

The Shareholders' Remedy of Winding Up the Company

Companies have perpetual succession. They do not end when their members or directors leave or die. They have to be deliberately terminated. We call this process 'winding up' or 'liquidation'. All the assets (land, buildings, securities, money, debts owed to the company) are collected up and realised (converted into money by sale etc). The proceeds of this realisation are then applied, first, in discharging the company's debts and obligations, and then in paying the costs of winding up. The balance (if any) is distributed to the members or otherwise as the articles of the company may direct. Finally, the legal entity is extinguished.

This winding up process is largely controlled by the *Companies Code*. Section 364 lists the circumstances in which a company may be wound up *by the court*. This is also called compulsory liquidation. (Companies can also be wound up 'voluntarily' in either a members' voluntary winding up or a creditors' voluntary winding up. They are not discussed here.) Section 364(1)(e) — the insolvency ground — is perhaps the most frequently used. It is classified as a creditor's remedy.¹

This chapter discusses the grounds most used by shareholders who, for one reason or another, are in conflict with the controllers and ask the court for an order to wind up their companies. Section 364(1)(f), (j) and the new (fa) and (fb) are frequently-pleaded grounds. Shareholders seeking to terminate their companies and extract their invested money will often also plead s 320 (the oppression provision) in the alternative.

Under s 320(2)(c) the court may order a winding up, as long as it is not 'of the opinion that the winding up . . . would unfairly prejudice the oppressed member or members' (s 320(4)). Section 364(1)(fa) and (fb) more or less duplicate the oppression grounds from s 320 by introducing the winding up grounds of unfair conduct of the company's affairs or unfair acts or omissions or proposed acts or omissions.

There are many reasons for ending a company's life. The purpose for which it was created may have been satisfied or may be unattainable. Or

1. See Corkery, 'Winding Up by the Court for Inability to Pay Debts: The Courts Exercise of its Discretion' (1982) 8 Adel LR 61; Barton, 'The Law Relating to Disputed Indebtedness Where the Winding-Up of a Company is Sought on the Ground of Inability to Pay Debts' (1981) 9 Aust Bus LR 94.

the members may wish to get their money out of the company and use it elsewhere. Often a company is brought to an end because some members are dissatisfied with its performance or their treatment at the hands of the controllers. Winding up may occasionally be seen as the only suitable solution especially where the company is small and family-based. We shall look at some of these situations and grounds for winding up by discontented shareholders. Two of the grounds listed in s 364(1) are of particular interest as shareholder remedies: paras (f) and (j).

Alternative remedies to winding up must be considered

The courts will not, of course, wind up companies without regard to other possible remedies or for the interests of others affected by such action (notably the interests of employees, other shareholders and creditors).

Section 367(3) says that, where contributories apply to wind up the company on the 'just and equitable' or the directors' misbehaviour grounds, the court must look to see if there is some other remedy to winding up and to see if the contributories are acting unreasonably in seeking to have the company wound up instead of pursuing some other remedy. As McPherson J stressed in *Re Dalkeith Investments Pty Ltd*,² winding up is 'a remedy of last resort and one which ought not to be granted if some other less drastic form of relief is available and appropriate'. In *Re A Company*,³ the court held the petitioner was unreasonable in rejecting, as an alternative to winding up, a proposed valuation of his shares by an independent expert and a subsequent offer by the respondents to buy his shares at a value reached by a reasonable method. Likewise, in *Mincom Pty Ltd v Murphy*,⁴ an injunction was issued to restrain presentation of a petition to wind up on the basis that an alternative remedy should be pursued. That remedy was the sale of the petitioner's shares. Significantly, Williams J referred the petitioner to the new oppression provision, s 320. No doubt impressed by the flexibility of that section, his Honour thereby suggested that, rather than bring an action under the 'just and equitable' ground, he would be better advised to bring an action under s 320 for oppression. As noted in the previous chapter, that very flexibility may well mean that s 320 eclipses s 364(1)(f) and (j) and renders them practically redundant.

Directors acting in own interests, unfairly or unjustly: section 364(1)(f)

Section 364(1)(f) offers shareholders some control over misbehaving directors.

2. (1985) 3 ACLC 74 at 79. See also *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692 at 707.
3. [1983] 1 WLR 927. Section 225(2) of the *Companies Act 1948* (UK) was applied.
4. (1983) 1 ACLC 749.

The Court may order the winding up of a company if — . . . directors have acted in affairs of the company in their own interests rather than in the interests of the members as a whole, or in any other manner whatsoever that appears to be unfair or unjust to other members.

