

JERSEY / JUDGMENT

Bisson v Bish [2008] JRC 193 (11 November 2008)

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JUDGMENT

commissioner: 1. On 20 th October 2008, the Court ordered the winding up of 3B Holdings Limited ("the Company") under Article 155 of the Companies (Jersey) Law 1991 ("the Companies Law") and appointed Adrian Rabet and Allen Roberts of Begbie Traynor as liquidators. We now set out our reasons.

Background

2. On 1 st January, 2005, the Company assumed the business of The Luggage Shop (previously conducted by the representor) and Horseplay (previously conducted by the first respondents). The representor was the landlord of the premises occupied by both businesses. 3. The shares of the Company are held as to 50% to the representor and 25% to Hazel Bish and 25% to Suzanne Barker. The representor and Suzanne Barker are the directors. 4. The representor originally proposed that 2% of the shares should be held by the Company's accountants for the purpose of them using those shares to resolve any deadlock. The accountants advised that such an arrangement was unworkable and that the parties should enter into a shareholders' agreement. 5. Rather than appointing a lawyer to attempt to draw up such an agreement, the shareholders resolved to pass a resolution for the appointment of a third party arbitrator/adjudicator to deal with any deadlock/serious disagreement. No such resolution was ever passed. 6. The parties were all engaged in the business of the Company, Suzanne Barker and Paul Bish as operational managers, Hazel Bish as book-keeper/management accountant and Glenvil Bisson as finance director. There is no need for the purposes of this judgment to relate the history of the breakdown in the relationship between the representor on the one hand and the first respondents on the other, as it was accepted by both sides that there had been a complete and irreversible mutual loss of trust and confidence, making it impossible for them to work together and manage the business. The breakdown extended to each side making allegations of impropriety against the other. The situation was such that the Court felt obliged at a directions hearing on 11 th September 2008 to urge the parties to exercise the utmost restraint. The Viscount 7. The Court convened the Viscount to the proceedings because the parties had been unable to find a liquidator prepared to act on a winding-up, in particular

because the representor wanted a number of matters investigated with a view to proceedings being issued against the first respondents. The Court had in mind the possibility of the Viscount being appointed liquidator if none could be found able and willing to act. 8. The Viscount submitted that he was only qualified to act as a liquidator of a company that is being wound up under chapter 4 of part 21 of the Companies Law (that is in a creditors' winding-up), pursuant to ministerial designation duly embodied in Article 7 of the Companies (General Provisions) (Jersey) Order 2002 . The appointment of a liquidator other than in accordance with these provisions constitutes an offence under Article 188(3) of the Companies Law. 9. Even if it were possible for the Viscount to act as liquidator on a just and equitable winding up under Article 155, he submitted that it would be undesirable for the Court to appoint him against his wishes, and in this case, he would not wish to accept nomination as liquidator. He disagreed with the assertion made by Advocate Simon Howard in *Winding Up The Living Dead* (Jersey Law Review 2003), to the effect that where the Viscount has inadequate funding (in a *désastre*) the costs of consequential procedures have to be met out of the budget of the Viscount's Department. The Viscount is a public functionary. He submitted that the only occasion in which public funding may be utilised to fund essential consequential activity in a *désastre* is where the public interest is engaged, such as where the Island's reputation as a responsible and well regulated financial centre is (and/or depositors' and investors' funds are) at risk. Even in such extreme circumstances, special funding needs to be sought from and granted by the States of Jersey Treasury. In the instant case, where private rights are wholly in issue, there was no justification in his view for engaging the services of a public functionary. 10. As it transpired, the Court did not have to determine this issue, as on the eve of the hearing the parties found qualified liquidators able and willing to act. Just and Equitable Winding Up 11. The parties were agreed that the Company should be wound up and Adrian Rabet and Allen Roberts appointed liquidators. The issue arose therefore as to why the Court should exercise its powers under Article 155 of the Companies Law when the parties might be expected to wind the Company up voluntarily under chapter 2 of part 21 of the Companies Law. 12. We were referred to *Jean v Murfitt*, *Murco Overseas Limited* and the Viscount

