

Insolvency act



Winding Up on Just and Equitable Grounds – Under the Insolvency Act 1986: Section 122 (1) (g) of the Insolvency Act 1986 gives a shareholder the right to apply to the court to have a company wound up on just and equitable grounds. There are three different categories that apply under this section: On the failure of the objects of the company: In the case of *Pirie v Stewart* (1904) the company was formed “to be ship owners and purchase charter and work ships”.

It so happened that the only ship bought by the company sank and the court ordered for the winding up of the company on the petition of the minority shareholders. On forming the company with intent to Fraud: In the case of *T. E. Brinsmead Ltd* there was a misstatement in the statement with respect to the cost of the business of the company which was using the name of another company for raising capital. The shareholders sued the company for fraud. The previous company got an injunction to stop the new one from using the company and finally the minority shareholders got the company wound up.

On quasi – Partnerships where there are issues related to the rights of shareholders to manage the company: Case Law on the subject is *Ebrahimi v Westbourne Galleries* (1973) “In 1945 W and Nazar formed a partnership (a Persian carpet business). In 1958 they formed a company – E and N were directors, each holding 500 ? 1 shares. G Nazar (the son of N) was later made the third director, and was given 100 shares by each of E and N. No dividends were paid to shareholders, and all profits went to directors’ wages.

In 1969, N and GN removed E as a director under s303 of the Companies Act 1985. E had 400 shares but these were worthless since they paid no dividends. E petitioned to have the company wound up so he could get his fair share. The courts agreed, citing the partnership history as being important. The Law relating to the Issue: For an easy understanding the relevant statutory provisions are stated hereunder: Companies Act 1985: Part XVII of the Companies Act 1985 comprising of sections 459 to 461 deal with the protection of company's members against unfair prejudice.

Section 459 (1) as amended which is relevant reads: 'A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial. Also read " Ebrahimi v Westbourne Galleries

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" Section 461 provides that if the court is satisfied that a petition under Part XVII is well founded, it may among other things provide for the purchase of the shares of any members of the company by other members of the company. Insolvency Act 1986: Section 122 (1) (g) of the Insolvency Act 1986 provides that a company may be wound up by the court if: 'the court is of the opinion that it is just and equitable that the company should be wound up."

Section 125(2) of the Insolvency Act provides that, before making a winding-up order on the 'just and equitable' ground on a petition by a contributory, the court must consider whether some other remedy is available to the petitioners. This would include a remedy under ss 459 and 461. Case of O'Neill v Phillips “ In O'Neill v Phillips the House of Lords considered the nature and extent of the jurisdiction under s 459(1). In O'Neill v Phillips the petitioner (Mr. O'Neill) sought relief under s 459(1), alternatively a winding-up order under s 122(1)(g), on the ground that his co-shareholder and co-director (Mr. Phillips) had unfairly terminated an agreement for equal profit-sharing and had repudiated an agreement for the allotment of further shares in the company.

The judge at first instance dismissed the petition, finding that Mr. Phillips had never committed himself to equal profit-sharing or to giving further shares to Mr. O'Neill. The Court of Appeal allowed Mr. O'Neill's appeal, on the footing that although there was no concluded agreement that Mr. Phillips would give Mr. O'Neill further shares, Mr. O'Neill had a 'legitimate expectation' that he would do so. The House of Lords allowed Mr. Phillips' appeal, on the footing that since Mr. Phillips had never agreed unconditionally to give Mr. O'Neill further shares he had not acted unfairly in not doing so. On the question whether Mr. Phillips had acted 'unfairly' under s 459, Lord Hoffmann observed that it did not matter whether Mr. Phillips had acted unfairly.

This is so because even if Mr. Phillips had not acted unfairly, the trust and confidence between Mr. O'Neill and Mr. Phillips on the basis of which the company was formed had broken down. Lord Hoffmann opined that under the circumstances Mr. O'Neill cannot be made to suffer as a minority

shareholder by getting himself locked in the company. In the course of his judgment Lord Hoffmann has given a detailed explanation on what constitutes ‘unfairly judicial’ under s 459 and an extract of his speech on the judgment is reproduced below: “ 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], adopted in giving content to the concept of “ just and equitable” as a ground for winding up. ”