Section 364(1)(f) was considered in *Re Cumberland Holdings Ltd.*⁵ Although the petitioner was unsuccessful in getting a winding up order on that ground, Bowen C J made some useful observations on the interpretation of the provision:

1. when it refers to 'directors' it does not limit its scope to where the whole board acts unanimously — it is sufficient if an effective majority has acted in its own interests, or even if one director has caused his personal interests to be preferred;
2. the affairs of the company are not limited to business or trade matters, but include all matters that come before the board for consideration (including dividend policy, voting rights, capital structure of the company etc);
3. the provision is satisfied if the directors prefer their own interests to those of the members, even though the directors' interests may coincide with those of the majority shareholders.

Paragraph (f) was also at issue in *Re William Brooks & Co Ltd.*⁶ The managing director, together with relatives, held 13,000 shares in the company. He also acquired options over a further 39,000 shares which he had arranged to be allotted or sold to company employees. He thereby gained control over the voting rights of most of the shares in the company. Over the years large bonuses had been paid out to these employees. These payments disguised the healthy state of the company's finances from the shareholders and retarded the price of the shares on the Stock Exchange. The managing director was also in the habit of making managerial decisions without consulting the fairly subservient board. Hardie J was satisfied that there were serious and persistent breaches of the managing director's fiduciary duty to act with honesty and probity. The circumstances established that there were grounds under both paras (f) and (j) for a winding up order.

Although para (f) was not required there (para (j) would have done the job alone) it is not a dead letter. In *Re National Discounts Ltd.*,⁷ for example, a predecessor of s 364(1)(f) was applied and the s 364(i)(j) ground was precluded.

In *Re Weedmans Ltd.*,⁸ Weedmans' board came under the control of a company, Sportscraft Ltd, that was intent on taking over Weedmans. The Weedmans' board then issued 400,000 shares to Sportsgirl, a subsidiary

5. (1976) 1 ACLR 361. See, generally, Rees, 'Directors' Unfair Conduct as a Ground for Remedy under the Companies Act' (1985) 3 C & SLJ 63.

6. [1962] NSWLR 142.

7. (1951) 52 SR (NSW) 244.

8. [1974] Qd R 377.

of Sportscraft. Then the board recommended that the members accept a revived Sportscraft takeover offer. Minority shareholders brought a petition to wind up the company claiming they were oppressed within s 222(1)(f) of the *UCA*. They claimed that the takeover bid was too low and that the directors' actions were unjust and unfair. Lucas J agreed. The majority of the board of Weedmans, he ruled, had failed to take proper steps to see the takeover from the point of view of the members, the allotment was an abuse of directors' powers, and they had also failed to meet the standards of commercial morality that could be expected of them. The directors had poorly informed or misinformed the members on the adequacy of the price offered for the members' shares, and (with one exception) they falsely informed the members that they intended to transfer the beneficial interest in their own shares. Winding up was ordered, it being accepted that there was no other suitable remedy available to the shareholders. *Oceanic Equity Ltd v Auto Investments Ltd*⁹ provides an example of the s 364(1)(f) and (j) grounds being unsuccessfully pleaded.

The 'just and equitable' ground: section 364(1)(j)

Paragraph (j) is most often used to wind up 'domestic' companies with small memberships.¹⁰ These are typically the so-called quasi-partnerships, or close companies. Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* described them:¹¹

- (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.

Broadly speaking, if a company exhibits these traits, and the circumstances presented to the court would justify a winding up of a partnership on the just and equitable ground, then the company will be wound up or, at least, the court will indicate a winding up is justified. As Smith J put in *Re Wondoflex Textiles Ltd*:¹²

9. (1983) 1 ACLC 681.

10. See, generally, Calloway, *Winding Up on the Just and Equitable Ground* (1978, The Law Book Company).

11. [1972] 2 All ER 492 at 500 (HL). Cf *Morgan v 45 Flers Avenue Pty Ltd*, above n 2 at 707.

12. [1951] VLR 458 at 465.

There is the rule that in the case of a private company which is in substance a partnership, the Court . . . should apply the same principles as would be applied in a claim for dissolution of partnership.¹³

The facts in *Westbourne Galleries* met the quasi-partnership criteria. The House of Lords ruled that in justice and equity the respondents could not use their powers of expulsion to remove Ebrahimi from the Board. It would be inequitable for the Nazars to insist on their legal rights to expel him. The right course was to wind up the company.

