SHAREHOLDER'S RIGHTS

1. The Rule in *Foss v Harbottle*

The classical rule

Foss v Harbottle (1843) 2 Hare 461:

> "Corporations like this, of a private nature, are in truth little more than private partnerships … principles of justice and convenience … This in effect purports to be a suit by cestuis que trusts complaining of a fraud committed or alleged to have been committed by persons in a fiduciary character. … The corporation, in a sense, is undoubtedly the cestui que trust…"

Mozley v Alston (1847) 1 Ph 790, Lord Cottenham LC:

> "… if it be an injury at all, it is an injury not to the plaintiffs personally, but to the corporation of which they are members …"

MacDougall v Gardiner (1875) 1 Ch D 13, 25, *per* Mellish LJ:-

> "In my opinion, if the thing complained of is a thing which in substance the majority of the company are entitled to do, or if something has been done irregularly which the majority of the company are entitled to do regularly, or if something has been done illegally which the majority of the company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called, and then ultimately the majority gets its wishes. Is it not better that the rule should be adhered to that if it is a thing which the majority are the masters of, the majority in substance shall be entitled to have their will followed?"
>
> "… Of course if the majority are abusing their powers, and are depriving the minority of their rights, that is an entirely different thing."

Burland v Earle [1902] AC 83, 93, *per* Lord Davey:-

> "It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company or to recover moneys or damages alleged to be due to the company, the action should prima facie be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss v. Harbottle* and *Mozley v. Alston*, and in numerous later cases …"

Limits on the majority rule

Gramophone and Typewriter Ltd v Stanley [1908] 2 KB 89, 105, *per* Buckley LJ:-

> "… even a resolution of a numerical majority at a general meeting of the company cannot impose its will upon the directors when the articles have confided to them

> the control of the company's affairs. The directors are not servants to obey directions given by the shareholders as individuals; they are not agents appointed by and bound to serve the shareholders as their principals. They are persons who may by the regulations be entrusted with the control of the business, and if so entrusted they can be dispossessed from that control only by the statutory majority which can alter the articles."

Edwards v Halliwell [1950] 2 A11 ER 1064, *per* Jenkins LJ

> *Where union dues were increased without acquiring the two-thirds majority required by the articles.*
> "… the reason for [the exception based on ultra vires acts] is clear, because otherwise, if the rule were applied in its full rigour, a company which, by its directors, had broken its own regulations by doing something without a special resolution which could only be done validly by a special resolution could assert that it alone was the proper plaintiff in any consequent action …"

Some factual problems

Atwool v Merryweather (1867) LR 5 Eq 464: *it was alleged that two directors (Merryweather and Whitworth) made a secret profit by selling mines to the company. The real nature of the contract was concealed from everyone else at the time. Page Wood VC: "the whole contract is a complete fraud". If no action could be brought, then directors who controlled the majority of the shares would always be able to vote for a transaction which effectively diverted the company's money to them.*

Burland v Earle [1902] AC 83: *shareholders sued to compel the directors to declare a dividend and to account for a secret profit. What if the majority are "endeavouring directly or indirectly to appropriate to themselves money, property or advantages which belong to the company, or in which the other shareholders are asked to participate … [N]o mere informality or irregularity which can be remedied by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear." Shareholders are not debarred from voting in their own interests. [Semble: one would have to rely on unfair prejudice, below.]*

2. Personal action

Eley v Positive Government Security Life Assurance Co Ltd (1876) 1 Ex D 88, CA
Hickman v Kent & Romney Sheep-Breeders Association [1915] 1 Ch 881
Allen v Gold Reefs Co. of West Africa (1900) 1 Ch 656

3. Derivative action

The statute now provides exclusively for the derivative action, instead of the common law setting that out.

(i) s.260 Companies Act 2006, etc.

New exclusive jurisdiction

260(1): Claim may only be brought under s.260

Basis for derivative action

260(3): "A derivative claim under this Chapter may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company."

