Privy Council Appeal No. 100 *of* 1923.

Janet Livingstone Loch and another - - - - - *Appellants*

v.

John Blackwood, Limited - - - - - - - *Respondents*

FROM

THE WEST INDIAN COURT OF APPEAL (COLONY OF BARBADOS).

JUDGMENT OF THE LORDS OF JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND JUNE, 1924.

Present at the Hearing:

LORD SHAW.
LORD PHILLIMORE.
LORD CARSON.

[*Delivered by* LORD SHAW.]

This is an appeal from an order dated the 15th March, 1923, of the West Indian Court of Appeal presided over by Sir A. Lucie Smith, Chief Justice of Trinidad, the other members of the Court being Sir Charles Major, Chief Justice of British Guiana, and Mr. W. P. Michelin, Acting Chief Justice of the Leeward Islands. This Court reversed an order dated 30th October, 1922, of His Honour Sir W. H. Greaves, Chief Justice of Barbados, sitting in the Court of Common Pleas for Barbados, for the winding up of the respondent company John Blackwood, Limited.

The appellants are petitioners for an order by the Court for the winding up. The petition is presented under Section 127 of the Barbados Companies Act, 1910. That section is in terms identical with those of Section 129 of the English Companies (Consolidation) Act, 1908. The sub-section particularly founded upon is sub-section 6 which declares that a Company may be wound up by the Court " if the Court is of opinion that it is just and equitable that the Company should be wound up."

A good many years ago Mr. John Blackwood established an engineering business in Barbados and carried it on until his death in January, 1904. Under the provisions of his will his estate fell to be divided one-half to Mrs. Rebecca Thomson McLaren, the wife of Mr. William McLaren and one-quarter each to his niece Mrs. Loch and to his nephew (Mrs. Loch's brother) James Blackwood Rodger lately deceased ; the shares to be paid to Mrs. Loch and Mr. Rodger when they reached the age of 30.

Authority was given to his trustees to convert his business into a Company, with powers to his trustees to act as directors and to Mr. McLaren to have the supreme control and management of matters connected with the business. The trustees were James Murphy (who died in 1911 and never acted in the trusts) ; Mr. William McLaren (the testator's sister's husband) and Mr. McLaren's clerk Henry Allan Yearwood.

A Company was accordingly formed on the 2nd January, 1905. In the year 1916 Mrs. Loch and James Blackwood Rodger had both attained the age of 30. The latter died in December, 1919. The Board of Directors now consists of Mr. McLaren, his wife Mrs. McLaren, who was appointed in 1913, and Mr. Yearwood. Under this directorate, the business of the Company appears to have been energetically managed and to have amassed considerable profits.

The arrangement of the capital was this : the total amount was £40,000 in £1 shares ; 20,000 of these were allotted to Mrs. McLaren ; of the remaining 20,000, 10,000 should have gone to Mrs. Loch and 10,000 to Mr. Rodger. Mrs. Loch, however, was allotted 9,999 ; Mr. Rodger, 9,998 ; and the three shares left over were allotted one to Mr. McLaren and one each to Mr. Yearwood and Mr. King (Mrs. McLaren's nominees ; the first being Mr. McLaren's clerk and the second his solicitor). This was quite a natural and proper arrangement ; but, of course, in the event of a division of opinion in the family between what may be called the McLaren interest on the one hand, and the interest of the nephew and niece on the other, the preponderance of voting power lay with the former. It is thus seen that although taking the form of a public company the concern was practically a domestic and family concern. This consideration is important, as also is the preponderance of voting power just alluded to.

In the petition for winding up eight different reasons are assigned therefor. The first is : that the statutory conditions as to general meetings have not been observed ; the second that balance sheets, profit and loss accounts and reports have not been submitted in terms of the articles of the Company ; and the third is that the conditions under the statute and articles as to audit have not been complied with. All these allegations are true and it seems naturally to follow from the preponderance already alluded to, that there is at least considerable force in the fifth reason that it is impossible for the petitioners to obtain any relief by calling a general meeting of the Company. There are further

submissions, viz., that the Company and the managing director, Mr. McLaren, have refused to submit the value of the shares to arbitration, and that without winding up it is impossible for the petitioners to realise the true value of their shares. But the principal ground of the petitioner is that in the circumstances to be laid before the Court it is just and equitable that the Company should be ordered to be wound up. This last ground was affirmed by the Court of Common Pleas.

With regard to the first three submissions made in the petition, it was strenuously argued on behalf of the Company, which practically means the directorate or the McLaren interest, that however true it might be that owing to the informal way in which the books of the Company had been kept it appeared as if both the statute and the articles of association had been violated in various particulars and that no general meetings of the Company had been held, and no auditors properly appointed and it was certain that no balance sheets, profit and loss accounts and reports had been submitted for the critical years 1919 and 1920, still these were no grounds for winding up. Other applications, it was said, might competently be made to the Court to compel the statute and articles to be properly complied with. It may be doubtful whether such a course of conduct lasting in several particulars since its inception until now, would be insufficient as a ground for winding the Company up. But their Lordships think it unnecessary to give any separate decision upon such a point.

