JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 11/90

BEFORE: THE HON. MR. JUSTICE CAMPBELL, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN	WIN-DOORS LIMITED DENNIS HOWELL	RESPONDENTS/APPELLANTS
AND	STEVE BRYAN RANNIE BROWN DONALD SPENCE	PETITIONERS/RESPONDENTS

Hilary Phillips & Denise Kitson
instructed by Perkins, Grant, Stewart Phillips & Co. for the appellants

Dennis Goffe & Douglas Leys
instructed by Myers, Fletcher & Gordon
for the respondents

21st, 22nd, 24th, 25th May &
18th, 19th, 20th June &
16th July, 1990

DOWNER, J.A.:

Before Malcolm J. in the Supreme Court, the appellants Win-Doors Limited and its managing director and majority shareholder Dennis Howell brought a summons to strike out the petition of the respondents Steve Bryan, Rannie Brown and Donald Spence. They were the minority shareholders as well as directors. The reliefs the appellants sought were as follows -

> "(1) That the Petition be struck out as an abuse of the process of the Court, and be removed from the file of proceedings.
>
> (2) That in the alternative the Petitioners herein may be ordered within ten (10) days to give security for the costs of the Respondents of the Petition herein in the sum of $50,000.00 and that

> "pending the giving of such security any further proceedings in the above matter be stayed."

Malcolm J., dismissed the summons and his order and reasons for judgment suggest that he resorted to the affidavits filed before coming to his decision. The relevant part of his order reads -

> ".......... and upon reading the Affidavits of Dennis Howell sworn to on the 18th January 1990 and 8th February 1990 and the Affidavits of Steve Bryan, Kannie Brown and Donald Spence sworn to on the 7th February 1990 it is hereby ordered:
>
> (1) That the Summons dated the 22nd January 1990 be dismissed."

The inference from the summons and the order is that the learned judge relied on the summary powers of the court to resolve the issue before him. The appellants had contended below and in this court that the summary powers were sufficient to decide that the minority shareholders complaint of oppression should be dismissed at the threshold. Equally, the prayer for a winding-up order being demurrable should also have been dismissed on a preliminary point of law. The purpose of this appeal is to determine whether these contentions of the appellants were correct.

Was it permissible to seek alternative reliefs in the petition pursuant to Section 196 and 203 of the Companies Act?

The The appellant's initial thrust was their 3rd ground of appeal which reads -

> "(3) That the Learned Trial Judge erred in failing to find that the relief provided by Section 196 and Section 203 of the Companies Act were mutually exclusive and the Petitioners/Respondents were therefore precluded from claiming relief under those sections in the alternative."

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In England it is common ground that both the rules of procedure and Section 210 of Companies Act (U.K.) permit alternative averments for winding up the company and for seeking relief for minority shareholders who complain of oppression. In Jamaica on the other hand there is no provision in Section 196 of the Companies Act (The Act) dealing with minorities and oppressive conduct for the alternative relief of winding-up. Section 154 of the Civil Procedure Code governs alternative averments generally and that section reads -

> "154. Subject to the following sections of this Title, the plaintiff may unite in the same action several causes of action, but if it appear to the Court or a Judge that any such causes of action cannot be conveniently tried or disposed of together, the Court or Judge may order separate trials of any of such causes of action, to be had, or may make such other order as may be necessary or expedient for the separate disposal thereof."

This section is relevant because the Winding Up Rules 1949 U.K. are applicable to Jamaica by virtue of Section 323(4) of The Act. Rule 227 reads -

> "In all proceedings in or before the Court, or any Judge, Registrar or Officer thereof, or over which the Court has jurisdiction under the Act and Rules, where no other provision is made by the Act or rules, the practice procedure and regulations shall unless the Court otherwise in any special case directs, in the High Court be in accordance with the Rules of the Supreme Court and practice of the High Court, and in a Palatine Court and County Court in accordance, as far as practicable, with the existing Rules and practice of the Court in proceedings for the administration of assets by the Court." (Emphasis supplied)

In all proceedings must include 'causes' 'suits' 'action' or 'matter' as defined in Section 2 of the Civil Procedure Code. Moreover, Section 4 of the Civil Procedure Code

specifically states that -

> ".....and all suits which previously to the commencement of the said Law were commenced by bill or information or cause petition in the Court of Chancery, or by a citation or otherwise in the Court of Ordinary, shall be instituted in the High Court by a proceeding to be called an action."

