising that the petition was dismissed; but in the course of his judgment Lord Cottenham L.C. expressed an opinion as to the scope of the subsection which had for many years an unfortunate influence on the practice of the Companies Court. He said, at p. 174:

> 'This clause, was, no doubt, thus worded in order to include all cases not before mentioned; but of course it cannot mean that it should be interpreted otherwise than in reference to matters ejusdem generis, as those in the previous clauses. There must be something in the management and conduct of the company which shows the court that it should be no longer allowed to continue, and that the concern ought to be wound up.'

It is not in fact easy to see what precisely Lord Cottenham L.C. had in ***383*** mind - for there may well be matters arising in the management of a company's affairs which make it 'just and equitable' that it should be wound up but which have no relation whatever either to insolvency or a cessation of business. Nevertheless, when the subsection reappeared as section 79 (5) of the Companies Act 1862 the courts, with Lord Cottenham L.C.'s words 'ejusdem generis' in mind, for many years interpreted it very narrowly and only made orders under it if the substratum of the company had disappeared or it was a 'bubble' company which had never had a genuine substratum at all. Towards the end of the century the idea that the 'just and equitable' clause only covered situations which could be said to be somehow 'ejusdem generis' with the situations envisaged in the preceding subsections was gradually given up, but even in recent times judges have displayed a certain unwillingness to take the words at their face value and to apply them to new situations, which may well be an unconscious reflection of the restrictive interpretation which was put on them for so many years. In the present century, when the subsection became in turn section 129 (6) of the Companies (Consolidation) Act 1908, section 168 (6) of the Companies Act 1929 and section 222 (f) of the Act of 1948, petitions brought under it have generally related to disputes between rival shareholders or groups of shareholders in private companies; and in many cases the parties to the dispute have stood to one another in a relationship analogous to that of partners in an unincorporated business. In some of the reported cases in which winding up orders have been made those who opposed the petition have been held by the court to have been guilty of a 'lack of probity' in their dealings with the petitioners. Thus in *Loch v. John Blackwood Ltd. [1924] A.C. 783* the managing director and majority shareholder was deliberately keeping the minority in ignorance of the company's financial position in order to acquire their shares at an undervalue, and in *In re Davis & Collett Ltd. [1935] Ch. 693* the holder of half the shares had used his casting vote as chairman in order to bring in an additional director who would vote as he wished and then proceeded to oust the owner of the other half of the shares from any participation in the management of the company's business. But it is not a condition precedent to the making of an order under the subsection that the conduct of those who oppose its making should have been unjust or inequitable. This was made clear as early as 1905 by Lord M'Laren in his judgment in *Symington v. Symington's Quarries Ltd., 8 F. 121* , 130. To the same effect is the judgment of Lord Cozens-Hardy M.R. in *In re Yenidje Tobacco Co. Ltd. [1916] 2 Ch. 426* , 431-432. It is sometimes said that the order in that case was made on the ground of 'deadlock.' That is not so. As Mr. Frank Russell K.C., who was counsel for the appellant, pointed out, although Mr. Rothman and Mr. Weinberg were not on speaking terms they communicated through third parties, the company's business was flourishing and the articles contained a provision for arbitration to which resort could be had in the event of their failing to agree on any point. The reason why the petitioner succeeded was that the court thought it right to make the order which it would have made had Mr. Rothman and Mr. Weinberg been carrying on business under articles of partnership which contained no provision for dissolution at the instance of either of them. People do not become partners unless they have confidence ***384*** in one another and it is of the essence of the relationship that mutual confidence is maintained. If neither has any longer confidence in the other so that they cannot work together in the way originally contemplated then the

 

relationship should be ended - unless, indeed, the party who wishes to end it has been solely responsible for the situation which has arisen. The relationship between Mr. Rothman and Mr. Weinberg was not, of course, in form that of partners; they were equal shareholders in a limited company. But the court considered that it would be unduly fettered by matters of form if it did not deal with the situation as it would have dealt with it had the parties been partners in form as well as in substance.

