IN THE MATTER OF AL AMIRA COMPANY LIMITED

SUPREME COURT (Harwood, A.J.): January 5th, 1996

Companies—compulsory winding up—grounds for winding up—"just and equitable"—winding up just and equitable if shareholdings based on personal relationship similar to partnership, and disposal of interest in company restricted—marital relationship between sole shareholders insufficient basis if company property acquired for sole benefit of one spouse and no participation in company business by other

The petitioner applied for an order that a company be wound up.

The parties, who were formerly husband and wife, together owned a land development company, of which they were also directors. The respondent, who travelled and lived abroad for long periods of time without his wife, purchased a plot of land in Spain and built a villa on it, which he then transferred to the newly-formed company for no consideration, allegedly to avoid payment of Spanish land tax on any future disposition. The company owned no other assets and never traded. The petitioner visited the villa with her children on two occasions before the parties were judicially separated. In English divorce proceedings, the county court declined to make an order in respect of the company shareholdings by way of ancillary relief. The petitioner then applied to the Supreme Court on the basis that it was just and equitable for the company to be wound up.

The petitioner submitted that (a) that the land was acquired and the villa built to provide a holiday home for the family; (b) at the time of its construction and for some time afterwards she had believed it to be owned jointly by them and was unaware that it was a company asset; and (c) since the company shareholdings had been based upon the parties' relationship as husband and wife, and its only asset was the villa, it was just and equitable to wind up the company to allow for the disposal of that asset.

The respondent submitted in reply that (a) the villa was built to be used as a European residence and winter retirement home for himself and was used as such; (b) the petitioner was fully aware of her status as a shareholder and of the transfer of ownership of the villa from her husband to the company, since she had been required to sign documents in relation to both; (c) since the petitioner had not participated in the business of the company, had made no contribution to the acquisition or upkeep of the villa, and had suffered no disadvantage in connection with either, there were no grounds for her application to wind up the company; and (d) in any event she should first seek to dispose of her shareholding in

accordance with the company's articles of association before the equitable jurisdiction of the court could properly be invoked.

Held, dismissing the application:

(1) The weight of the evidence showed that the sole asset of the company—the villa—had been acquired by the respondent with no financial contribution from the petitioner and with no intention that it should be used other than for the respondent's own occupation. Ownership was transferred to the company for the purpose of tax avoidance, but it would not otherwise have been held in the parties' joint names. Since the petitioner was unaware of her own shareholding in the company until several years after its formation, the basis of the company could not be said to be the marital relationship between the parties (page 195, line 19 – page 196, line 2).

(2) Whilst the court's discretion to wind up the company on "just and equitable grounds" was not strictly limited, it was commonly exercised when there existed between the shareholders of the company a personal relationship similar to a partnership. In the present case no such relationship existed, and the mere fact that the company's shareholders had once been married and were now divorced did not justify the court's intervention. The petitioner had never participated in the running of the company and was not prevented from disposing of her interest in it or subject to any other disadvantage by her continued shareholding. The court could not, in any event, invoke its equitable jurisdiction until she had attempted to dispose of her shares by the procedure outlined in the articles of association and the petition would therefore be dismissed (page 196, lines 13–34; page 197, lines 1–22).

Case cited:

(1) *Ebrahimi* v. *Westbourne Galleries Ltd.*, [1973] A.C. 360; [1972] 2 All E.R. 492, *dicta* of Lord Wilberforce applied.

N.P. Cruz for the petitioner;
S.V. Catania and *S. Bossino* for the respondent.

HARWOOD, A.J.: Mrs. Mabel Elizabeth Cook by her petition prays for the winding up by this court of Al Amira Co. Ltd. ("the company") pursuant to the Companies Ordinance, on the ground that it is "just and equitable." There is no particular category of cases in which a court may conclude that it is just and equitable so to order. It is necessary in each case to examine all the facts before reaching a decision in the light of any applicable case law.

The company was formed as a company limited by shares on April 24th, 1986 in Gibraltar. It has a nominal share capital of £100 comprising 100 shares of £1 each. On October 3rd, 1986 there was a meeting of the subscribers to the memorandum and articles of association. Those

attending the meeting were Lillian Kenny and Solomon Marrache, who represented respectively Equity Nominees Ltd. and Gibland Nominees Ltd., and were both appointed as directors, and Isaac Marrache, who was appointed as the company's solicitor.

The petitioner and her then husband, Mr. Peter Ian Lewis Cook, were allotted shares in almost equal proportions—the precise quantity is not clear owing to an obvious mistake in the allotment as recorded in the minutes of that meeting. The copy share certificates and transfer forms prepared for the company and exhibited to the affidavit of Mr. Cook sworn on November 29th, 1994 give the name of the company as "Al Almira," but "Al Amira" is probably correct. I have not seen the memorandum of association of the company. There is evidence as to the identity of the directors in a copy of the annual return made up to July 24th, 1991 by Gibland Secretarial Services Ltd., in which both Mr. and Mrs. Cook are so described and in a recent affidavit sworn by Mr. Cook. Both he and his wife have been represented by counsel in these proceedings on the basis that both are currently directors. The case having proceeded on that footing, in the absence of evidence to the contrary, I shall assume that they both are. I have not been told whether the nominees are still directors.