Since Section 154 of the Civil Procedure Code permits the joinder of the causes of action in the petition, the specific complaint of the appellants that the relief of winding-up and relief from oppression cannot be joined in the same petition is not well founded. This was the substance of Mr. Goffe's submission and it was a complete answer to the appellants argument. The result is that, on this ground, the appellants have failed.

But although this submission failed in relation to the joinder of claims for relief pursuant to Sections 196 and 203 of the Companies Act, the principle enunciated by counsel for the appellants, namely that there are specific limits to the joinder of causes of action in a petition, is sound. A petition can only institute proceedings by virtue of a statute or rule of procedure. The following reliefs prayed for in the petition would have to be sought by way of writ of summons or motion or otherwise than by petition. They are to be found at p. 7 of the Record -

> "(a) A declaration that Dennis Howell is in breach of his fiduciary duties to the Company;
>
> (b) A declaration that Dennis Howell is a Trustee for the Company of all the monies that he has received wrongfully;
>
> (c) An account of what is due from Dennis Howell in respect of all monies, profits or gains which would have been realised by the Company but for the wilful default and/or neglect by Dennis Howell and/or the breach of fiduciary duty owed by Dennis Howell to the Company;
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> (d) An order for payment by the said Dennis Howell to the Company of any such monies received by Dennis Howell and/or any sum found

> " due upon the taking of such account, with interest thereon at 20% or at such other rate as at the date of the order may seem just;
>
> (e) An order that the said Dennis Howell is personally liable for all debts that he had incurred in the name of the Company to further his personal interests and that he take immediate steps to release and/or indemnify the Company from any liability therefor;
>
> (f) A declaration that any meeting of the Company and/or of the Board of Directors for which your Petitioners were not properly served notice is null and void and of no effect;
>
> (j) Such further or other relief as may seem just."

therefore only -

> "(g) an order that Dennis Howell purchase your Petitioners' shares at a fair value;
>
> (h) an order that a Receiver/Manager of the Company by appointed;
>
> (i) Further or in the alternative, an order that the Company be wound up,"

were permissible by petition pursuant to the Companies Act. The upshot of this is that it would have been appropriate for the appellants to ask that seven of the reliefs be struck out or that the whole petition ought to have been struck out as the preponderance of the reliefs sought were not permissible by way of petition.

The court found it had jurisdiction to hear the petition as it stood. In so doing, it relied on the affidavit evidence supporting the petition and the affidavits of the respondent to find that -

> " The Petition and all the Affidavits filed in this matter show that there was and is an acute conflict between the parties herein and that there are several triable issues."

> "Rannie Brown subscribed for 500 Shares each; Dennis Howell subscribed for 3,250 Shares. Dennis Howell and your Petitioners were all named as the first Directors of the Company. Dennis Howell was appointed Managing Director and your Petitioner Rannie Brown was appointed Company Secretary."

It was not stated that the company was solvent and that on a winding-up there would be a tangible interest for the petitioners. It was this failure, that gave force to the submission that the petition was demurrable and ought to have been struck out. Legally, a company is a separate entity from its members and on principle the courts are of the opinion that a fully paid up member ought not to be permitted to petition to wind-up a company unless there are good grounds to do so and that they have some tangible interest to gain on its dissolution. Mr. Goffe however, contended that the plain language of Section 206 (1) does not support such a principle. That section reads -

> "206.- (1) On hearing a winding up petition the Court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit, but the Court shall not refuse to make a winding up order on the ground only that the assets of the company have been mortgaged to an amount equal to or in excess of those assets, or that the company has no assets." (Emphasis supplied)

Volume 6, 3rd edition of Halsbury's Laws paragraph 1043 and Volume 2 (1960) 17th edition of Palmers Company Precedents p. 48 were cited in support of this submission. The learned authors contend that since there was no ambiguity in the emphasised words in the U.K. Act, then there was no need to specify solvency since 1907, as this phrase first appeared in the Companies Act that year.

