

(1) Frank Tony Vujnovich and
(2) Steven Michael Vujnovich

Appellants

v.

Anthony Ljubo Vujnovich

Respondent

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
23RD MAY 1989

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD BRANDON OF OAKBROOK
LORD ACKNER
LORD OLIVER OF AYLERTON
LORD LOWRY

[Delivered by Lord Oliver of Aylmerton]

This appeal arises out of proceedings instituted by the respondent on 6th April 1987 in the High Court of New Zealand under section 209 of the New Zealand Companies Act 1955 in relation to the affairs of three limited companies of which the respondent was and is a director and a shareholder and in which the appellants (two of his co-directors) were and are the holders of the majority of the issued shares. The respondent's original claim was for an order that the appellants sell their shares in the companies to him, but at the trial he was given leave to add a claim under section 217(f) of the Act for a winding-up order in relation to all three companies on the ground that a winding-up would be just and equitable. On 13th April 1987 the appellants counterclaimed for an order under section 209 that the respondent sell his shares in the companies to them.

On 15th December 1987, after a nineteen-day hearing, Henry J. delivered a judgment in which, after a careful and exhaustive review of the facts, he refused orders for sale of the shares to both the appellants and the respondent but, having found that there had been a complete and irretrievable breakdown in the original partnership concept among the parties to which the companies had been intended to give effect, he held

that it was just and equitable that the companies should be wound up and ordered accordingly. From that judgment the appellants appealed to the Court of Appeal of New Zealand. On 19th May 1988 that court dismissed the appeal. The value of the property in dispute was such that an appeal lay to their Lordships' Board as of right and leave was granted by the Court of Appeal on 5th September 1988, further proceedings in relation to the winding-up (save in relation to one pending sale) being stayed pending the determination of the appeal.

It is unnecessary for present purposes to rehearse the facts in any detail. The broad background is that the appellants and the respondent are three brothers who, in 1969, commenced a corporate business of property developers through the medium of Anthony Stevens Holdings Limited of which they held the entire issued capital in equal shares and of which they were and are directors. In July 1971 a further company was formed which, after two changes of name, became International Airpark Limited. Again, the issued share capital became held by the three brothers in equal shares. A third company, Eaglehurst Properties Limited, was purchased in 1982, a little under one-third of the shares being held by the respondent and the balance between the two appellants.

The substantial matter of the respondent's complaint is that, for reasons which it is unnecessary to catalogue, the appellants have progressively ceased to take any active part in the conduct of the business of the companies the responsibility for which has, in substance, fallen entirely upon his shoulders. The judge found that by 1980 the first appellant had withdrawn from active management involvement. The second appellant suffered from 1983 until 1986 from a depressive illness which significantly reduced his working contribution, so that the judge was able to find that his full time involvement in the business ceased by the beginning of 1983 and was never thereafter resumed. By the date of the trial, the judge found - and this finding at least cannot be seriously open to challenge - that the original intention and purpose of the operation of the business as, in effect, a partnership between the three brothers had long since ceased and that the respondent had, since 1981, been the one person out of the three who remained a full-time working executive. The respondent also complained of the improper and abusive conduct of the second appellant in relation to various members of the companies' staff - conduct which the judge found to be both disruptive and inexcusable - and of the failure of both appellants to concur in executing mortgages and guarantees to enable company transactions to proceed, which the judge found to be indicative of the almost total breakdown of communication between the appellants and the respondent. The respondent further

complained of the appellants' failure to respond constructively to proposals advanced with a view to resolving the management deadlock, but the judge found that their failure to agree to these proposals could not be categorised as unreasonable.

Section 209 of the Companies Act 1955 is in the following terms so far as material:-

- "(1) Any member of a company who complains that the affairs of the company have been or are being or are likely to be conducted in a manner that is, or any act or acts of the company have been or are likely to be, oppressive, unfairly discriminatory, or unfairly prejudicial, to him (whether in his capacity as a member or in any other capacity) ... may make an application to the Court for an order under this section.
- (2) If on any such application the Court is of the opinion that it is just and equitable to do so, the Court may make such order as it thinks fit, whether for -
- (a) ...
- (b) ... or
- (c) the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital; or
- (d) ...
- or otherwise."