Likewise in *Re Dalkeith Investments Pty Ltd*, McPherson noted that:

. . . the parties . . . entered into an arrangement, which was no doubt implied rather than expressed, the substance of which was that they constituted a partnership in corporate form. That arrangement was a family arrangement in which their expectation was that they would act in the affairs of a company in a spirit of friendly co-operation for their common benefit and not one in which they contemplated that their rights and relations inter se would be governed by a strict application of the rules of company law. . . . It is no longer possible for them to work together for the common good or to rely, for the protection of their interests and investments in the company, upon the goodwill which they supposed would exist between them. The point has now been reached where such a state of animosity exists between them as precludes all reasonable hope of reconciliation and friendly co-operation in the affairs of the company.¹⁴

It is easier to secure a winding up order on the just and equitable ground where you are dealing with a quasi-partnership company. Once you have a breakdown in personal relationships within the 'partnership' the courts are prepared to take a broad view of the internal relationships and, if appropriate, ignore strict corporate law principles.

Categories of 'just and equitable' grounds

Traditionally the s 364(1)(j) authorities are grouped into discrete categories. Most discussions offer four subheadings:

1. Expulsion from office;
2. Justifiable loss of confidence;
3. Deadlock;
4. Failure of substratum.

Of course, the court is not limited to these or any other headings. The court's discretion is wide. It may order the winding up of the company 'if in the public interest it should be wound up'.¹⁵ But these listed headings conveniently embrace practically all the 'just and equitable' cases.

13. See good discussions by Calloway, above n 10 at Ch 3; Chesterman, 'The "Just and Equitable" Winding Up of Small Private Companies' (1973) 36 MLR 129.

14. Above n 2 at 79.

15. Young J in *Fisher v Southern Logistics Pty Ltd (No 2)* (1985) 3 ACLC 534 at 535; see also *Loch v John Blackwood Ltd* [1924] AC 783 at 788.

Expulsion or exclusion from office

The *locus classicus* in this field is a case already mentioned, *Ebrahimi v Westbourne Galleries Ltd.*¹⁶ Lord Wilberforce's typically incisive judgment is the leading authority on 'just and equitable' winding up. Here two former partners incorporated a company and shared its management and profits, each owning 500 shares. Later, one partner's son joined as member and director. The son bought 100 shares from each of the original two. The company thrived. All profits were distributed as directors' remuneration. Then, by ordinary resolution in general meeting, the father and son pair used their majority voting power (600 versus 400) to remove the petitioner from office as a director. In a stroke the dismissed director's livelihood was under threat. Accordingly he petitioned, *inter alia*, for a winding up on the just and equitable ground. The House of Lords complied.

Lord Wilberforce eschewed a restrictive interpretation. His Lordship noted that the 'just and equitable' ground enabled 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.¹⁷

But expulsion from office, even in a small 'domestic' company, does not always guarantee a winding up order. In *Re Warrick Howard (Aust) Pty Ltd*,¹⁸ a winding up order was denied, even though the petition was based on expulsion from the Board in a small, quasi-partnership company. It was genuinely thought by the other shareholders that the ex-director was going to compete with the company. Likewise, in *Re G Jeffery (Mens Store) Pty Ltd*,¹⁹ a 'locked in' family member failed to get winding up orders for two companies that were being run successfully but autocratically by his dominant brother. The powerful brother was acting within the articles. The exclusions of his brother from management were held neither improper nor beyond what the parties contemplated when the companies were created.²⁰

The court is wary of overriding too often the company's articles and the majority-rule principle. In broad terms, the more arm's-length and the less partner-like the board's members are, the more likely it is the 'contractual' terms of the articles and the Code will determine what is just and equitable between parties. At some stage mature business people must be left to the justice of majority rule and the consequences of their agreement. The threat of winding up should not and will not be used to prop up every disappointed managerial expectation or give a ready

16. Above n 11.

17. *Ibid* at 500.

18. (1983) 1 ACLC 634.

19. (1984) 2 ACLC 421.

20. See also *Re Graham and Technequip Ltd* (1981) 121 DLR (3d) 640; (1983) 139 DLR (3d) 542.

exit on good terms to every unsettled shareholder wanting to grab his money and run.

There are, nonetheless, plenty of examples of winding up orders on the grounds of expulsion. In *Re Lundie Bros Ltd*,²¹ a shareholder/director was expelled from management without adequate justification. The three-man company was wound up under the equivalent of s 364(1)(j).