- Default of the director
- Fault includes
  - Negligence
  - Default
  - Breach of duty
  - Breach of trust

Requirement for permission

261(1) "A member … who brings a derivative claim … must apply to the court for permission … to continue it."

Dismiss or make procedural order

261(2) "If it appears to the court that the application and the evidence filed by the applicant in support of it do not disclose a prima facie case for giving permission (or leave), the court- (a) must dismiss the application, and (b) may make any consequential order it considers appropriate."

261 (3) If the application is not dismissed under subsection (2), the court- (a) may give directions as to the evidence to be provided by the company, and (b) may adjourn the proceedings to enable the evidence to be obtained.

261(4) On hearing the application, the court may-

(a) give permission (or leave) to continue the claim on such terms as it thinks fit,

(b) refuse permission (or leave) and dismiss the claim, or

(c) adjourn the proceedings on the application and give such directions as it thinks fit.

If the claim is not pursued diligently enough

262(2) A member of the company may apply to the court for permission (in Northern Ireland, leave) to continue the claim as a derivative claim on the ground that-

(a) the manner in which the company commenced or continued the claim amounts to an abuse of the process of the court,

(b) the company has failed to prosecute the claim diligently, and

(c) it is appropriate for the member to continue the claim as a derivative claim.

(ii) Under the old case law

(1) Fraud on the minority

(a) Negligence

Pavlides v Jensen [1956] Ch 565

> *Sale of asset negligently below market value: the complaint related to a sale of an asbestos mine in Cyprus, which was acquired by the company (according to the statement of claim) in 1936 for about £142,000 and was resold in 1947 for about £182,000 to Cyprus Asbestos Mines Ltd. It was alleged that the mine should have fetched £1 million. Held, the action was not beyond the powers of the company and there was no evidence of fraud: therefore, no action could be brought.*

Daniels v Daniels [1978] Ch 406, Templeman J

> *Shareholders sued directors who negligently sold land to one of the directors at a fraction of its true value, such that that director ultimately stood to make a large profit: she sold the land for over 28 times what she had paid for it.*
>
> "If minority shareholders can sue if there is fraud, I see no reason why they cannot sue where the action of the majority and the directors, though without fraud, confers some benefit on those directors and majority shareholders themselves … To put up with foolish directors is one thing; to put up with directors who are so foolish that they make a profit of £115,000 odd at the expense of the company is something entirely different."

(b) Appropriation of corporate property

Burland v Earle [1902] AC 83
Cooks v Deeks [1916] 1 AC 554

Menier v Hooper's Telegraph Works (1874) 9 Ch App 350: *where majority votes itself the right to divide the assets among themselves.*

> *Per* James LJ: "I think it would be a shocking thing if that could be done, because if so the majority might divide the whole assets of the company, and pass a resolution that everything must be given to them, and that the minority shall have nothing to do with it."

(c) Abuse of power

Hogg v Cramphorn [1967] Ch 254 – *an exercise of a director's power (so as to block a proposed takeover) in bad faith cannot be ratified*
Burland v Earle [1902] AC 83 – *director can vote qua shareholder to ratify an action*
Cooks v Deeks [1916] 1 AC 554 – *director can vote qua shareholder to ratify an action unless fraudulent or illegal to do so*
Estmanco v GLC [1982] 1 All ER 437 – *a vote to deprive the minority of assets is a fraud on the minority*

(2) Wrongdoer control

Prudential Assurance v Newman Industries (No.2) [1982] 1 All ER 354: Vinelott J reversed by CA

> *The plaintiff was a large institutional investor which held 3% of the Newman Industries which sought to bring a derivative claim against two directors (Bartlett and Laughton) alleging that they had defrauded the company of £400,000 (but this was never proved).*
>
> Need to establish meaning of "fraud" and meaning of "control". Fraud = (1) improper appropriation of company's property; (2) diversion of business opportunity to self as director; (3) directors' breach of duty to company. "Control" not limited to direct ownership of voting rights.
>
> Court of Appeal: (a) no general exception "where justice so requires"; (b) plaintiff must establish a prima facie case; (c) rule in *Foss* operates to protect the majority; (d) plaintiffs may not bring any action they please, no matter how public-spirited.