The 'just and equitable' clause is, as I see it, an equitable supplement to the common law of the company which is to be found in the memorandum and articles; but there are some reported decisions which I find difficult, if not impossible, to square with this view. The most notable of these is that of Simonds J. in *In re Cuthbert Cooper & Sons Ltd. [1937] Ch. 392* . The company there was a private company founded in 1913 to take over the business then being carried on by a father and his two elder sons. The capital was £10,000 divided into £1 shares of which 5,000 were held by the father and 2,500 each by the two sons. The three of them were the directors of the company. In 1930 the father died having appointed his three younger sons who were employed by the company his executors and having bequeathed them his shares equally. The articles gave the directors an absolute discretion to refuse to register as members any person to whom a member executed a transfer of shares or any person who became entitled to shares by transmission on the death of a member. Such a person had a right to receive any dividends declared on his shares and a right to share in the surplus assets on a winding up, but no right to attend meetings or to receive accounts. No share could be transferred either by a member or by a person entitled by transmission to a person not a member so long as a member was prepared to buy them at a price based on the average rate of dividends over the preceding three years. After the father's death the younger sons asked their brothers - now the sole directors - to register them as members but they refused to do so. Dividends were, however, declared and the younger sons - though not entitled to them as of right - received copies of the accounts. In 1936 dissensions arose. The younger sons were dismissed from their employment; the dividend payable for the year ending June 30, 1936, was reduced; and the directors refused to supply them with the balance sheet for that year. The directors offered to buy their brothers' shares but only at a price which, so the younger brothers alleged, was far below their real value. In view of the right of the directors to refuse to register transfers a sale to an outsider was not possible. In these circumstances the younger sons petitioned to have the company wound up. They complained not that they had no share in the management of the company but simply that they were not put on the register, the suggestion being that the directors were trying to force them to sell their half interest in the company at an undervalue by reducing the rate of dividend and refusing to let them see the accounts. In dismissing the petition the judge said that, although he must be guided by the principles applied by the court in deciding whether or ***385*** not to dissolve a partnership, even in a partnership case the court would be guided by the partnership articles which one must in this case assume to correspond - mutatis mutandis - with the articles of the company. He also said that he was not prepared to assume that the directors were not acting in good faith in refusing to register the executors as shareholders and he refused to order them to attend for cross-examination. In effect he simply applied the common law, as laid down in the company's constitution and told the petitioners that if they wished to impugn their brothers' good faith they must prove their case by bringing an action against them. One naturally hesitates to dissent from any decision of Lord Simonds; but I cannot help thinking that on this occasion he took too narrow a view. It is not right to say that in a partnership case the court is tied by the terms of the partnership articles, for it will decree a dissolution of a partnership for a fixed term if it is 'just and equitable' to do so. Further, he appears to have taken no account of the fact that the petitioners had made out a prima facie case against their brothers. Of course, the directors might have been able to show that they had respectable reasons for refusing to register their brothers as members and were not in the least influenced by any wish to induce them to sell their shares to them at a price which might be less than their true value; but on the undisputed facts it was for them to establish their good faith. The proper way to deal with the case would, I venture to think, have been to say that if the directors did not wish to give evidence and submit to cross-examination the company would have to be wound up. It is to be observed that the judge himself said that he had found the case a difficult one and in *In re Swaledale Cleaners Ltd. [1968] 1 W.L.R. 1710* Danckwerts L.J. expressed the view that it was wrongly decided. It is true that in the earlier case of *Charles Forte Investments Ltd. v. Amanda [1964] Ch. 240* the Court of Appeal - of which Danckwerts L.J. and I myself were members - had accepted the *Cuthbert Cooper* decision as correct, but it was not in any way necessary for our decision in that case to approve it and I think that we were wrong to do so.

What the minority shareholder in cases of this sort really wants is not to have the company wound up which may prove an unsatisfactory remedy - but to be paid a proper price for his shareholding. With this in mind Parliament provided by section 210 of the Companies Act 1948 that if a member of a company could show that the company's affairs were being conducted in a manner oppressive to some of the members including himself, that the facts proved would justify the making of a winding up order under the 'just and equitable' clause but that to wind up the company would unfairly prejudice the 'oppressed' members the court could (inter alia) make an order for the purchase of the shares of those members by other members or by the company. To give the court jurisdiction under this section the petitioner must show both that the conduct of the majority is 'oppressive' and also that it affects him in his capacity as a shareholder. Mr. Ebrahimi was unable to establish either of these preconditions. But the jurisdiction to wind up under section 222 (f) continues to exist as an independent remedy and I have no doubt that the Court of Appeal was right in rejecting the submission of the respondents to the effect that a petitioner cannot obtain an order

 