*Re City Meat Company Pty Ltd*²² provides an example of *exclusion* from office, a different category. Millhouse J ruled that the petitioners' rights, expectations and obligations had been ignored. The decision is interesting, not the least because it sits on the boundaries of the established law on s 364(1)(j).²³ For 30 years the principal in the business, the managing director, dominated the business and its development. He worked hard. The business flourished. Millhouse J commented²⁴ of the principal that he was

an autocrat . . . a man who has given the whole of his working life to the business and has enjoyed it, . . . a successful businessman and . . . a man who at the age of 67 has no intention whatever of relaxing his grip on the affairs of the business until he is obliged to do so by ill-health, death — or by the Court. In short I have the impression of a man who regards City Meat Co. Pty. Ltd. as his own, just as did Mr McLaren in *Loch v. John Blackwood Ltd*. . . .

The shareholders received dividends that Millhouse J described as 'miserable'. There were rarely if ever any formal meetings of directors. One petitioner was denied a place on the board and the principal obstructed a petitioner's attempts to find the true value of the shares in the company. Yet most of what the principal did or failed to do was quite lawful. Such facts are not uncommon. The court concluded that the rights, expectations and obligations of the petitioners had been 'quite ignored'. His Honour sympathised, 'It is just not fair to them'.²⁵ Winding up on the 'just and equitable' ground was deemed appropriate, but an order was withheld. The matter settled subsequently.

Acting within the articles (and bona fide in the company's best interest) does not bar a winding up order, though. Freezing out a director/shareholder, for example, may well be perfectly 'constitutional', but it may also provide grounds for winding up. The court is not hamstrung by the articles.²⁶ Smith J summarised in *Re Wondoflex Textiles Pty Ltd*:²⁷

21. [1965] 1 WLR 1051.

22. (1984) 2 ACLC 149.

23. This case dealt with s 222(1)(h) of the UCA, the equivalent of s 364(i)(j).

24. Above n 22 at 156.

25. *Ibid* at 157.

26. See Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd*, above n 11 at 499–502; also Megarry J in *Re Fildes Bros Ltd* [1970] 1 All ER 923 at 927: 'I do not think that equity will listen only to what the articles say and ignore a settled course of conduct; equity is not like that.'

27. Above n 12 at 467.

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.

Traditionally, but with less conviction of late, the judiciary has expressed itself to be reluctant to interfere in the internal management of companies.²⁸ It is unlikely that a court can avoid significant interference as it must assess the fairness of company procedures and management action. And the order to wind up itself is interference on a grand scale. The remedies outlined in the allied provision, s 320 (the oppression provision), also call for major interference in a company's internal affairs. The principle of non-interference in management is being pushed well and truly into the background of corporate law.

Justifiable loss of confidence

If the petitioner can demonstrate that he has justifiable loss of confidence in the company's controllers, based on a lack of probity in their conduct of those affairs, then the court may order a winding up on the just and equitable ground. Again, while this principle is not limited to the partnership analogy cases, it most often arises there. This category embraces the more serious occasions of fraud, directors' breaches of duty, misappropriation of corporate assets, fraudulent payments out of company funds, and failure to observe proper procedures as set out in the articles and the Code.

*Loch v John Blackwood Ltd*²⁹ is a classic example. The managing director, who also had general meeting voting control, along with his fellow directors failed to hold general meetings, draw up accounts and audit them, or recommend dividends to the general meeting. The shareholders who were not on the board successfully petitioned for a winding up order.³⁰

Deadlock

This category arises where business can no longer be carried on effectively because of irreconcilable differences between controllers. Total deadlock is not required. Extreme difficulty in working together is enough. As Lord Lindley said in the analagous context of partnership law:

Refusal to meet on matters of business, continued quarrelling and such a state of animosity as precludes all reasonable hope of reconciliation and friendly cooperation, have been held sufficient to justify a dissolution. . . . All that is necessary is to satisfy the court that it is

28. See *Re G Jeffery (Mens Store) Pty Ltd*, above n 19 at 422, per Crockett J; *Re City Meat Company Pty Ltd*, above n 22 at 157, per Millhouse J.

29. Above n 15.

30. Cf *Re K/9 Meat Supplies (Guildford) Ltd* [1966] 3 All ER 320 at 325–327.

impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it.³¹

*Re Yenidje Tobacco Co Ltd*³² offers an example. A serious dispute arose between the two shareholder/directors who had equal voting power in a flourishing company. One refused to abide by the arbitral procedure set out in the articles. They refused even to speak to the other. A winding up was ordered. The court, invoking the partnership analogy, ruled: 'this company is now in a state which could not have been contemplated by the parties when the company was formed. . . .'³³

Similarly, in *Pizem v Malek*,³⁴ there was real animosity between the shareholder/directors. If it continued, the conflicts would have seriously damaged the businesses run by the company. Hodgson J ruled there was a deadlock. Accordingly, it was just and equitable that the company be wound up. Here, too, the partnership analogy applied. Unreasonable attitudes and demands between persons in a close business relationship were held to be untenable.