[1996] JLR N 8c which involved a dispute between the beneficial owners of a quasi partnership company whose relationship had broken down, such that the company was effectively paralysed. It was held that the paralysis of the company was in itself sufficient reason to order that it be wound up under Article 155. The phrase 'just and equitable' had to be given a flexible interpretation. It could not be defined fully in what circumstances it would be just and equitable to wind a company up; rather, it would depend on the particular circumstances of each individual case. 13. In *Re Leveraged Income Fund Limited* 2002/209, 31 st October 2002, Birt, Deputy Bailiff said this at paragraph 10 of the Court's judgment:- "Article 155 is based upon a similar provision of the Companies Act of the United Kingdom. English authorities are therefore of assistance. Although the English courts have developed certain categories of cases where the court will exercise its power under the just and equitable jurisdiction the court is not confined to such categories. The

words 'just and equitable' are general words. As Palmer's Company Law Vol 3 para 15.219 puts it: 'It has sometimes been suggested that there is an exhaustive list of situations that may fall within the scope of the 'just and equitable' clause, but it now seems that, although such classification may be convenient for purposes of presentation, the words 'just and equitable' require a more flexible interpretation. In the words of Lord Wilberforce: 'Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances.'" In that case, a just and equitable winding-up was ordered because the stratum of the company had gone. We were also referred to In the matter of Belgravia

- [2008] JRC 161 in which a just and equitable winding-up had been ordered primarily because the affairs of the company which was insolvent needed to be investigated. 14. It is clear that under English law, one of the situations in which the courts will wind up a company is where the company is substantially a domestic company, in the nature of a partnership, whose members are unable to cooperate in the conduct of its affairs. In such companies winding-up could be seen as analogous to dissolution in partnership law. In *Ebrahimi v Westbourne Galleries Ltd*
- (1973) AC 360, Lord Wilberforce said this:- "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." 15. Murco involved a quasi partnership company and Mr Hoy submitted that this case also involved a quasi partnership company. The representor argued that there was no element of quasi partnership. In his view this was an entirely commercial venture. In our view, the Company comes within at least two of the elements set out by Lord Wilberforce in that it was an association formed on the basis of personal relationships involving mutual confidence and on the understanding that the shareholders would participate in the conduct of the business. 16. However, it is clear from both English authority (see *Applications to Wind Up Companies*, Second Edition, by Derek French paragraph 7.10) and Murco that deadlock is of itself sufficient reason to wind up a company on just and equitable grounds. The issue of what constitutes deadlock is dealt with in *Applications to Wind Up Companies* at paragraph 7.10.2 as follows:- "7.10.2 What Constitutes Deadlock There is no precise definition of 'deadlock' for the purpose of winding up on the