under that subsection *386 any more than under section 210 unless he can show that his position as a shareholder has been worsened by the action of which he complains. The facts of this case are set out in detail in the judgment of Plowman J. and I need not repeat them. The essence of the matter is that Mr. Nazar and Mr. Ebrahimi had been carrying on business as partners at will in equal shares; that the business was transferred to the company in which each had 40 per cent. Of the capital and Nazar's son George the remaining 20 per cent.; that it was not contemplated that any dividends would be paid but was contemplated that the profits of the company should be distributed by way of director's fees; and that the result of Mr. Ebrahimi's removal from the directorship was that instead of his having a share in the management of the business and an income of some £3,000 a year he was excluded from the management and deprived of any share in the profits save such dividend as might be paid on his shares if the Nazars thought fit to declare a dividend. The Court of Appeal held that Mr. Ebrahimi could not obtain a winding up order under the 'just and equitable' clause unless he could show that the Nazars had not exercised the power to remove him from his directorship 'bona fide in the interests of the company' or that their grounds for exercising the power were such that no reasonable man could think that the removal was in the interest of the company. With all respect to them I cannot agree that this is an appropriate test to apply. If one assumes that the company is going to remain in existence it may very well be that a reasonable man would say that it was in the interest of the company that Mr. Ebrahimi should cease to be a director. 'These two men,' he might say, 'are hopelessly at loggerheads. If the business is to prosper one or other must go and the company is likely to do better without Mr. Ebrahimi than without Mr. Nazar.' But these considerations have not, to my mind, anything to do with the question whether in the circumstances it is right that the company should continue in existence if Mr. Ebrahimi wishes it to be wound up. The argument upon which counsel for the respondent chiefly relied in support of the decision of the Court of Appeal was quite different. Mr. Ebrahimi, he said, consented to the conversion of the partnership into a limited company. Even though he became, because George Nazar was taken in, only a minority shareholder he could have safeguarded his position by procuring the insertion in the articles of a provision 'weighting' the voting power of his shares on any question touching his retention of office as director: see *Bushell v. Faith [1970] A.C. 1099* . He must, therefore, be taken to have accepted the risk that if he and Mr. Nazar fell out he would be at Mr. Nazar's mercy. There might be force in this argument if there was any evidence to show that the minds of the parties were directed to the point; but there is no such evidence and the probability is that no one gave a moment's thought to the change in relative strength of their respective positions brought about by the conversion of the partnership into a company. It was not suggested that Mr. Ebrahimi had been guilty of any misconduct such as would justify one partner in expelling another under an expulsion clause contained in partnership articles. All that happened was that without one being more to blame than the other the two could no longer work together in harmony. Had no company been formed Mr. Ebrahimi could have had the partnership *387 wound up and though Mr. Nazar and his son were entitled in law to oust him from his directorship and deprive him of his income they could only do so subject to Mr. Ebrahimi's right to obtain equitable relief in the form of a winding up order under section 222 (f). I would, therefore, allow the appeal.

In conclusion, I would refer briefly to three recent decisions under paragraph (f). *In re Lundie Brothers Ltd. [1965] 1 W.L.R. 1051* was, like this, an 'exclusion' case. Plowman J. was I think right in that case, as in this, to make a winding up order. In *In re K/9 Meat Supplies (Guildford) Ltd. [1966] 1 W.L.R. 1112* the company had an issued share capital of 11,001 shares 3667 of which were held by each of three men who were the sole directors and each of whom took part in the running of the business. It was arranged between them that the profits should be divided equally by way of directors' fees. One of the three, a Mr. Darrington, got into financial difficulties. He resigned his directorship in January 1965, and in April was adjudicated bankrupt. Shortly afterwards the two remaining directors sold the business for £18,000 and placed the purchase price on deposit. They offered to buy Mr. Darrington's shares from his trustee in bankruptcy at par but the trustee, taking the view that Mr. Darrington ought to receive a third share of the purchase price, petitioned under section 222 (f). Pennycuick J. came with regret to the conclusion that he must dismiss the petition. He thought it deplorable that the two other quasi-partners should retain in their hands assets to which Mr. Darrington's creditors were in common fairness entitled but he held that as the three had elected to trade together through the medium of a company instead of as partners there was no ground on which he could properly make the order. In coming to this conclusion he was, I think, much influenced by *In re Cuthbert Copper & Sons Ltd. [1937] Ch. 392* . I think that a winding up order should have been made since in the absence of any other explanation the inevitable inference was that the two remaining directors in resisting a winding up and distribution of the surplus assets among the shareholders were putting pressure on the trustee in bankruptcy to sell them Mr. Darrington's shares at an undervalue. The last case is the decision of Brightman J. in *In re Leadenhall General Hardware Stores Ltd.* (unreported), February 4, 1971. His decision not to make a winding up order was, I think, justifiable - though I cannot agree with the reasons which he gave for it. If the respondents were telling the truth - and the judge held that they were the almost inevitable inference was that the petitioner had been stealing the company's money. 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. But the judge dealt with the case on the footing that the respondents' loss of confidence in the petitioner might have been due to a tragic and inexplicable misunderstanding. If it was right in the light of the evidence to deal with this case on that basis then I would have thought that a winding up order should have been made.

 

I agree with the order proposed by my noble and learned friend Lord Wilberforce with regard to costs.
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LORD SALMON.

My Lords, I concur in the opinions of my noble and learned friends Lord Wilberforce and Lord Cross of Chelsea and I would accordingly allow the appeal.

I agree that the individual respondents should be ordered to pay the appellant's costs here and in the Court of Appeal.

**Representation**

Solicitors: Arbeid & Co.; Davenport, Lyons & Co .

*Appeal allowed. Second and third respondents to pay appellant's costs in House of Lords. Legal aid taxation of appellant's costs in House of Lords. (M. G. )*

## Footnotes

1 Companies Act 1948, s. 222 : 'A company may be wound up by the court if - ... (f) the court is of the opinion that it is just and equitable that the company should be wound up.'