Estmanco v GLC [1982] 1 All ER 437, Megarry J

> *Conservatives established a company to manage flats and to sell them off to owner-occupiers – GLC assumed control of the council and decided to use the flats for the occupation of those in need, not for profits for the shareholders – question arose whether "wrongdoer control" or fraud on a minority.*
> "It may be that the test may come to be whether an ordinary resolution of the shareholders could validly carry out or ratify the act in question; but I do not think that a motion in the Long Vacation is the time or place for a judge to attempt any far-reaching analysis of the exceptions, or any distillation of a guiding principle to be found in them. … If a case falls within one of the exceptions from *Foss v. Harbottle*, I cannot see why the right of the minority to sue under that exception should be taken away from them merely because the majority of the company reasonably believe it to be in the best interests of the company that this should be done. This is particularly so if the exception from the rule falls under the rubric of " fraud on a minority. …"
>
> "It does not seem to have yet become very clear exactly what the word " fraud" means in this context; but I think it is plainly wider than fraud at common law, in the sense of *Derry v. Peek* (1889) 14 App.Cas. 337 … Apart from the benefit to themselves at the company's expense, the essence of the matter seems to be an abuse or misuse of power. " Fraud" in the phrase " fraud on a minority" seems to be being used as comprising not only fraud at common law but also

fraud in the wider equitable sense of that term, as in the equitable concept of a fraud on a power."

- *No general test of injustice.*
- *Stultifying purposes for which company formed may be a fraud on the minority.*
- *Majority may not simply decide to take away the rights of the minority.*
- *Minority shareholders' rights not considered by the GLC.*

(3) Prima facie case needed

Smith v Croft (No.2) [1988] Ch 114: *is the shareholder being prevented from bringing the action by a proper or an improper organ of the company?*

4. Unfair prejudice to the minority

(i) s.994 Companies Act 2006

(ii) Under the old case law

Re a Company [1989] BCLC 427: *must be suing qua shareholder and not in another capacity: e.g. managing-director who was sacked may not bring an action under s.994.*

Ebrahimi v Westbourne Galleries [1973] AC 360:

- The claim may be founded on legitimate expectations as to how company's affairs were to have been conducted.
- This need not be based solely on what is in the articles of association.

Re Ghyll Beck Driving Range Ltd [1993] BCLC 1126: *small group of people = quasi-partnership*
R&H Electric Ltd v Haden Bill Electrical Ltd [1995] 2 BCLC 280 *small group of people = quasi-partnership*

Re R.A. Noble and Sons [1983] BCLC 273:

> *The company was a quasi-partnership formed on the basis that the petitioner would provide capital and that the respondent would manage the company. The petitioner alleged that he had been excluded from the management of the company. The respondent contended that this had not been done deliberately. It was held that it would depend on whether a reasonable bystander would consider the conduct to have unfairly prejudiced the petitioner's interests. Here, it was prejudicial but not unfair.*

- The test for unfair prejudice is objective, not subjective.
- No need to show bad faith nor intention to cause harm
- Conduct must cause harm to relevant interest of the member
- Conduct must be unfair

Scottish CWS v Meyer **[1959] AC 324, House of Lords**

The Co-op formed a subsidiary company to work in the rayon production industry during the Second World War when licences were required to work in the cotton trade. Two Germans (who had fled the Nazis) were employed as directors of this subsidiary with shareholdings because they had contacts and expertise. They were essential to acquiring the necessary licences because of their skill. The business did very well. When licensing ended in 1952, the Co-op tried to buy out their shares at an under-value but the Germans refused. Consequently, the Co-op set up a competing business and slowly starved the subsidiary of work. *Quaere*, is this "oppressive" under s.210? *Held*, this was oppressive of the minority and obligations were owed by a holding company to its subsidiary.

[Viscount Simonds relied on the dictionary definition of "oppressive".]