The company was and is a "shelf company," amongst whose stated objects were the acquisition, management and/or development and sale or other disposal of land and buildings. None of the other objects has any relevance to this case. According to Mr. Cook, he purchased a plot of land in Spain in his sole name, on which, in 1986, a four-bedroom villa was built. When the villa was almost completed he transferred the ownership of the villa to the company for no consideration. There is no documentary evidence of title or ownership apart from that contained in his affidavits, nor any evidence of any activity ever undertaken by the company at any time.

As to the purpose for which the villa was built, there is an apparently irreconcilable difference of views between Mr. and Mrs. Cook, evidenced by their several affidavits sworn in the course of matrimonial proceedings in England and two affidavits sworn recently for the purpose of these proceedings. In so far as these affidavits shed light on the intentions of Mr. and Mrs. Cook with regard to the villa, they are material to the court's decision on the application for winding up.

Mr. Cook describes himself in three of his affidavits as a property developer—a description of him used also by Mrs. Cook—whilst in another affidavit, he describes himself as a retired builder. According to the petition for judicial separation dated January 3rd, 1991 filed on behalf of Mrs. Cook, he retired in 1974. These differences are not significant and no point has been taken on them.

In her affidavits, Mrs. Cook makes it clear that by 1991 she was aware of the existence of the villa in Spain where he was living and believed

that it was held by them jointly. She was also aware of the company in which he had "business interests." However, at that stage she sought to make no connection between the villa and the company. In one of his affidavits (in reply to his wife's first affidavit), Mr. Cook stated the connection, saying that his wife was well aware of it and alleging that from time to time she had had to sign various documents as a shareholder in the company and in connection with the "acquisition and construction of the villa." I doubt whether she was aware of it and, if she signed such documents, I doubt whether she had much idea of what they concerned.

On April 28th, 1991 Mr. and Mrs. Cook were judicially separated. Shortly afterwards, a dispute arose as to whether or not an oral agreement had recently been reached between them for, *inter alia*, the eventual transfer of her shareholding in the company to him in exchange for one of his other properties in England. It seems the dispute was never resolved, but there is no doubt that on May 27th, 1991 her share certificate was sent to the company secretary by Mr. Cook's Spanish lawyer, at the company secretary's request, with a view to some such transfer. However, on June 5th, 1991 Mrs. Cook's solicitors in England wrote a letter on her behalf denying knowledge of the proposed transaction.

On July 25th, 1991 her solicitors requested further information about matters contained in his affidavit. They asked, *inter alia*, for the names of the directors and officers of the company, copies of certain of the company's accounts, copies of the memorandum and articles of association, a copy of the completion statement of the purchase of the villa and certain other details. This court is not aware of any specific response having been forthcoming to that request but on August 21st, 1991 Mr. Cook gave certain other information not requested regarding the share ownership, reasserted the company's ownership of the villa, and included certain other matters.

On October 15th, 1992, after protracted proceedings in the Manchester County Court ancillary to their matrimonial dispute, an order was made which disposed of all matters within the jurisdiction of that court and was expressed to be "in full and final satisfaction of each party's claims against the other." It seems, from a note of the judge's findings, that he considered it fair to provide for the transfer to Mrs. Cook of the title to nine or so properties in the United Kingdom, leaving Mr. Cook with the entire property and other assets owned by him abroad. But the judge specifically declined to make any provision for a transfer of either party's shareholding in the company. The winding-up petition is dated March 30th, 1994 and the couple were eventually divorced by decree absolute on September 6th, 1994.

In her petition Mrs. Cook avers that after the company was formed the villa was purchased by the company "to enable the petitioner and her husband to spend their summer vacations with their children . . . in Spain." In his last affidavit, Mr. Cook avers that the corporate ownership

of the villa was effected by him for the avoidance of Spanish land tax on any future transfer either upon sale or on his death. It was, he says, never intended as a holiday home for summer vacations with the family but as his main European residence and as a retirement home for himself during the winter months, and was used as such by him. He goes into some detail to support those contentions, whereas Mrs. Cook rejects them as a complete fabrication or distortion of the facts. Both are agreed that she and the children made two visits to the villa with him—he says in 1988 and 1990, she says in 1987 and 1989. Reading and comparing the parties' affidavits in conjunction with the rider to Mrs. Cook's petition for judicial separation dated January 3rd, 1991, I consider they are both partly mistaken in that the visits probably occurred in 1987 and 1988, shortly whereafter the couple became increasingly estranged for the reason she gives in her final affidavit and in the manner described in the rider to the petition.

The earlier visits to that particular area of Spain in 1985 and 1986, of which she speaks, were, I believe, more likely to have been made out of curiosity on her part and did not signify any intention or belief on the part of either of them that the villa, when completed, would be a family home. I accept, as being more likely, that the decision to buy the land in that location and to build upon it was entirely his own; and that the design was his, without input from her. There is no doubt that none of the financing of the project came from funds of hers. It seems likely from her first two affidavits that she was not aware of her membership of the company until years after its formation. She was not required to participate in the signing of the memorandum or articles when the company was formed in 1986.