Henry J. held that the respondent failed to bring himself within the terms of this section, first, because the mere failure of a director or shareholder in the partnership type of company to continue full-time work could not be said to be the conduct of the affairs of the company and, secondly, because in any event the mere failure of the appellants to work could not be oppressive, discriminatory or prejudicial to the respondent. As regards the conduct of the second appellant and the failure of both appellants to sign documents, he held that this was not the conduct of the affairs of the company and was not within the terms of the section. He found, however, equally that the conduct of the respondent, of which the appellants complained in their counterclaim, did not fall within the section.

Their complaints fell broadly under five heads, the first of which was that they had been excluded from

decision-making by the respondent. As to this, the judge pointed out that the appellants in any event controlled the companies through their majority shareholdings and he drew the inference that they deliberately kept their distance from management responsibility. The appellants' second contention was that they had been subjected to unfair pressure to sell their shares to the respondent, first, by his permitting the overdraft limit with the companies' bankers to be exceeded and, secondly, by his refusal to concur in signing certain loan documents, which included his own personal guarantee. As to the former, the matter was, as the judge found, within the appellants' own control as majority shareholders and, as to the latter, he did not see how a refusal by a director or shareholder to subject himself to a personal liability for the companies' indebtedness could constitute oppressive conduct. Complaint was also made that the respondent had subjected the appellants to pressure to increase the number of directors, but again the judge rejected the contention that this could constitute "oppression" when the whole concept of partnership management had long since been abandoned.

The fourth and fifth heads of complaint were (a) that in 1986 the respondent had wrongfully diverted business of the companies to a company controlled by members of his family and (b) that the respondent had borrowed from the companies to provide benefits for members of his family. Both these were rejected by the judge as oppressive conduct, although he expressed considerable unease about the former transaction and was of the view that any profit made should be accounted for.

In the result, therefore, the judge rejected both the claim and the counterclaim for relief under section 209. On the other hand, he was satisfied that the deadlock in fact existed and that there had been a complete and irrevocable breakdown of the original partnership concept. The companies could effectively be managed only if the appellants were excluded or if they combined to use their majority shareholdings to exclude the respondent. It was, in his view, just and equitable that the companies should be wound up and he could see no sensible alternative to making such an order.

The appellants appealed against the making of the winding-up order and both sides appealed against the judge's rejection of their respective claims for relief under section 209. The Court of Appeal differed from Henry J. in his conclusion that neither side had laid any foundation for a claim under that section. They held that the failure of the appellants to work in the business did constitute conduct of the affairs of the companies which was oppressive of the respondent. They also were of the view that the conduct of the respondent in relation to the raising of the finance for the company in order to put pressure on the appellants

to sell their shares to him probably did amount to oppressive conduct as did the respondent's diversion of profitable business to a company in which the appellants had no interest.

Nevertheless they were satisfied that Henry J. had correctly diagnosed the episodes as symptoms rather than as causes of the collapse of the underlying partnership concept and they agreed with him that, even allowing that both sides could in some respects be said to have been guilty of oppressive conduct in the companies' affairs, they would not, as a matter of discretion be prepared, having regard to the whole history of the matter, to make an order against the wishes of one party for the sale of his shares to the other. The circumstances were, however, clearly such as would justify a winding-up order as just and equitable under section 217(f) of the Act and they were of the view that such an order, although extreme, afforded a fairer and more effective resolution of the problem.

Accordingly the Court of Appeal affirmed Henry J.'s order and they did so as a matter of discretion after a three-day hearing and after carefully considering and summarising the facts and the contentions of the parties which had been fully set out in Henry J.'s careful judgment in the High Court.

In opening the appeal to their Lordships, therefore, Mr. Temm faces the initial difficulty that the making of an order under section 209, like the making of a winding-up order under section 217, is essentially a discretionary exercise in respect of which an appellate court will not interfere unless it can be demonstrated that the discretion has been plainly wrongly exercised or has been exercised on some erroneous principle of law. It is not sufficient for him, as he recognises, simply to persuade the Board, if it be the case, that it might, had it been called upon to do so in the first instance, have exercised its discretion in some different way. No doubt with this in mind, the appeal has been presented to their Lordships not entirely upon the basis of the appellants' printed case, but on the footing that there are two and only two issues. These have been expressed thus:-

- (1) Was the dictum of Lord Cross of Chelsea in *Ebrahimi v. Westbourne Galleries Ltd.* [1973] A.C. 360 at page 387F properly applied by the court below?
- (2) Was that court right to conclude that the only sensible course was to make a winding-up order when an alternative course (i.e. an order for the purchase of shares under section 209) was available?