Re Harmer [1959] 1 WLR 62

Re London School of Electronics [1986] Ch 211

Re Saul D Harrison & Sons plc [1995] 1 BCLC 14

O'Neill v Phillips **[1999] 1 WLR 1092, House of Lords**

See next page

[1999] 2 All ER 961
House of Lords

O'Neill v Phillips

LORD HOFFMANN.

Pectel Ltd (the company) operates in the construction industry, providing specialist services for stripping asbestos from buildings. In 1983 it employed the petitioner Mr O'Neill as a manual worker. The respondent to the petition and appellant before your Lordships is Mr Phillips, an accountant. In 1983, having bought out another shareholder, he held the entire issued share capital of 100 £1 shares. Mr Phillips was impressed by Mr O'Neill's energy and ability and advanced him rapidly to foreman, site supervisor and contracts manager. In January 1985 Mr Phillips gave Mr O'Neill 25 shares and appointed him a director. In May of that year they had an informal discussion at which Mr Phillips expressed the hope that Mr O'Neill would be able to take over fully the day-to-day running of the company. He also indicated that on that basis he would allow him to draw 50% of the company's profits.

Mr O'Neill did take over the running of the business and on 30 December 1985 Mr Phillips retired from the board, leaving Mr O'Neill as sole director. Although not so described, he was in effect managing director. During the construction boom of the late 1980s, the company prospered. Mr O'Neill was credited with half the profits, some of which he drew in the form of salary and dividends and some of which he left in the company. When a dividend was declared, Mr Phillips would waive a third of his 75% entitlement in favour of Mr O'Neill to produce equality. In 1988 £49,900 of retained profits, which partly represented Mr O'Neill's undrawn entitlement, was capitalised by the issue of bonus shares to increase the company's issued share capital to £50,000. They were allotted in the same proportions as their existing holdings. In September 1990 another £50,000 was capitalised in the same way, except that this time non-voting shares were issued. Mr O'Neill also guaranteed the company's bank account and he and his wife mortgaged their house in support of the guarantee. So that by 1990 Mr O'Neill had put some of his own earnings into the capital of the company and was potentially liable to contribute more under the guarantee.

For two years, between the beginning of 1989 and the end of 1990, there were discussions with a view to Mr O'Neill obtaining a 50% shareholding. Solicitors, counsel and the company's accountants were consulted. Draft documents were prepared. By October 1990 negotiations had reached a point at which Mr Phillips indicated that in principle he was willing to increase Mr O'Neill's shareholding to

50% when the company's net asset value reached £500,000 and his voting rights to 50% when it reached £1,000,000. These figures were referred to as the targets. It was contemplated that a formal agreement would be drafted to embody these terms and any others which might be found desirable. But this did not happen. At that point, the negotiations stopped. The judge found that there was never any concluded agreement for the allocation of more shares to Mr O'Neill.

1989-90 was the last good year before the construction boom came to an end. The retained profits were £158,759. The company extended its business to Germany. In 1991, however, the industry went into recession and the company was struggling. Mr Phillips became alarmed about its financial position and concerned about Mr O'Neill's management. At the beginning of August 1991 he decided, as controlling shareholder, to resume personal command. He gave Mr O'Neill the option of managing, under him, the UK or the German branches of the business. Mr O'Neill chose to go to Germany. Mr Phillips became in effect managing director and assumed that title in November. Mr O'Neill remained on the board as an ordinary director.

It is clear that Mr Phillips was not as impressed with Mr O'Neill's energy and commitment when times were bad as he had been when they were good. He was critical of his conduct of the German side of the business and matters came to a head at an acrimonious meeting on 4 November 1991. Mr Phillips, as he himself put it in his evidence, 'ranted and raved'. He made his criticisms forcibly and pungently. He also told Mr O'Neill that as he was no longer acting as managing director he would no longer receive 50% of the profits. He would be paid only his salary and any dividends payable upon his 25% holding. Mr O'Neill made no comment. The meeting came to an end and he went back to his work in Germany.