These words cannot be understood without reference to Section 203 (f) (supra). This section speaks of specific circumstances i.e., 'just and equitable' in which a company may be wound-up by the court. Section 206 (1) stipulates the orders the court may make on hearing a winding-up petition. It may wind up generally even if the company has no assets. To return to the crucial words "just and equitable" they empower the court to take into account equitable principles in deciding whether a company ought to be wound-up. In this regard, the courts have ruled that in the special circumstances where a fully paid up shareholder petitions to wind-up a company, he must aver and prove that he would have a tangible interest on its winding-up by the court. Where the petitioner has not averred a tangible interest, the court would not hear the winding-up petition on the merits and Section 206 would not come into play. The court, by resorting to equitable principles as Section 203 (f) of the statute ordained, would use its inherent powers to dismiss the petition in limine, on the ground that the petitioner had no locus standi. This approach is an illustration of the generality of legislative provisions being harmonised with the common law approach to individual cases for a "just and equitable" result.

Take the case of Re Westbourne Galleries Ltd (1970) 3 All E.R. 374. Plowman J., said at p. 375 -

> "The relief in fact sought on this petition is an order that the personal respondents, Mr. Nazar Achoury, whom I will call Mr. Nazar, and his son George Achoury, whom I will call George, may be ordered to purchase the petitioner's shares in the respondent company, Westbourne Galleries Ltd. Alternatively, the petitioner asks for a winding-up order. It is common ground that the company is solvent."

There the petitioner recognised that he was obliged to plead with particularity in paragraph 10 of the petition on page 377 which reads -

> "10. The Company has in recent years been making a net profit before providing for directors' remuneration of about £6,000 a year (after such provision there is a small loss)."

Because solvency was specifically pleaded, its absence was not in issue in the House of Lords see Ebrahimi v Westbourne Galleries Ltd. (1972) 2 All E.R. 492. The following extract from the speech of Lord Wilberforce at p. 500 states the principle of interpretation where discretion of the court is to be exercised on equitable principles. He said -

> "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."

Although used in the particular situation of a company which was akin to a partnership, these words are of general applicability. An application of this principle was in Re W.R. Willcocks & Co. Ltd. (1973) 2 All E.R. 93 where Plowman J. cited the case which first stated the principle. At p. 95 he said -

> " Let me first of all dispose of one point which was submitted by counsel for Mr. Dutch, namely, that the allegation in para 6 of the petition, that 'in a winding up there would be a considerable surplus for the two shareholders', is not enough without further evidence to support it. Counsel

> "referred me to what was said by Sir George Jessel MR in the Court of Appeal in Re Rica Gold Washing Co. (1879) 11 Ch. D 36 at 43:
>
> > 'That being his position, and the rule being that the Petitioner must succeed upon allegations which are proved, of course the Petitioner must shew the Court by sufficient allegation that he has a sufficient interest to entitle him to ask for the winding-up of the company. I say "a sufficient interest," for the mere allegation of a surplus or of a porbable surplus will not be sufficient.'
>
> Counsel for Mr. Dutch submits that is all there is here. The petition with which the court was concerned in that case was a petition by a shareholder who was not a director of the company. The petition in the present case is by someone who is one of the two shareholders and one of the only two directors. It is, therefore, different from the position which prevailed in the Rica case (1879) 11 Ch D 36, and I think that para 6 of the petition, read in conjunction with the affidavit, to which I have already referred, is sufficient prima facie evidence that there would be a surplus for the members in a winding up."

A clear statement of the rule that a petition would be demurrable if there was a failure to allege that there would be a surplus on a winding-up comes from the same judge in Re Bellador Silk Ltd. (1965) 1 All E.R. at 673. He said -

> "The only previous authority in which this point has been touched on appears to be Re G.A. Hawken, Ltd. (1950) 2 All E.R. 408 which was decided on a question of costs. In that connexion it became relevant for Wynn-Parry, J., to consider whether a s. 210 petition would be demurrable, if it omitted an allegation that on a winding-up there would be a surplus for contributories. In the course of his judgment he said this
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> > ' It is said, in the first place, on behalf of the respon-dents, that the costs in question which relate only to the matters