just and equitable ground. Lord Donovan in *Ng Eng Hiam v Ng Kee Wei*

- (1964) 31 MLJ 238, said at p 240: 'The question whether such a deadlock exists as makes it just and equitable to wind the company up is a question predominantly of fact in each case'. It seems that deadlock involves a division of the membership and directors into two opposed and uncooperative factions inhibiting decisions on matters crucial to the company's prosperity. Deadlock has been described as 'an impasse in the corporate decision-making process'. In *Re Deep Sea Trawlers Ltd*
- (1984) 2NZCLC 99,137Jeffries J said, at p 99, 148: 'Deadlock is an interesting word in sound and meaning. It appealed to Charles Dickens as an appropriate name for leading characters in a novel concerning a suit in Chancery. The dictionary meaning is that of a standstill, or inaction, resulting from the opposing aims of different people. The impasse is the result of clash An impasse can arise without the presence of exact equality'. The writer of the headnote of *Re Motor Accessories Repair Co Pty Ltd*
- [1956] QWN 46 referred to 'Insoluble dissension and differences ... between the directors'. In *Ng Sing King v PSA International Pte Ltd (No 2)*
- [2005] SGHC 5, (2005) 2 SLR 56 the court used the phrase 'irretrievable breakdown in the relationship amongst the shareholders'. In *Re Fromm's Extract Co Ltd*
- (1901) 17 TLR 302 'deadlock' seemed to mean that it was impossible for the company to carry on business. But the word 'deadlock' was not used at all in the judgment in *Re Upper Hutt Town Hall Co Ltd*
- [1920] NZLR 125, in which a winding-up order was made because, it was said (at p 126), that '...there are two factions in the company. Neither will coalesce with the other, and the continuance of the company has become impossible.' In *Re Mataia Ltd*
- [1921] NZLR 807 the petitioner held one quarter of the company's shares and another man held the remainder; the two were the company's only directors. Adams J summarised the position at p 808; '... it is hopeless to expect these two persons to work together... Neither of them can carry on the business of the company alone.' His Honour described this as 'a complete deadlock' and made a winding-up order citing *Re Sailing Ship 'Kentmere' Co*
- [1897] WN 58, *Re Fromm's Extract Co Ltd*
- (1901) 17 TLR 302 and *Re Upper Hutt Town Hall Co Ltd*
- [1920] NZLR 125. In *Scozzafava v Prosperi* ABQB 248 [2003] 6 wwr 351 Read J said, at [50] 'It is apparent that there are two equal factions of shareholders and that they are at odds'. This is a classic case of deadlock ." 17. It is clear that in the case of the Company, we have a division of the members and directors into two opposed and uncooperative factions inhibiting or indeed preventing decisions on matters crucial to the Company's prosperity. It is a clear case of deadlock justifying the winding-up of the Company on just and equitable grounds. There are further grounds for the Court making such an order as

follows:- (i) Although on the face of it the Company would be able to discharge its liabilities within six months of the commencement of a summary winding-up, there would be difficulty in the directors agreeing to sign a statement to that effect 'having made full enquiries into the Company's affairs' as required under Article 146 of the Companies Law in relation to a summary winding-up. The state of affairs is such that no such enquiry is feasible. (ii) The parties constitute, to a substantial degree, the Company's creditors and a creditors' winding-up would merely pass on to that body the same acrimonious state of affairs as exist between the members and directors, making, for example, a liquidators' committee unworkable. 18. We therefore agreed with the submissions of the parties and of the Viscount that a just and equitable winding-up was the only appropriate way forward. We gave the liquidators all the rights and powers given to a liquidator in a creditors' winding-up under Chapter 4 of Part 21 of the Companies Law and made provisions in relation to their remuneration and its monitoring by the members. Because of the existence of creditors, we ordered that Article 166 of the Companies Law (applying the law relating to *désastre*) will apply to the winding-up and ordered the parties to cooperate with the liquidators in accordance with the provisions of Articles 183 and 185 of the Companies Law. We gave the parties and any creditor (in addition to the liquidators) the power to apply to the Court pursuant to the provisions of Article 186A of the Companies Law and ordered that there should be no distribution of assets to the members of the Company without the prior sanction of the Court. Finally, in view of the mutual allegations of impropriety made by the parties, we imposed upon the liquidators the obligations under Article 184 of the Companies Law imposed upon liquidators in any creditors' winding-up to report criminal or other activities to the Attorney General and this on a confidential basis. Authorities Companies (Jersey) Law 1991. Companies (General Provisions) (Jersey) Order 2002. Winding Up The Living Dead (Jersey Law Review 2003). *Jean v Murfitt, Murco Overseas Limited and the Viscount* [1996] JLR N 8c. *Re Leveraged Income Fund Limited* 2002/209. In the matter of *Belgravia*

[2008] JRC 161 . *Ebrahimi v Westbourne Galleries Ltd*

(1973) AC 360. Applications to Wind Up Companies, Second Edition, by Derek French. Page Last Updated: 22 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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