…

(5) 'Unfairly prejudicial'

In s 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history (which I discussed in *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 17-20) that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. As Warner J said in *Re J E Cade & Son Ltd* [1992] BCLC 213 at 227: 'The court ... has a very wide discretion, but it does not sit under a palm tree.'

Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others ('it's not cricket') it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.

In the case of s 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.

The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith.

This approach to the concept of unfairness in s 459 runs parallel to that which your Lordships' House, in *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492, [1973] AC 360, adopted in giving content to the concept of 'just and equitable' as a ground for winding up. After referring to cases on the equitable jurisdiction to require partners to exercise their powers in good faith, Lord Wilberforce said ([1972] 2 All ER 492 at 500, [1973] AC 360 at 379):

> 'The words ['just and equitable'] 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 1948 and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents [the company] suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one

> individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.'

I would apply the same reasoning to the concept of unfairness in s 459. The Law Commission, in its report on *Shareholder Remedies* (Law Com No 246) (1997) para 4.11, p 43 expresses some concern that defining the content of the unfairness concept in the way I have suggested might unduly limit its scope and that 'conduct which would appear to be deserving of a remedy may be left unremedied'. In my view, a balance has to be struck between the breadth of the discretion given to the court and the principle of legal certainty. Petitions under s 459 are often lengthy and expensive. It is highly desirable that lawyers should be able to advise their clients whether or not a petition is likely to succeed. Lord Wilberforce, after the passage which I have quoted, said that it would be impossible 'and wholly undesirable' to define the circumstances in which the application of equitable principles might make it unjust, or inequitable (or unfair) for a party to insist on legal rights or to exercise them in particular way. This of course is right. But that does not mean that there are no principles by which those circumstances may be identified. The way in which such equitable principles operate is tolerably well settled and in my view it would be wrong to abandon them in favour of some wholly indefinite notion of fairness.

…

This way of looking at the matter is a product of English legal history which has survived the amalgamation of the courts of law and equity. But another approach, in a different legal culture, might be simply to take a less literal view of 'legal' construction and interpret the articles themselves in accordance with what Page Wood V-C called 'the plain general meaning of the deed'. Or one might, as in continental systems, achieve the same result by introducing a general requirement of good faith into contractual performance. These are all different ways of doing the same thing. I do not suggest there is any advantage in abandoning the traditional English theory, even though it is derived from arrangements for the administration of justice which were abandoned over a century ago. On the contrary, a new and unfamiliar approach could only cause uncertainty. So I agree with Jonathan Parker J when he said in *Re Astec (BSR) plc* [1998] 2 BCLC 556 at 588:

> '... in order to give rise to an equitable constraint based on "legitimate expectation" what is required is a personal relationship or personal dealings of some kind between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience of the former.'

This is putting the matter in very traditional language, reflecting in the word 'conscience' the ecclesiastical origins of the long-departed Court of Chancery. As I have said, I have no difficulty with this formulation. But I think that one useful cross-check in a case like this is to ask whether the exercise of the power in question would be contrary to what the parties, by words or conduct, have actually agreed.

…

(6) Legitimate expectations

In *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 19 I used the term 'legitimate expectation', borrowed from public law, as a label for the 'correlative right' to which a relationship between company members may give rise in a case when, on equitable principles, it would be regarded as unfair for a majority to exercise a power conferred upon them by the articles to the prejudice of another member. I gave as an example the standard case in which shareholders have entered into association upon the understanding that each of them who has ventured his capital will also participate in the management of the company. In such a case it will usually be considered unjust, inequitable or unfair for a majority to use their voting power to exclude a member from participation in the management without giving him the opportunity to remove his capital upon reasonable terms. The aggrieved member could be said to have had a 'legitimate expectation' that he would be able to participate in the management or withdraw from the company.