It is common ground that Mr. Cook has for a great many years spent much of his time travelling and staying abroad without Mrs. Cook and that golf is a major interest of his. I find no reason to disbelieve his final affidavit, despite her affidavit in response in which she joins issue in wholly unspecified terms and I find several of the points she seeks to make on this aspect of the matter to be of dubious logic. Notwithstanding her insistence that the villa was to be a family home, I do not accept that. I find the reasoning of Mr. Cook to be the more persuasive. I do not consider that the jointly held shares, the large size of the villa, and other matters which Mrs. Cook has mentioned, are sufficient to prove her version regarding the alleged purpose for which the company was formed and the proposed use of the villa. Specifically, I am not at all convinced that title to the villa would, as she says, have been held in joint names had its ownership not been transferred to the company.

Nor do I accept the submissions on her behalf that "the company's purpose and founding" was entirely based either "on a relationship of trust or confidence" or on the marital relationship of its shareholders. I am of the view that Mr. Cook is probably correct in his evidence to the effect that the sole purpose of the transfer was to avoid the incidence of tax in Spain and that when he gave instructions for the formation of the

company and when he effected the transfer, he was acting on the advice of his solicitors in England.

The case for Mrs. Cook appears to rest entirely on the supposition that the purpose of purchasing the villa, whether by Mr. Cook or by the company, was to provide a holiday home for the family and on the fact that she and the two children (now adults) have scarcely had and are never likely again to have the use of it. This is apparent from the winding-up petition. Having found, as I do, that this was not the intended use of the villa nor the purpose of its acquisition by the company, I have to consider whether it is "just and equitable" that the company should be wound up, for that is the relief which Mrs. Cook is seeking in her last affidavit as well as in the prayer of her petition.

It seems to have been accepted by counsel that the leading case on this topic is that of *Ebrahimi* v. *Westbourne Galleries Ltd.* (1). However, in that case and the others referred to therein, some element of disadvantage to the petitioning party was found to exist. It is not thought to be an ingredient essential to the success of a winding-up petition but it is certainly a most usual feature. Both counsel repeatedly referred to the speech of Lord Wilberforce. After reviewing the cases, he emphasized that it would be "impossible, and wholly undesirable, to define the circumstances" in which equitable considerations may arise and he went on to suggest circumstances in which they might do so. He spoke ([1973] A.C. at 379) of circumstances involving—

> "(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 move elsewhere."

But this has not, on the facts, been shown to my satisfaction to be a case that fits any of those descriptions.

After mentioning the interconnection with the law of partnership he went on to say (*ibid.*):

> "And in 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 ['quasi-partnerships' or 'in substance partnerships'] may be confusing if they obscure, or deny, the fact that the parties . . . 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."

On the facts as I find them there has been no element of partnership or even quasi-partnership with respect to the villa at any time. Mrs. Cook has contributed nothing of any material or significant value and that is not, and never has been, expected of her. Nor was she or ever likely to be an active participant, whether as a director or otherwise, in the company management. The continued existence of the company does not depend upon "a personal relationship, involving mutual confidence" between the members. Its only asset remains intact and is of value to Mr. Cook who has not, so far as I am aware, acted in bad faith nor by his conduct deprived his former wife of any interest to which she has been shown to be entitled. She has not in any capacity been subjected to obligations nor suffered disadvantage in connection with the villa or the company. I believe that by petitioning for the winding up of the company, Mrs. Cook is endeavouring, on a false premise, to force the issue in connection with the valuation and disposal of her shareholding.

In any event, I accept the submission of Mr. Catania that there is nothing to prevent her from disposing of her shareholding in accordance with the articles, art. 4 of which makes express provision for that. Thus, even if she were able to show some just and equitable ground for winding up, it seems that she would not be entitled to that remedy until at least the provisions for pre-emption have been exhausted as provided by art. 4A. That stage has not yet been reached. The value (if any) of her shares has not been determined by the auditor of the company who, according to the minutes of the subscribers' meeting on October 3rd, 1986, are Messrs. Clintons. I have been provided with no evidence as to whether the art. 5 (AGM) and art. 21 (accounts) provisions have or have not been complied with, so I do not know what the present position is with regard to the office of auditor. On May 31st, 1995 I adjourned the hearing of the petition to enable the petitioner to avail herself of the art. 4 procedure yet, apart from giving notice that she wishes to sell her shares in the company, that procedure has not been followed and brought to a conclusion as provided for therein. The opportunity to do so was granted at a late stage of the hearing and was one which I considered it essential should be taken before the court's equitable jurisdiction could properly be invoked.

The burden is, of course, upon Mrs. Cook to prove as a matter of probability that it is just and equitable to order the winding up of the company. I have come to the conclusion that this has not been shown. Taking into account all the circumstances that are disclosed in the affidavits and other documents, there is nothing to justify the making of a winding up order. The petition is accordingly dismissed with costs (save to the extent that costs have already been provided for by earlier orders made herein).

This judgment is given under the power reserved to me as an additional judge by the proviso to s.59(4) of the Constitution.

Petition dismissed.