As regards the first question, it is, to begin with, important to bear in mind both exactly what Lord Cross said and the context in which he said it. He was considering, and suggesting a justification for, an unreported decision in which Brightman J. had declined to make a winding-up order under the just and equitable rule on a ground with which Lord Cross felt unable to agree. He felt, however, that the decision might have been justified on the facts on the footing that it was the petitioner's own misconduct which brought about the impasse on which the petition was based and in this connection he observed:-

"A petitioner who relies on the 'just and equitable' clause must come to court with clean hands, and if the breakdown in confidence between him and the other parties to the dispute appears to have been due to his misconduct he cannot insist on the company being wound up if they wish it to continue."

What Mr. Temm seeks to do is to extract from this the reference to coming to court with clean hands as if it stood alone and to suggest that, since both Henry J. and the Court of Appeal were of the view that the respondent had misconducted himself in relation to the diversion of business away from the company, that should have concluded the case against the making of a winding-up order. The same submission was made to the Court of Appeal who rightly rejected it. It is quite clear that Lord Cross was considering the position in which the petitioner's misconduct (and thus the relatively uncleanness of his hands) was causative of the breakdown in confidence on which the petition was based. On no analysis of the facts could that possibly apply here. The transaction concerned did not take place until 1986, long after all confidence between the parties had irretrievably gone, and it did not come to light until the trial. Whether or not the Court of Appeal was right to regard it as a consequence of the breakdown, it was clearly right in saying that it was not the cause of it and in regarding it as being no bar to a winding-up order if such an order was otherwise appropriate.

The second issue raised by Mr. Temm is framed in such a way as to suggest that what their Lordships are invited to do is to re-exercise the discretion exercised by the Court of Appeal by reviewing what that Court regarded as the good sense of making a winding-up order. That is something which their Lordships would be unwilling to do even if they were persuaded (which they are not) that they might independently have exercised the discretionary jurisdiction in a different way. It transpired at the hearing, however, that what Mr. Temm was suggesting was that the court's exercise of discretion was fatally flawed in law by their failure to refer to and apply the provisions of section 220(2) of the Act. Section 220(2) reproduces in substance the

provisions of section 225(2) of the United Kingdom Companies Act 1948 and is in the following terms:-

"Where the petition is presented by members of the company as contributories on either of the grounds specified in paragraph (da) or paragraph (f) of section 217 of this Act, the Court, if it is of opinion -

- (a) That the petitioners are entitled to relief either by winding-up the company or by some other means; and
- (b) That in the absence of any other remedy it would be just and equitable that the company should be wound up -

shall make a winding-up order, unless it is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy."

Mr. Temm suggests, if their Lordships understand the submission aright, that the section directs the court, before making a winding-up order, to consider whether some other remedy is available and that, having regard to their conclusion that there had been oppressive conduct on both sides, the Court of Appeal ought to have been of opinion that some other remedy was available and thus refrained from making a winding-up order. Their Lordships are unable to see how this section helps the appellants. In the first place, it is directed to imposing a mandatory duty on the court to make a winding-up order with a discretion not to make one if certain conditions are satisfied. Secondly it is directing the court to regard the position of the person seeking the order (in this case the respondent) and giving a discretion to withhold the order if it is of opinion that he has another available remedy and is unreasonably failing to pursue it. In the instant case the respondent was in fact seeking to pursue another remedy and was prevented from doing so by the exercise of the court's discretion to withhold it. The submission based on section 220 is, therefore, entirely misconceived.

Their Lordships can discern no error in the approach of the Court of Appeal to the discretions which they were called upon to exercise and their conclusions (a) that in the circumstances no order for purchase under section 209 ought to be made in favour of either party and (b) that the only sensible way of resolving the deadlock was for the companies to be wound up were not only amply justified on the facts as found by Henry J. but may indeed be said to have been inevitable.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondent's costs of the appeal to their Lordships' Board.