It was probably a mistake to use this term, as it usually is when one introduces a new label to describe a concept which is already sufficiently defined in other terms. In saying that it was 'correlative' to the equitable restraint, I meant that it could exist only when equitable principles of the kind I have been describing would make it unfair for a party to exercise rights under the articles. It is a consequence, not a cause, of the equitable restraint. The concept of a legitimate expectation should not be allowed to lead a life of its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application. That is what seems to have happened in this case.

5. Winding up on the just and equitable ground

Insolvency Act 1986, s.122:-

> (1) A company may be wound up by the court if –
> (g) the court is of the opinion that it is just and equitable that the company should be wound up.

Facts of *Ebrahimi v Westbourne Galleries*

per Lord Wilberforce

> My Lords, the issue in this appeal is whether the respondent company Westbourne Galleries Ltd. should be wound up by the court on the petition of the appellant who is one of the three shareholders, the personal respondents being the other two. The company is a private company which carries on business as dealers in Persian and other carpets. It was formed in 1958 to take over a business founded by the second respondent (Mr. Nazar). It is a fact of cardinal importance that since about 1945 the business had been carried on by the appellant and Mr. Nazar as partners, equally sharing the management and the profits. When the company was formed, the signatories to its memorandum were the appellant and Mr. Nazar and they were ***374** appointed its first directors. Of its issued share capital, 500 shares of £1 each were issued to each subscriber and it was found by the learned judge, after the point had been contested by Mr. Nazar, that Mr. Ebrahimi paid up his shares out of his own money. Soon after the company's formation the third respondent (Mr. George Nazar) was made a director, and each of the two original shareholders transferred to him 100 shares, so that at all material times Mr. Ebrahimi held 400 shares, Mr. Nazar 400 and Mr. George Nazar 200. The Nazars, father and son, thus had a majority of the votes in general meeting. Until the dispute all three gentlemen remained directors.
>
> The company made good profits, all of which were distributed as directors' remuneration. No dividends have ever been paid, before or after the petition was presented.
>
> On August 12, 1969, an ordinary resolution was passed by the company in general meeting, by the votes of Mr. Nazar and Mr. George Nazar, removing Mr. Ebrahimi from the office of director, a resolution which was effective in law by virtue of section 184 of the Companies Act 1948 and article 96 of Part I of Table A. Shortly afterwards the appellant presented his petition to the court.
>
> … No doubt, in order to present a petition, he must qualify as a shareholder, but I see no reason for preventing him from relying upon any circumstances of justice or equity which affect him in his relations with the company, or, in a case such as the present, with the other shareholders.

… a winding up may be ordered if such facts are shown as could justify a dissolution of partnership between them.

… The foundation of it all lies in the words 'just and equitable' and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence - this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company - so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

… My Lords, this is an expulsion case …

… I come to the facts of this case. It is apparent enough that a potential basis for a winding up order under the just and equitable clause existed. The appellant after a long association in partnership, during which he had an equal share in the management, joined in the formation of the company. The inference must be indisputable that he, and Mr. Nazar, did so on the basis that the character of the association would, as a matter of personal relation and good faith, remain the same. He was removed from his directorship under a power valid in law. Did he establish a case which, If he had remained in a partnership with a term providing

for expulsion, would have justified an order for dissolution? This was the essential question for the judge. … To my mind, two factors strongly support this. First, Mr. Nazar made it perfectly clear that he did not regard Mr. Ebrahimi as a partner, but did regard him as an employee. But there was no possible doubt as to Mr. Ebrahimi's status throughout, so that Mr. Nazar's refusal to recognise it amounted, in effect, to a repudiation of the relationship. Secondly, Mr. Ebrahimi, through ceasing to be a director, lost his right to share in the profits through directors' remuneration, retaining only the chance of receiving dividends as a minority shareholder. It is true that an assurance was given in evidence that the previous practice (of not paying dividends) would not be continued, but the fact remains that Mr. Ebrahimi was thenceforth at the mercy of the Messrs. Nazar as to what he should receive out of the profits and when. He was, moreover, unable to dispose of his interest without the consent of the Nazars. All these matters lead only to the conclusion that the right course was to dissolve the association by winding up.