[1988–90 Gib LR 132]

IN THE MATTER OF EARLEY MEAD INVESTMENTS LIMITED

SUPREME COURT (Alcantara, A.J.): February 7th, 1989

Companies—compulsory winding up—"just and equitable"—winding up "just and equitable" if no confidence in management following failure to produce audited accounts for 22 years—disputed loan/gift could be shown as such on accounts, so delay not excused and adjournment inappropriate—support of only other shareholder for petition strengthens case for winding up

The petitioner sought the winding up of the company on the grounds that it was just and equitable for it to be wound up and that it had breached its statutory duty under the Companies Ordinance.

The petitioner's father had established the family company, in which he, his wife, and his three children had shares, in 1964. In 1965, the father, through the company, either loaned or gave the petitioner £20,000; the nature of the transaction was unclear, and remained the subject of a dispute. In 1982, the father died, leaving his wife as the only director, and with a majority holding in the company. The company last produced audited accounts in 1967, and the last annual general meeting took place in 1983.

The petitioner submitted that the company should be wound up because (a) it would be just and equitable to do so, as the director and majority shareholder, by refusing to submit accounts or hold general meetings, was

keeping the other shareholders in ignorance of the state of the company, and had lost their confidence; and (b) the company was in breach of its statutory duties under the Companies Ordinance to submit accounts and hold annual general meetings.

The company submitted in reply that (a) it would not be just and equitable for it to be wound up, as no accounts could be prepared until the question of whether the £20,000 was a loan or a gift had been resolved; and (b) an adjournment of five months should be granted in order to enable the company to produce audited accounts, in which regard it had already instructed its auditors.

Held, ordering the winding up of the company:

(1) It would be just and equitable for the company to be wound up. Confidence in its management was justifiably at an end, by reason of its failure to produce accounts or hold annual general meetings; the excuse that accounts could not be produced owing to the disputed loan/gift was not a valid one, as it could be shown on the accounts as a disputed item. The shareholders were being deprived of the ordinary rights of shareholders; the support of another minority shareholder for the petition further supported the proposition that it was just and equitable for the company to be wound up (paras. 12–17).

(2) A long adjournment, such as that requested by the company, to allow audited accounts to be produced after a long period of time, was not appropriate; it was just and equitable for the company to be wound up now (para. 15).

Cases cited:

(1) *Baird* v. *Lees*, 1924 S.C. 83, *dicta* of Lord Clyde applied.

(2) *Ebrahimi* v. *Westbourne Galleries Ltd.*, [1973] A.C. 360; [1973] 2 W.L.R. 1289; [1972] 2 All E.R. 492; (1972), 116 Sol. Jo. 412, *dicta* of Lord Wilberforce applied.

(3) *Loch* v. *John Blackwood Ltd.*, [1924] A.C. 783; (1924), 93 L.J.P.C. 257; [1924] B. & C.R. 209; [1924] All E.R. Rep 200; 68 Sol. Jo. 735, applied.

Legislation construed:

Companies Ordinance (1984 Edition), s.104(1): The relevant terms of this sub-section are set out at para. 8.

s.115: The relevant terms of this section are set out at para. 9.

s.156: The relevant terms of this section are set out at para. 1.

D.J.V. Dumas for the petitioner and another shareholder supporting the petition;

J.J. Neish for the company and another shareholder;

J.M.P. Nuñez, Crown Counsel, for the official receiver.

1 **ALCANTARA, A.J.:** This is a petition for the winding-up of a

company by a shareholder on the ground that it is "just and equitable" so to order. This is pursuant to the Companies Ordinance, s.156, which provides that "a Company may be wound up by the court if . . . (f) the court is of opinion that it is just and equitable that the company should be wound up."

2 The evidence discloses that the father of the petitioner formed this private company in 1964, and allocated the shares amongst his family. This was going to be, for want of a better name, a family company, the purpose of it being to protect the family wealth and to avoid estate duty. The father died in 1982, and thereafter the shareholdings stood and stand as follows:

Kathleen Holland (wife)	52 shares
David Holland (son)	16 shares
Susan Seymour (daughter)	16 shares
William Holland (son and petitioner)	16 shares

3 Before his death, the father had loaned William Holland £20,000 through the company in 1965. This can be seen in an audited account of the company for 1967, where it is shown that there is a loan to the petitioner for £20,000 and in turn a loan by the petitioner to the company for £21,620. This is the last audited account that the company has produced.