> " 'alleged in support of the relief claimed under s. 210 of the Act ought, in any event, to be disallowed, because the petition, so far as that relief is concerned, was demurrable on the face of it. The condition, on the existence of which the jurisdiction of the court depends, is that 'the facts would justify the making of a winding-up order on the ground that it was just and equitable that the company should be wound-up', i.e, that if the petition had been presented as a contributory's petition for the winding-up of the company, the court could have made such an order: see s. 210 (2) (b). The petition, as I have said, contains an allegation that the company is insolvent and unable to pay its debts, and, therefore, it is said, it is demurrable on the face of it. Prima Facie, this would appear to be so. A contributory is not entitled to a winding-up order unless he can show that he has a tangible interest in the assets in a winding-up: See Re Rica Gold Washing Co. (1879) 11 Ch. D. at p. 43, per Sir George Jessel, M.R.; and an allegation that a company has no assets and is insolvent has been held to disentitle a petitioner to such an order: see Re Kaslo-Slocan Mining & Financial Corpn., Ltd (1910) W.N. 13.' "

Similar statements were made in Bryanston Finance Ltd v. de Vries (No. 2) (1976) 1 All E.R. 25.

There are however, exceptions to the rule and one was formulated by Pennycuick J., in In Re Newman v. Howard Ltd (1962) 1 Ch. 257 and Oliver J., followed it in In Re Chesterfield Catering Co. Ltd (1977) 1 Ch. 373 at 379 where he said -

> " ..... I do not think that as the law now stands the exception goes beyond this: that a petition will not be regarded as demurrable on the ground of the petitioner's lack of locus standi if his inability to prove his locus standi is due to the company's own default in providing him with information to which, as a member, he is entitled."

It is necessary to reiterate that all the respondents were directors. Section 142 (5) of the Act imposes on the directors the responsibility of ensuring that the financial records be kept in accordance with the Act. Also they have access to the auditors. How then can the respondents legitimately seek to be within the exception on the ground that they were in the dark regarding the solvency of the company? Further, they have, in their petition said that before it was presented, they were in possession of the financial statements for the years December 1982 - 87 so the only missing year was 1988. In that situation the respondents could have averred the solvency or otherwise of the company.

In the light of the above, it is appropriate to strike out the prayer to wind-up the company pursuant to Section 203 (f) of the Act.

It is now necessary to turn to ground 1 of the Notice of Appeal which contends that the summary powers of the court ought to have been used to dismiss the respondents' petition which complains of oppressive conduct by the appellants, because a hearing thereof would be an abuse of process.

Was the minority shareholders' complaint of oppression pursuant to Section 196 of the Act frivolous or vexatious or an abuse of the process of the court?

(a) pursuant to 238 of the Civil Procedure Code

or in

(b) its inherent jurisdiction

As to (a), Section 238 of the Civil Procedure Code reads -

> "238. The Court or a Judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer; and in any such case, or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the Court or a Judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

The hearing below took place on 6th and 9th February, 1990 and an oral judgment was delivered 16th February, 1990. In that judgment Malcolm J., examined the affidavits and his reasons suggest that part of his examination took place in the exercise of his inherent jurisdiction. Before assessing that approach, it is convenient to examine the allegations in the petition to determine if the respondents were bound to fail because the averments could never amount to oppressive conduct by the appellants within the intendment of Section 196 of the Act. Bramwell B stated the test thus, in Castro v. Murray (1875) 10 Ex. 213 at 218 -

> "This action, therefore, is pretenceless, and has properly been stopped. I do not say it was malicious - in one sense, it may be said to be vexatious - but it is absolutely groundless, and it is one in which the Court, in the exercise of its discretion, ought to stop the proceedings as being an abuse of the process of the Court."

An application of this principle to this issue was Five Minute Car Wash Service Ltd (1966) 1 W.L.R. 746, where a petition was dismissed on a preliminary point because the allegations could not in law amount to oppression.

The learned trial judge in dealing with his statutory discretion said -

> " Of course I am not unmindful that Miss Phillips had not yet spent herself and took the matter one step further. She submitted that the Petition should be struck out as the Affidavit verifying it was merely a Statutory affidavit and to quote her 'something more than that is required.' In her view an essential requirement was omitted which is necessary under the Winding Up Rules and the Court has the jurisdiction 'to stay an action in limine if it amounts to an abuse of the process of the Court.' "

As there was no affidavit to support the petition with regard to oppressive conduct, in rejecting the submission of the appellants, the inference is that the learned judge considered that the allegations of oppressive conduct were sufficient for the petition to proceed. The statutory provisions must be considered.