A directors' dispute is unlikely to provide grounds for winding up except in the 'domestic' or quasi-partnership cases. There are too many strategies to avoid deadlock in the larger organisation. For example, damaging tension or deadlock can be avoided by the use of the casting vote, appointment of extra directors, removal of directors by members, lawful alterations to articles and sale of listed shares on the Stock Exchange.³⁵

Failure of substratum

This final category arises where the company cannot or will not carry out the objects or purposes for which it was formed. As Jenkins J put it succinctly in *Re Eastern Telegraph Co Ltd*:

. . . if a shareholder has invested his money in the shares of the company on the footing that it is going to carry out any particular object, he cannot be forced against his will by the votes of his fellow shareholders to continue to adventure money on some quite different project or speculation.³⁶

In *Re Haven Gold Mining Co*³⁷ winding up was ordered because it was impossible to carry on the main object or purpose of the business — working a gold mine — for which the company was formed. Interestingly, there was a winding up order even though a majority of the share-

31. *Partnership* (14th ed, 1979) at 625–626.

32. [1916] 2 Ch 426. See also *Re Bondi Better Bananas Ltd* [1952] 1 DLR 277.

33. *Ibid* at 432.

34. (1985) 3 ACLC 612.

35. See, generally, O'Donovan and O'Grady, 'Company Deadlocks: Prevention and Cure' (1982) 1 C & SLJ 67.

36. [1947] 2 All ER 104 at 109.

37. (1882) 20 Ch D 151.

holders wished the company to carry on in existence. Lack of capital to carry on the company's business also points to a failure of substratum, as in *Re Bleriot Aircraft Co Manufacturing (Ltd)*.³⁸

*Re Tivoli Freeholds Ltd*³⁹ is another interesting example. A public, unlisted company, had been incorporated with the main object of public entertainment. New controllers involved it in lending surplus funds and profitable 'corporate raiding'. This activity was not contemplated in the company's main objects. It represented 'a complete and far-reaching departure from what was originally commonly intended and understood by members of the company'.⁴⁰ Menhennitt J gave a very good summary of the matters to be considered in a petition based on the just and equitable ground.

While a search for substratum points us in the direction of the objects clause (if any) in a memorandum of association or in prospectuses and other documents, they are not decisive. In other words, to show failure of substratum you do not have to demonstrate that the company is either not acting at all or is acting ultra vires. The failure of substratum concerns not corporate capacity but the general understanding of members as to the purpose of the company.⁴¹ The court seeks the underlying and common intention of the members. The best that one can say is that, if the memorandum shows a purpose or purposes to be distinct and dominant, this will be a strong guide, even where the memorandum contains subsidiary general objects and powers which allow for different lines or methods of business.⁴²

Some of these issues arose in *Re Johnson Corporation Limited*.⁴³ The petitioner, a preference shareholder, alleged inter alia a failure of the leather company's substratum. New controllers had taken over and dominated the board. In the following four years the company sold a substantial proportion of its assets. The leather business steadily declined. The company instead involved itself in investing. The petitioners argued that accordingly the company was 'financially disabled from pursuing its objects or carrying out the main and dominant purpose for which it was incorporated'.⁴⁴ Needham J noted:

I would reject the company's submission that a winding-up order could not be made on the ground of loss of substratum if the company were carrying on a business authorised by its Memorandum. That contention . . . flies in the face of decisions which distinguish between questions of loss of substratum and of ultra vires.⁴⁵

38. (1916) 32 TLR 253.

39. [1972] VR 445.

40. *Ibid* at 476.

41. If the objects in the memorandum, however, lead to a different conclusion from the company's course of conduct, there is authority that the memorandum may prevail: see *Re Tivoli Freeholds Ltd*, *ibid* at 472.

42. See *Re German Date Coffee Company* (1882) 20 Ch D 169 at 177.

43. (1980) ACLC 34,341.

44. *Ibid* at 34,346.

45. *Ibid* at 34,348.

Unprofitable trading — another form of failure of substratum?