4 Even before the death of the father, there was a dispute between the petitioner and the company as to whether the £20,000 was a loan or a gift. This dispute still continues.

5 The last annual general meeting of the company took place on July 17th, 1983, when the accounts for the year ending March 31st, 1982, were not presented. The petitioner was later informed that a copy of them would be provided to him as soon as they were completed.

6 Since 1984, the petitioner has persistently been requesting to view the accounts, and, as late as November 27th, 1987, he wrote to the company requesting copies of the company's accounts for the years ending in March 1982, 1983, 1984, 1985, 1986 and 1987. No accounts have been provided and no annual general meetings have been held, except for a meeting held on July 3rd, 1988, at which, on the face of it, the only item on the agenda was "shareholder's loan," with no confirmation of the minutes of the previous meeting or presentation of any accounts.

7 Mrs. Kathleen Holland, as majority shareholder and sole director of the company, opposes the petition on two grounds. First, that no accounts could be finalized until the question of loan or gift was solved; and secondly, that she has now instructed the company's auditors to produce

audited accounts, and when this is done a meeting of the company will be called. Counsel for the company asks that either the petition should be dismissed, or that there should be a long adjournment (five months) to enable accounts to be presented.

8 Mr. Dumas for the petitioner resists such a long adjournment and contends that it would be just and equitable for a winding-up order to be made now. He draws the court's attention to the fact that the company is in breach of statutory duties. Section 104(1) of the Companies Ordinance states that "a general meeting of every company shall be held once at the least in every calendar year, and not more than fifteen months after the holding of the last preceding general meeting." In the present case, the last annual general meeting—with the exception of a meeting held on July 3rd, 1988, to which I have already made reference—was held on July 17th, 1983.

9 Further, the relevant part of s.115 of the Companies Ordinance provides that—

> "(1) The directors of every company shall . . . once at least in every calender [*sic*] year lay before the company in general meeting a profit and loss account or, in the case of a company not trading for profit, an income and expenditure account for the period . . .
>
> Provided that the Governor, if for any special reason he thinks fit so to do, may, in the case of any company, extend the period . . ."

10 No sort of accounts has been prepared by this company or presented since 1982. No extension has been sought from the Governor. The petitioner has tried hard to obtain information, but he has been unsuccessful. In the circumstances, is it just and equitable to wind up this company?

11 The term "just and equitable" has been judicially defined in a number of decisions. I need only refer to two of them. The first one is *Loch* v. *John Blackwood Ltd.* (3), where it was held that the power to wind up a company under the Barbados equivalent of s.156(f) of the Companies Ordinance was not confined to cases in which there are grounds analogous to those mentioned earlier in the section; and that in the circumstances of that case, regard being had to the domestic character of the company, the petitioners were entitled under that provision to a winding-up order.

12 Lord Shaw of Dunfermline adopted ([1924] A.C. at 793) the following passage by Lord Clyde in *Baird* v. *Lees* (1) (1924 S.C. at 92):

> "I have no intention of attempting a definition of the circumstances which amount to a 'just and equitable' cause. But I think I may say this. A shareholder puts his money into a company on certain conditions. The first of them is that the business in which he invests shall be limited to certain definite objects. The second is that it shall

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

13 The other case is *Ebrahimi* v. *Westbourne Galleries Ltd.* (2), where Lord Wilberforce, in reviewing previous decisions on this point, had this to say ([1973] A.C. at 379):

> "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."

14 It only remains to apply the doctrines expressed above to the circumstances of the present case. The sole director and majority shareholder, Mrs. Kathleen Holland, who has been in control of the company since her husband's death in 1982, has laid herself open to suspicion that by refusing to hold general meetings and to submit accounts, her object was to keep the petitioner in ignorance of the truth and state of the company. The excuse given during this hearing that the loan or gift of £20,000 had to be settled first is not, to my mind, a valid reason, as the company's accounts could continue to show that amount as a loan or as a disputed item.

15 A long adjournment to enable audited accounts to be produced from the year 1982 to date is not a proper course to take. I have to decide now whether a case for winding up has been made.

16 In this case the petitioner is not on his own, as his sister, Mrs. Susan Seymour, another minority shareholder, also supports the petition. That

leaves only the majority shareholder and her other son, Mr. David Holland, opposing the petition.

17 In the circumstances I think that it is proper for me to order the winding up of this company. The broad ground for so ordering is that the confidence in the management of the company is justifiably at an end, and that consequently it is just and equitable that a winding-up order should be made.

Order accordingly.