Section 196 of the Act in so far as is material, reads -

> "196. (1) An application to the Court may be made by petition for an order under this section either -
>
> (a) by any member of a company who complains that the affairs of the company are being conducted in a manner oppressive to some part of the members (including himself).
>
> (b) .....
>
> (2) If on any such petition the Court is of opinion that the company's affairs are being conducted as aforesaid, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit whether for regulating the conduct of the company's affairs in future, or for 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 otherwise."

As all the respondents were directors, and therefore in the majority, they could have called directors meetings regarding the management of the company. Also to be noted is the difference previously adverted to in the U.K. legislation regarding oppression. In that jurisdiction, once oppression is alleged and proved, the statute provides for the alternative relief of winding-up. See Ebrahimi v. Westbourne Galleries Ltd (1972) 2 All E.R. 492. In Jamaica, on the other hand, the statutory remedies are designed to bring an end to oppressive conduct, by regulating the conduct of the company's affairs in

the future, or by the purchase of shares of the minority by the other members of the company. Winding-up is not an alternate relief.under Section 196 of the Act.

On jurisdiction to hear and determine pursuant to Section 196 Lord Cross puts it this way in Ebrahimi v. Westbourne Galleries Ltd at page 565 -

> "To give the court jurisdiction under this section the petitioner must show both that the conduct of the majority is 'oppressive' and also that it affects him in his capacity as a share-holder."

In this regard, it should be reiterated that apart from the order which sought to wind-up, pursuant to Section 203 (f), the order which sought to compel Dennis Howell to purchase the shares of the respondents and the prayer to appoint a Receiver and Manager, the other orders sought were not available as statutory remedies under the Act.

What is oppressive conduct? A good starting point is Scottish Co-operative Wholesale Society Ltd v. Myers (1959) A.C. 324 at 342 where Lord Simonds had this to say -

> "My Lords, upon the facts, as I have outlined them and as they appear in greater detail in the judgments of their Lordships of the First Division, it appears to me incontrovertible that the society have behaved to the minority shareholders of the company in a manner which can justly be described as 'oppressive.' They had the majority power and they exercised their authority in a manner 'burdensome, harsh and wrongful' - I take the dictionary meaning of the word."

Gordon J.A. (ag) has helpfully brought to my attention Aaberg v. Pederson (1975) 13 J.L.R. which has a useful collection of other cases on oppressive conduct. It is in the light of these definitions that the ground of appeal must be resolved.

That ground reads -

> "1. That the Learned Trial Judge erred in law in dismissing the application of the Respondents/ Appellants for an order that the Petition be struck out as an abuse of the process of the Court and be removed from the file of proceedings."

In the petition, the respondents firstly complained that no directors meetings had ever been held, no dividend had ever been declared, there was no general meeting and also no share certificates were issued. However, as previously stated, the respondents were the majority directors. They could have declared a dividend and they could have called a general meeting. The point is that none of these allegations could amount to oppression by the appellant Howell as the majority shareholder.

As to the second and third complaints, the allegation was that Dennis Howell purchased a horse, retained the prize money and that he also bought an apartment out of the company's money as well as a house. These are allegations of criminality or breach of trust on Howell's part and it would be straining the language of Section 196 of the Act to cover investigation into these matters. Moreover, Section 25 of the Larceny Act provides the appropriate safe-guards in proceedings where allegations of this nature are made. That section reads -

> "25. Every person who, being a trustee of any property for the use or benefit either wholly or partially of some other person, or for any public or charitable purpose, with intent to defraud, converts or appropriates it or any part thereof to or for its own use or benefit, or the use or benefit of any person other than the person entitled thereto, or for any purpose other than such public or charitable purpose, or otherwise disposes of or destroys such property or any part thereof, shall be guilty of a misdemeanour, and on conviction thereof liable to imprisonment with hard labour for any term not exceeding seven years;

> " Provided that no prosecution for any offence included in this section shall be commenced -
>
> (a) by any person without the sanction of the Director of Public Prosecutions;
>
> (b) by any person who has taken any civil proceedings against such trustee, without the sanction also of the court or Judge before whom such civil proceedings were heard or are pending."