Trading companies are established for the overriding object of making a profit. Companies can, of course, be wound up for insolvency under s 364(1)(e). But many companies struggle for years and insolvency, while hovering, may not be capable of clear proof. The company's assets may exceed its liabilities but payment of its debts may be a struggle. The company sputters along without ever being truly profitable and with no real prospects. In this situation shareholders may argue it is 'just and equitable' to wind up because the reasonable expectation of trading at a profit is frustrated. This at least was the view of the court in *D Davis & Co Ltd v Brunswick (Australia) Ltd*.⁴⁶ Lord Maugham pronounced:

The decisive question must be the question whether at the date of the presentation of the winding-up petition there was any reasonable hope that the object of trading at a profit, *with a view to which the company was formed*, could be attained [emphasis added].⁴⁷

There was such 'reasonable hope' in *Davis*. Accordingly, a petition for winding up was unsuccessful.

This ground was revived recently by Starke J in *Re Deep Sea Fisheries Pty Ltd*.⁴⁸ A winding up order was granted. Starke J, relying on *Davis*, noted 'the test is whether there is any reasonable hope of trading at a profit'.⁴⁹

Again there is an analogy in partnership law. Section 35(e) of the *Partnership Act 1891* (SA)⁵⁰ says that a court may decree a dissolution of a partnership 'when the business of the partnership can only be carried on at a loss'. This is a different test to whether there is any reasonable hope of profit. However, there is not much in it. In *Handyside v Campbell*,⁵¹ which concerned s 35(e), Farwell J inferred the partnership's loss would have to be traced to an inherent defect in the business, not just to a temporary fault. This would doubtless be the view also of any court applying the *Davis* principle outlined above.

This revived ground for a just and equitable winding up has potentially wide application. All trading companies will be set up with the hope and underlying expectation of operating at a profit. Long-term unprofitability may well expose them to a just and equitable application perhaps long before insolvency arrives. However, the courts are reluctant to delve into accounts and balance sheets and speculate on a company's financial prospects. The company in *Re Deep Sea Fisheries Pty Ltd* was in a 'hopeless'

46. (1936) 36 SR (NSW) 215.

47. *Ibid* at 227.

48. (1984) 2 ACLC 326 at 330–331.

49. *Ibid* at 331.

50. See also s 35(e) (NSW); s 38(5) (Qld); s 40(V) (Tas); s 39(e) (Vic); s 46(f) (WA); s 40(1)(e) (ACT); s 38(e) (NZ); s 35(e) (UK). See brief discussion by Higgins and Fletcher, *The Law of Partnership in Australia and New Zealand* (4th ed, 1981) at 190–191.

51. (1901) 17 TLR 623.

position and this, presumably, would be a precondition for a just and equitable winding up order in this category.⁵²

Interrelationship of sections 364(1)(j) and 320

Winding up on the just and equitable ground was justifiably difficult. Winding up is a drastic 'remedy'. It is and has always been seen as a severe step and is never lightly given. Oppression was also very difficult to prove, mainly because of drafting idiosyncracies and some judicial sabotage. On balance, and most surprisingly, it was probably easier to get a winding up on the just and equitable ground than to prove statutory oppression on which the court could act. It was easier to kill a company than to interfere with it but leave it intact.

Invariably petitioners plead both s 320 and s 364 (or their predecessors) seeking in some way or other to extract their investment from the company. No doubt in caution they will continue to do this.⁵³ Usually the practical way to extract their money was to wind up the company, even though that was often too dramatic. As O'Donovan and O'Grady commented,⁵⁴ in the context of deadlock cases, ordering winding up 'is rather like prescribing euthanasia as a cure for arthritis'. Ironically, many petitioners caused winding ups when in fact they probably did not want that. Usually they wanted their investment out on the best terms, and a liquidated company does not give that. As Chesterman said, 'indeed, liquidation is usually the last thing that the petitioner, or anyone else, wants, because financially it spells disaster for all. It is instead the threat of liquidation that will often be effective in achieving redress for an aggrieved member'.⁵⁵

Now we have the redrafted s 320. Most of the fact situations that came up in the 'just and equitable' cases could now satisfy the criteria for oppression under s 320. In *Loch v John Blackwood Ltd*⁵⁶ the board's persistent breaches of statutory duties and neglect of the articles, and its refusal to submit the value of the company's shares to arbitration, would undoubtedly amount to oppression or unfairness under s 320. In fact, the situations in any of the 'justifiable lack of confidence' cases would satisfy s 320.