In their opinion, however, elements of that character in the history of the Company, together with the fact that a calling of a meeting of shareholders would lead admittedly to failure and be unavailable as a remedy, cannot be excluded from the point of view of the Court in a consideration of the justice and equity of pronouncing an order for winding up. Such a consideration, in their Lordships' view, ought to proceed upon a sound induction of all the facts of the case, and should not exclude, but should include circumstances which bear upon the problem of continuing or stopping courses of conduct which substantially impair those rights and protections to which shareholders, both under statute or contract, are entitled. It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the Company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs but in regard to the Company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the Company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the Company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the Company be wound up.

The judgment of the Court below appears to have proceeded upon the view that this statutory prescription for winding up

under the sixth subsection, namely, when the Court is of opinion that it is just and equitable that this should be done, is restricted to cases *ejusdem generis* with those enumerated in the other subsections 1–5 of Section 127 of the Barbados Companies Act.

The Board having fully considered the authorities, the judgment and the arguments, are of opinion that this is not the law. The alleged principle of restriction, as applicable to enumerated causes for the winding up of companies, may be said to have taken its origin in a sentence used in the judgment of Lord Chancellor Cottenham in *Ex parte Spackman* (1849), 1 M. & G. Rep., 174. The sentence is :—

> " 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 to those in the previous clauses."

But it is apt to be forgotten that the very next sentence is :—

> " 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."

Whether these two sentences could stand together may be a question, but it is quite plain that the first ought not to be read alone without the second : and if the second be taken in the ordinary and natural meaning of the words used, it may be left to the speculator to conjecture whether there is anything in the application to this section of the Companies Act of the *ejusdem generis* doctrine considered restrictively. Lord Cottenham's words are quoted somewhat guardedly by Lord Cairns in *re Suburban Hotel Company*, 1867, 2 Ch. App. 737, and his definite proposition is as follows :—

> " But what I am prepared to hold is this, that this Court, and the winding-up process of the Court, cannot be used, and ought not to be used, as the means of evoking a judicial decision as to the probable success or non-success of a company as a commercial speculation."

The cases set forth in sub-sections 1 to 5 separately are : (1) if the company has by special resolution resolved that the Company be wound up by the Court ; (2) if default is made in filing the statutory report or in holding the statutory meeting ; (3) if the company does not commence its business within a year from its incorporation, or suspends its business for a whole year ; (4) if the number of members is reduced below five ; and (5) if the company is unable to pay its debts. It seems plain enough that beyond these cases there is the whole category of fraudulent administration under which a company's property might be imperilled or transferred into the pockets of its directors, when the case for winding up would be of supreme urgency. Yet if the argument as to *ejusdem generis* were sound, it would logically exclude such a case from the grounds for winding up, which is absurd. It has been long stated that the element of fraud could not be so dealt with.

The cases need not be further referred to in detail : but in the opinion of the Board it is in accordance with the

laws of England, of Scotland and of Ireland that the *ejusdem generis* doctrine (as supposed to have been laid by Lord Cottenham) does not operate so as to confine the cases of winding up to those strictly analogous to the five instances of the first sub-section of Section 129 of the British Act. It so happens, however, that, in several instances, there have occurred circumstances analogous to those of the present in regard to the two other points noted above, namely the domestic nature of the Company and the permanent preponderance of voting power. And accordingly one or two of such cases may be cited.

In *re Amalgamated Syndicate*, 1897, 2 Ch. 600, Vaughan Williams J. (afterwards L.J.) put the matter thus :—

> "Mr. Buckley, at page 245 of the 7th edition of Buckley on the Companies Acts, says : 'So where a company is proceeding to do something which is *ultra vires*, a shareholder has a right in an action, on behalf of himself and all other shareholders, to restrain the company, though every shareholder but himself be acquiescent ; but has no right to come for a winding-up order under the "just and equitable" clause' ; and he cites *ex parte* Fox as an authority. But it is plain that the passage is a mere illustration of a previous passage on the same page, in which he says : 'There is no doubt that the "just and equitable" clause gives the Court power to wind up a company in cases not coming under any of the first four heads (of section 79), but there must be a strong ground for exercising the power, at any rate, at the instance of a shareholder.' Without going into details, I repeat what I said during the argument, that the stringency of the *ejusdem generis* rule has been considerably relaxed of late."