Similarly, the allegation that Howell made $400,000 by an illegal deal which evaded excise duty is an offence under the Excise Duty Act and ought to be reported to the revenue, if it is a serious complaint. Such an investigation is outside the scope of Section 196 of the Act.

As for the other three allegations, they were equally inappropriate as charges of oppressive conduct. The first is a complaint as to how Howell as managing director filled the orders made to the company. There could be no oppression of shareholders in that regard. The second relates to the dismissal of the respondent Bryan. That may be an instance of wrongful dismissal as an employee, but not oppression of Bryan as a shareholder. Then there is the allegation that Howell kept the records to himself, but one of the respondents Rannie Brown was the Secretary who has a responsibility for such records. It is difficult to see now this could be the basis of oppressive conduct on the part of Howell.

It should be noted that not every civil or criminal allegation concerning a company finds relief under the Act. See D.P.P. v. Schildcamp (1971) A.C. 1. Also to be noted was that in Re W.R. Willcocks Co. Ltd. (1973) 2 All E.R. 93 Plowman J., struck out a petition on the ground

that it was unparticularised and frivolous or embarrassing within Section 238 of the Civil Procedure Code. By parity of reasoning, it must be good law to strike out this petition on the ground that it was an abuse of the process of the court or frivolous or vexatious to present it. For even assuming the allegations are truthful, it was bound to fail as the proof of the averments could never have amounted to oppression within the intendment of Section 196 of the Act. Another approach would be to find that since the allegations could not amount to oppression pursuant to Section 196, the court would have had no jurisdiction to hear the matter. So considered even if ground 1 had not been argued here, or considered below, it was open to this court to take the point.

As to (b), the alternative approach adopted by the judge was to rely on the inherent jurisdiction of the court to determine whether it was appropriate to use the summary powers of the court to strike out the petition. The case of Forte (Charles) Investments v. Amanda (1963) 2 All E.R. 940, as a leading authority on this aspect of the law was cited.

The relevant passage in the judgment below at p. 50 of the Record on this aspect reads as follows -

> " If, it could have been shown before me that on the available evidence the Petition presented would be bound to fail on all the reliefs sought I would have been minded to agree that its filing and presentation was clearly an abuse of the process of the Court."

In analysing this passage, the first point to note was that the learned judge assumed that unless it was established by the appellant on the available evidence that "all the reliefs sought" were "bound to fail", then he was not

empowered to strike out the petition. The reliefs sought were set out previously and to reiterate, only three at (g), (h) and (i) which sought an order that the appellant would purchase the petitioners shares at a fair value or in the alternative that the company ought to be wound-up or that a receiver or manager be appointed were permissible pursuant to Sections 196 and 203 (f) of the Act. I have already found that an order pursuant to Section 203 (f) could not be granted. It is because the learned judge gave consideration to the other reliefs sought which were not permissible under Section 196, that he erroneously found, after considering the affidavits, that there were several triable issues and this led him to conclude that the petition should proceed. It was also in these circumstances that he found that as there was a conflict of affidavit evidence to be resolved, there should be a hearing of the petition.

In this case therefore, having regard to Section 196 of the Act, the evidence adduced by the appellants should have been examined not so as to note the conflict with the respondents evidence, but to see if the respondents affidavit evidence was bound to fail.

It should be asked, what was the nature of the evidence adduced which the learned judge found gave rise to several triable issues? And what was the conflict between the evidence of the parties which required resolution? Apart from the formal affidavit of verification by the respondent, there was the affidavit or the appellants in opposition to the petition, there was the respondents response to that affidavit and there was a further response by the appellant. There was no specific affidavit by the respondents supporting the petition. What is also significant, is that

none of the affidavits contain any evidence concerning oppressive conduct on the part of the appellants as the majority shareholder towards the respondents. It was therefore a wrong exercise of discretion to find that there was a failure on the part of the appellants to establish abuse of process. On the contrary, to present such evidence as the respondents did, in support of allegations which could not amount to oppressive conduct, was manifestly vexatious because the evidence was directed to prove matters which were not permissible in a petition. Therefore there was no need to consider the question of triable issues, as illustrated in the American Cyanamid case (1975) A.C. 396 which the learned judge did as can be seen at p. 51 of the Record where he said.