The failure of substratum cases are more difficult to include within the broader wording of s 320. However, where a shareholder puts his capital into a company expecting that a certain line of business will be pursued, it can be seen as unfairly discriminatory of or detrimental to him for his capital not to be employed in that particular venture or line of business.

52. See, generally, McPherson, 'Winding Up on the "Just and Equitable" Ground' (1964) 27 MLR 282 at 291-293.

53. See Baxt, 'The New Remedy in Oppression — A Reworded Provision or a New Remedy' (1983) 3 C & SLJ 21 at 27-28.

54. Above n 35 at 89.

55. Above n 13 at 129-130.

56. Above n 15.

Even if the new line of business is profitable, as it was in *Re Tivoli Freeholds Ltd*⁵⁷ where corporate raiding was very successful, it is still arguably unfairly prejudicial or discriminatory. Someone who invests in a company involved in the entertainment business is perhaps unfairly treated if that investment is used instead in corporate raiding. Richardson J stated broadly in *Thomas v H W Thomas Ltd*,⁵⁸ that the words 'oppressive, unfairly prejudicial or unfairly discriminatory', understood together, mean

conduct of the company which is unjustly detrimental to any member of the company whatever form it takes and whether it adversely affects all members alike or discriminates against some only. . . .

While profitable corporate raiding may in a sense benefit all members and thus be detrimental in a financial sense to none, one can argue a frustration of the intent of a shareholder's investment would be detrimental or discriminatory.

The deadlock cases more surely come within the words 'contrary to the interests of the members as a whole' in s 320. In a small company, where the members and directors refuse to communicate with each other, the interests of the members as a whole are not being served. Clearly the size of the company in deadlock would be material. The smaller the company, the more personal interaction and partnership-type cooperation and mutual trust is required. However, if the business of the company cannot be carried on in a reasonable manner, then that unfairly discriminates against or prejudices any innocent members of the company (only those with 'clean hands' can petition successfully).⁵⁹ The facts of *Re Yenidje Tobacco Co Ltd*⁶⁰ follow this pattern. They would probably satisfy s 320.

The expulsion from office cases would also, without much difficulty, satisfy s 320. Again the small, closely-held company is usually involved. While a dismissal may well be in accordance with the legal rights of the controllers, it can be inequitable and unjust, especially where the dismissed party relies on remuneration from the company for his livelihood. *Ebrahimi v Westbourne Galleries Ltd*⁶¹ falls into this category.

The revived category of winding up cases — those where the company has no reasonable hope of trading at a profit — does not fall within s 320 so easily. Unprofitable trading affects all members equally. It is not unfair or oppressive to any particular group.

In conclusion, the 1983 changes to the law and the subsequent case law on the new s 320 indicate that, first, minority shareholders have a much more potent weapon in the *Companies Code* than they ever had before and, second, the confusion, even desperation, that aggrieved minority

57. Above n 39.

58. [1984] 1 NZLR 686 at 693.

59. See, generally, on refusal of relief on this and other grounds, Calloway, above n 10 at 97ff.

60. Above n 32.

61. Above n 11.

shareholders and their advisers may have felt over which remedy was attainable and which remedy to seek will fade away. The drafting of the new s 320 and of the amendments to s 364 could certainly have been crisper and more coherent. But overall the 1983 changes should have the desired effect. Section 320, because it offers a range of possible remedies, and because its threshold criteria have been relaxed, should become a popular route for minority shareholder action.

One effect of the broadening of s 320 will be that there will be fewer 'just and equitable' cases. For example, *Re City Meat Company Pty Ltd*⁶² was really an oppression/unfairness case. While it was a suitable set of facts for a s 364(1)(f) decision, it did not fit into the pattern of 'just and equitable' cases. There was no deadlock in management, no justifiable loss of confidence or real impropriety or lack of probity in the conduct of its affairs. There was also no expulsion from office, nor any exclusion from office of someone who by a close personal relationship and underlying understanding had a legitimate expectation of a managerial say. There was certainly no failure of substratum or unprofitable trading. But the new grounds of oppression and unfairness were arguably there. To deny reasonable dividends, act autocratically, and discourage a share valuation could certainly be unfairly prejudicial to or discriminatory of a shareholder. Further, such activities may be contrary to the interests of the members as a whole.