Circumstances analogous to those of the present case occurred with regard to the composition of a company which was private (see *re Yanidje Tobacco Company, Limited*, 1916, 2 Ch. 431) and the Master of the Rolls, Lord Cozens Hardy, in expressing the opinion that the company should not be allowed to continue said :—

> "I have treated it as a partnership, and under the Partnership Act of course the application for a dissolution would take the form of an action ; but this is not a partnership strictly, it is not a case in which it can be dissolved by action. But ought not precisely the same principles to apply to a case like this where in substance it is a partnership in the form or the guise of a private company ? . . .
>
> "I think that in a case like this we are bound to say that circumstances which would justify the winding-up of a partnership between these two by action are circumstances which should induce the Court to exercise its jurisdiction under the just and equitable clause and to wind up the company."

The Board specially refers to the accurate and careful opinion of Warrington L.J. in that case.

In *Blériot Manufacturing Aircraft Company Limited*, 32, T.L.R. Feb. 4, 1916, 255, Mr. Justice Neville made an order for winding up on the ground that the substratum of the company was gone and upon a further ground of proved misconduct by the directors. His observations upon the latter point are apt in the present case :—

> "But there is another ground. Here the company has considerable capital, and it is alleged that there is misconduct by the directors. It is

truly said by Mr. Russell that the mere fact of misconduct is no ground for winding up' The words 'just and equitable' are words of the widest significance, and do not limit the jurisdiction of the Court to any case. It is a question of fact, and each case must depend on its own circumstances. I think the moneys of the company have been misapplied, and that the company is so constituted that it is deprived of its usual remedies. This is again sufficient for a winding-up."

A passage was read from Lord Halsbury's Laws of England (5), 397, the authorship of which was acknowledged to be that of the late Master of the Rolls, Lord Swinfen. It is as follows :—

"The words as to its being 'just and equitable' to wind up are not to be read as being *ejusdem generis* with the preceding words of the enactment."

It may be doubtful if the reference to the authorities there given are all precisely in point, but as to the view of the law there expressed, their Lordships agree with it.

This law is fully accepted in Ireland, and their Lordships refer to the judgment and the analysis of the authorities in the case of the *Newbridge Sanitary Steam Laundry, Limited,* 1917, 1 I.R. 67, by the Lord Chancellor.

In Scotland the point has been most carefully canvassed in two leading cases in Company Law. The one is the case of *Symington* v. *Symingtons' Quarries, Limited,* 1905, 8 Fraser, 121. and their Lordships think it not inexpedient to quote the following passages from that eminent Judge and Commentator Lord M'Laren. It expresses, in their view, the correct principle of interpretation :—

"I apprehend that the true rule for determining whether general words are to be confined to things *ejusdem generis* is this, that if the general words are bound up with the enumeration by proper words of relation, then their meaning is confined to the subject-matter indicated in the enumeration, but if the general words are severed from the enumeration of particulars there is no logical reason for interpreting the one by the other. . . . In this Act of Parliament the general words have reference to the discretion and judgment of the Court. The case put is, 'Whenever the Court shall be of opinion that it is just and equitable that the company should be wound up' That introduces a different order of ideas altogether from the conditions which precede, because these are not conditions referred to the judgment of the Court, but are defined in the Act itself, and the function of the Court is only to say whether the facts of the case come within one or other of the categories. I have made these observations because, while I find in the English decisions that not much weight is now attached to the *ejusdem generis* rule of construction for this clause, yet I think it desirable, at least, for my own satisfaction, to see upon what grounds the true construction can be maintained and defended."

As applying aptly to the circumstances of the present case, the following further sentences may be cited :—

"But this is not a company that is formed by appeal to the public. It is what, for want of a better name, I may call a domestic company. The only real partners are the three brothers of a family, the other shareholders

having only a nominal interest for the purpose of complying with the provisions of the Act. 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, and I agree with your Lordship that this is a case in which it would be just and equitable that this Company should be wound up, and the partners allowed to take out their money and trade separately if they please."

The present Lord President of the Court of Session (Lord Clyde) in *Baird* v. *Lees*, 1924, Session Cases, 92, discusses the section and the *ejusdem generis* doctrine in exactly the same spirit. His words are as follows :—

"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."

It only remains to apply the doctrines thus expressed to the circumstances of the present case. Their Lordships forego unnecessary details. They are of opinion that the learned Chief Justice Greaves is correct when he says that :—

"The directors in control since the death of Blackwood Rodger have, I think, laid themselves open to the suspicion that by omitting to hold general meetings, submit accounts and recommend a dividend, their object was to keep the petitioners in ignorance of the truth and acquire their shares at an under value."