> In another and higher forum the correct judicial approach was put this way - a judge should be slow to dismiss proceedings on a technicality where it is plain there is a triable issue."

Be it noted that the affidavit of verification by the respondents in this appeal is an example of an inadequate affidavit which gave no supporting evidence to the petition and so the action must be an abuse of process - see Re W.R. Willcocks & Co. Ltd. (supra). As recorded by the judge, counsel for the appellant in the court below had said of the statutory affidavit "something more than that is required" and there is support for this proposition in Re S.A. Howlsen Ltd. (1950) 2 All E.R. 408 where the petition in part complained of oppression pursuant to Section 210 of the United Kingdom Act, where a complaint of "oppressive conduct" and winding-up on the "just and equitable" ground are embodied in that section.

At p. 413 Wynn-Parry J., said -

> "I can imagine few cases of petitions presented under Section 210 in which it would be wise, or even possible to rely merely on the statutory affidavit."

The appellants have therefore, made out a case that the affidavit evidence in support of the petition could not make out a case of oppression. On this aspect also, it was an abuse of process and should be struck out. It should be mentioned that ground 2 of the Notice of Appeal was specifically abandoned.

Conclusion

Although failure to plead a tangible interest was raised by the appellants in the court below, it does not appear to have been considered in the reasons for judgment. The dominant issues in that court were those which, as earlier stated, could not be heard and determined by a petition. At the end of a lengthy hearing in this court, the respondents sought an amendment so as to include the particular averment of a tangible interest in the petition. If such an amendment were to be granted, it would not be in the interests of justice. It would mean that the successful appellants would be deprived of their right to have the order against them in the court below set aside. Further, how could such an amendment have assisted the respondents. It has already been decided that the averments in this petition could not make out a case of oppression against the appellants. They would be equally ineffective as grounds to wind-up the company particularly as there are alternative remedies.

Different considerations of course, may have applied, had the demurrer not been promptly sought.

In certain circumstances, an amendment might then have been appropriate - See Re The White Star Consolidated Gold Mining Co. Vol. 68 L.T. N.S. 815. This petition is bad in law and cannot be cured by an amendment.

As regards ground 1 dealing with abuse of process, that ground did receive a full treatment in the judgment below, but the approach was not in accord with the relevant authorities. The result is that the order below must therefore be set aside and the petition struck out. I agree with the order proposed by Campbell, J.A.

CAMPBELL, J.A.:

I agree entirely with the reasoning and conclusions of Downer, J.A., that the appeal should be allowed. The order of the court is that the order of Malcolm J., be set aside and the petition struck out and removed from the file of proceedings. The appellants are to have their costs here and below, the same to be taxed if not agreed.

GORDON, J.A. (Acting)

I have read the judgment of Downer, J.A., and agree with the reasoning and conclusions. I have nothing to add.

As the learned judge had no jurisdiction to make such a finding, this led to a further error which will be adverted to when ground 1 of the Notice of Appeal pertaining to abuse of process, is being addressed.

Was the petition to wind up the Company pursuant to Section 203 (f) of the Companies Act demurrable because the respondents failed to aver that the company was solvent?

The object of Win-Doors Limited was -

> "(a) to carry on the business of manufacturers, merchants, importers, exporters, repairers and agents for the sale and purchase of and dealers in windows, window frames, doors, door frames, store-fronts, partitions and materials of all kinds capable of being used in connection therewith;"

and

> "(b) to buy, sell, manufacture, repair, convert, alter, exchange, let or hire and deal in all kinds of articles and things which may be required for any of the purposes of any of the said businesses."

Bearing in mind that the respondents relied on Section 203 (f) of the Act to wind-up the company, it was necessary for them to state their qualification as shareholders. That section reads as follows -

> "203. A company may be wound up by the Court if -
>
> (f) the Court is of opinion that it is just and equitable that the company should be wound up."

As for the manner in which the respondents stated their standing to institute proceedings, here is how paragraph 6 of the Petition sets out the claim -

> "6. Your Petitioner Donald Spence subscribed to the Memorandum of Association of the Company for 750 Shares while your Petitioner Steve Bryan and your Petitioner