The threat of winding up

It would have been unfortunate if City Meat Co Pty Ltd had actually been wound up. That would hardly have been just and equitable. Millhouse J did not have to go that far. His Honour noted he was prepared to make such an order if necessary. As in *Re Wondoflex Textiles Pty Ltd*,⁶³ *Re Lundie Bros Ltd*⁶⁴ and *Re Straw Products Pty Ltd*,⁶⁵ the parties were then left to reach some agreement among themselves. Usually that works, as it indeed worked in *City Meat*,⁶⁶ even though it is not a really satisfactory approach. Yet a minority shareholder should be treated seriously and dealt with fairly. Until 1983 minority shareholders in Australia could argue they needed to retain the big stick of winding up applications because without it they had no weapon. The threat of winding up will no longer be necessary providing s 320 and its broader scope get the reception they deserve.

62. Above n 22.

63. Above n 12.

64. Above n 21.

65. [1942] VLR 139.

66. In *Re Tivoli Freeholds Ltd*, above n 39, and *Re Lundie Bros Ltd*, above n 21, the parties later requested rescission of the winding up orders.

Conclusion

Serious dissatisfaction with or failure of the affairs of the company is needed to warrant winding up on the just and equitable ground. There must be something that convinces the court that the concern or business should not carry on. Mere dissatisfaction with management policy or majority decisions is not enough.⁶⁷ The court forms a fair view of the reasons for the formation of the company and its operations. In summary, a frustration of major underlying expectations of members is the basis of successful petitions.⁶⁸ An appropriate question for the court to ask in applications on the just and equitable ground may be — is the company in a state that was not foreseen by the persons who formed it?⁶⁹

Procedure by petition/application/summons

A petitioner/applicant/plaintiff should draft his petition/application/affidavit carefully as he is confined, short of amendments, to the heads of complaint set out.⁷⁰ Proceedings may be dismissed if they fail to set out the necessary allegations of fact to found a winding up on the 'just and equitable' ground.⁷¹ In *Re National Petroleum Ltd*, Mathews J noted:

[The petition] must contain a statement as brief as the nature of the case will allow of the material facts on which the petitioner relies, but not the evidence by which they are to be proved nor, except so far as they are material, the contents of documents.⁷²

Simonds J in *Re Cuthbert Cooper & Sons Ltd* had earlier said:

For the purpose of determining whether the petition should be granted or not it is necessary for me to look at the allegations in the petition and I do not propose to travel beyond them.⁷³

The affidavit supporting the originating process (be it summons, application or petition) must allege facts or grounds which justify an order to

67. *Loch v John Blackwood Ltd*, above n 15 at 788.

68. *Gower's Modern Company Law* (4th ed) at 664 offers a useful final statement:

'All of the above instances — expulsion, breakdown of confidence, deadlock and failure of substratum — contain some element of frustration of contract or of fundamental breach and might perhaps be subsumed in a general doctrine based upon the repudiation or destruction of some fundamental underlying obligation or understanding.'

See also McPherson, *The Law of Company Liquidation* (2nd ed, 1980) at 98ff.

69. See Lord Cozens-Hardy MR in *Re Yenidje Tobacco Co Ltd*, above n 32 at 432; Smith J in *Re Wondoflex Textiles Pty Ltd*, above n 12 at 467.

70. *Re Fildes Bros Ltd*, above n 26 at 927–928; *Re Lundie Bros Ltd*, above n 21 at 1058.

71. *Re Cottonvale Distilleries Pty Ltd* (1985) 3 ACLC 316; *Re Squashland Southport Pty Ltd* [1981] Qd R 544; *Re National Petroleum Ltd* [1958] Qd R 482.

72. *Ibid* at 486–487.

73. [1937] 1 Ch 392 at 399.

wind up.⁷⁴ It is insufficient merely to state that a winding up is just and equitable.⁷⁵ You cannot look outside the petition for explanation of the foundation of the petition. The court has, as part of its inherent jurisdiction, the power to strike out a petition/application on the ground that it is vexatious or discloses no ground for winding up.⁷⁶ However, a court also has power to allow a petition to be amended.⁷⁷ This power of amendment is used sparingly.

74. See Rules 45–51 of the *Companies (South Australia) Rules 1985*; Order 8 of the *Supreme Court (Companies and Securities) (Victoria) Rules 1985*; Order 18 of Part 80, Div 4 *Supreme Court (NSW) Rules 1970*.

75. *Re Cottonvale Distilleries Pty Ltd*, above n 71.

76. *Re Squashland Southport Pty Ltd*, above n 71. For a discussion of the defence of 'unclean hands' of the applicant see *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692 at 708.

77. *Re Wear Engine Works Co* [1875] LR 10 Ch App 188 at 191; *Re The White Star Consolidated Gold Mining Co* (1883) 48 LTR (NS) 815.