The Board agrees with these views. In the opinion which they have formed, Mr. McLaren, for reasons not unnatural, had come to be of opinion that the business owed much of its value and prosperity to himself. But he appears to have proceeded to the further stage of feeling that in these circumstances he could manage the business as if it were his own. Had Mrs. Loch and Mr. Rodger, or after his death Mr. Rodger's executor, obtained a dividend which year by year represented in any reasonable measure a just declaration out of the undoubted profits of the concern, they might no doubt have been content to allow this state of matters to go on, but although on one or two occasions Mr. McLaren paid trifling and fragmentary sums to Mrs. Loch, neither she nor the Rodger family have ever obtained any dividend at all. And it is not to be wondered at that in the

transaction now about to be mentioned they completely lost confidence in Mr. McLaren, and had only too great justification for doing so.

It appears that Mr. McLaren viewed with the highest disrelish the testamentary arrangements made by Mr. J. B. Rodger who died in December, 1919, and he expresses his opinion upon that subject in a somewhat extraordinary letter of the 24th February, 1920, going so far as to suggest that another and prior will of Mr. Rodger ought to be substituted for his last will. It is difficult to understand what he conceived this had to do with the management of the business, or the distribution of profits therein. But it is certain that Mr. McLaren then proceeded with much urgency and vigour to attempt to acquire the shares of Mrs. Loch and of Mr. Rodger's executor for himself, thereby consolidating the entire concern in himself and his wife.

The substantial fact which their Lordships think to be proved is that in 1920 the assets of that business, apart from any allowance for goodwill, very substantially exceeded the £40,000 of the Company's nominal capital. A skilled accountant called in after the proceedings commenced placed the amount somewhere about £80,000 : but it is sufficient to take the facts simply as their Lordships have just put them.

This most satisfactory state of the Company's finances was fully realised by Mr. and Mrs. McLaren.

Upon the 1st May, 1920, Mr. McLaren, Mr. Yearwood and Mrs. McLaren, at a director's meeting agreed :—

> "That the financial position of the firm was such that the directors unanimously agreed that they could with every confidence partly discharge the Chairman's deferred salary; to meet this it was agreed that the £12,500 5 per cent. War Loan be transferred to his name and become his property absolutely including the six months' interest now due. . . . It was further agreed that the Chairman's salary be increased from £1,100 to £2,000 per annum from January 1st, 1920."

(It may be noted that the Company's own minutes form the most important evidence in the case, and that, owing probably to the view of the statute taken as already mentioned, they are not referred to in the judgment in the Court of Appeal.)

No notice was given to the respondents, as shareholders, of this piece of business being contemplated, and no notice was given of what had been done. Four days after this extraordinary transaction, Mr. McLaren wrote to Mrs. Loch's husband a letter dated the 5th May, 1920, proposing to her that £10,000 should be given by him as the cumulative value of Mrs. Loch's shares and Mr. J. B. Rodger's executor's shares. These shares in all amounted to one half of the capital of the Company, namely £20,000, and as already mentioned, it is evident that the true value of assets much exceeded this amount. The proposal was to buy Mrs. Loch and the Rodger family out for £10,000. But a further suggestion, which in some way seems to have been mixed up with the umbrage felt by Mr. McLaren in

regard to the contents of Mr. Rodger's will, was made, and that was that Mrs. Loch should be a participant in a scheme whereby the £10,000 to be paid should be distributed—£8,000 to herself and only £2,000 to the Rodger family.

Their Lordships do not desire to characterise these suggestions in the language which perhaps they fully deserve. The Rodger family, entitled to one-fourth of the holding in the Company, nominally £10,000, but in reality of a much higher value, were to be bought off for £2,000, and Mrs. Loch was to be the agent in this scheme. No confidence in the directorate could survive such a proposal. To crown all this, as was afterwards discovered, the £10,000 could be comfortably paid by Mr. McLaren out of the £12,500 which, four days before, he and his wife and clerk had voted to himself out of the funds of the Company. Their Lordships express no surprise at the instant repudiation of Mr. McLaren's proposals by Mrs. Loch—a repudiation which is creditable to her—and at the application for a winding up of the Company being made. Upon the principles already set forth in this judgment that application must succeed. The broad ground is that confidence in its management was, and is, and that most justifiably, at an end. A further narrative of the facts is unnecessary, although some of them are grave.

It must, however, be said in justice to Mr. McLaren that after the parties were at arm's length the £12,500 was refunded and the minute rescinded. Further, being advised that the increase of salary from £1,100 to £2,000 was wrong he abandoned the same from February, 1922, and at their Lordship's bar, he being present, an assurance was given that the two year's increase already drawn, namely £1,800, would forthwith be paid to the Company.

Their Lordships will humbly advise His Majesty that the appeal should be allowed with costs, and the order of Court of Common Pleas of Barbados restored with costs in both Courts below.

In the Privy Council.

JANET LIVINGSTONE LOCH AND ANOTHER

v.

JOHN BLACKWOOD, LIMITED.

DELIVERED BY LORD SHAW.

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