*Neutral Citation no. (2000) 2077*

*Ref:* GIRB3044

*Judgment: approved by the Court for handing down*
*(subject to editorial corrections)*

*Delivered:* 14/04/00

2000 Nos. 402, 403, 404

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION
(COMPANIES WINDING UP)

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IN THE MATTER OF JAMES E McCABE LIMITED

AND

IN THE MATTER OF CITY OF BELFAST WAREHOUSING LIMITED

AND

IN THE MATTER OF WINE INNS LIMITED

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**JUDGMENT**

**GIRVAN J**

**Introduction**

There are presently before the court separate applications by Paul Hunt, James Oliver Hunt and Robert Davis to strike out those parts of three petitions seeking the winding up of three companies, James E McCabe Limited ("McCabe"), Wine Inns Limited ("Wine Inns") and City of Belfast Warehousing Ltd ("COB") brought by Patrick Anthony McCormack ("the petitioner") and applications by Paul Hunt and James Oliver Hunt to stay the full petition proceedings involving Wine Inns on the grounds that those proceedings are covered by an

arbitration clause in a shareholders agreement entered into between the parties on 2 May 1979 ("the shareholders agreement"). In each of the petitions the petitioner seeks a winding up of the company concerned and in the alternative relief under article 452 of the Companies (Northern Ireland) Order 1986 ("the 1986 Order").

On the hearing of the application Mr Weir QC and Mr Good appeared on behalf of Paul Hunt, Mr Stephens QC and Mr Shaw appeared for Robert Davis, Mr Simpson QC and Mr McLaughlin appeared for James Oliver Hunt, Mr Orr QC and Mr Lockhart appeared on behalf of the companies, Mr Deeny QC, Mr Morgan QC and Mr Keogh appeared on behalf of the petitioner who opposed the applications.

**Factual Background**

McCabe was incorporated on 4 February 1975 and was given its present name on 22 November 1978. Wine Inns was incorporated on 14 July 1971 and COB was incorporated on 28 February 1978. In the case of McCabe the nominal share capital of the company is £200,000 divided into 175,000 ordinary shares of £1 each and £25,000 3½% non-cumulative preference shares of £1 each. The amount of the capital paid up is £100,000. The petitioner holds 45% of the paid up capital. In the case of Wine Inns the nominal capital is £500,000 divided into 500,000 shares at £1 each. The amount of capital paid up or credited as paid up is £360,200. The petitioner is the holder of 45% of the paid up capital of that company. COB has a nominal share capital of £300 divided into 100 A voting shares of £1 and 200 B non voting shares of £1 each. The petitioner is the holder of 100 B shares.

Wine Inns controls a number of other companies, Winemark NI Ltd, Regency Hotel (Northern Ireland) Ltd and Fioonagh Properties Ltd. McCabe controls another company Property Management Services Ltd.

The three companies and the related subsidiaries as a group represent a very substantial and successful business in the licensed trade operating a large number of profitable on and off licences and warehouses. It appears that the business of the three companies is closely interconnected and although they represent three separates companies they operate

very much as a group.

The petitioner in his petition sets out a background to the founding of the business. He alleges that in 1973 he and Paul Hunt, a son of a friend Patrick Hunt, agreed to enter into a partnership to acquire and operate The Hunting Lodge Public House, Stewartstown Road, Belfast. By that stage the petitioner was already successfully involved in a smaller way in the licenced trade. Subsequently, the petitioner agreed to the participation of James (otherwise Seamus) Oliver Hunt, a brother of Paul Hunt. The parties' interest in the partnership was agreed at 45% for the petitioner, 45% for Paul Hunt and 10% for Seamus Hunt. The business grew and prospered between 1973 and 1979.

Subsequently, the corporate entity Wine Inns Limited which had been incorporated in 1971 was utilised as a vehicle for the business. Its capital was increased to £500,000 divided as to 45% to the petitioner, 45% to Paul Hunt and 10% to Seamus Hunt. These shares reflected the partnership shares immediately prior thereto.

It is the petitioner's case that it was agreed and understood that Paul Hunt was responsible for completing the formalities in respect of the business and that the petitioner and Paul Hunt would participate fully and equally in the ongoing conduct of the business and participate equally in the benefits. The petitioner asserts that it was understood that Paul Hunt would fairly and properly administer the company without prejudice to the interests of the petitioner.

It is the petitioner's case that he was unaware that COB was to be set up and only learned of its existence some time after its incorporation. He claims that he was led to believe that it was merely a mechanism to administer the business and that it did not own anything. However, the company later acquired and operated three substantial cash and carry businesses which the petitioner until 1994 wrongly understood were owned by another company Bargain Bottle Limited.

In 1983 the petitioner and Paul Hunt with some participation from Paul Hunt's uncle acquired McCabe.

At the heart of the petitioner's case is the proposition that the companies were conducted by the petitioner and Paul Hunt as a quasi partnership with Seamus Hunt as a sleeping partner, that the continuation of that quasi partnership depended on the mutual confidence and trust between the petitioner and Paul Hunt, that both (though not Seamus Hunt) would participate fully and equally in the conduct of the business and deserved equal benefits, that the companies were conducted with few, if any, formal board meetings or general meetings and that the petitioner would be able to trust and rely on Paul Hunt.

The thrust of the petitioner's case -

Paragraphs 24-43 of each petition sets out the matters relied on by the petitioner as establishing a breakdown of mutual trust and confidence and is showing that the parties can no longer co-operate to carry forward the business of the companies.

In the case of COB the petitioner asserts that Paul Hunt arranged between 1978 and 1979 for the articles to provide for A shares with voting rights and B shares without voting rights and that only B non voting shares were allocated to the petitioner to his detriment and without his knowledge or consent. He contends that three cash and carry businesses acquired by the group were allocated to COB rather than Wine Inns without the petitioner being informed that he had only a one third non voting shareholding. He also makes the case that Paul Hunt transferred to himself the shares formally belonging to Thomas Hunt, his uncle, contrary to the articles of association. In addition in 1995 nine shares were transferred to Robert Davis in breach of the articles of association and without following the procedures therein. The petitioner claims that the discovery of Paul Hunt's dealings, which he described as underhand, caused him considerable concern and distress.

In the case of Wine Inns the petitioner makes a number of allegations in the petition which lays the basis for his claim that the mutual confidence and trust necessary for the quasi-partnership between the parties has been so undermined that the company should be wound up. These include allegations that:

(a) Robert Davis was made a director without consultation with the petitioner.

(b) The company has failed to inform licensing courts that Robert Davis is a director contrary to the licensing legislation.

(c) Paul Hunt dismissed the company solicitors and quantity surveyor behind the petitioner's back and without his consent at a time when he was undergoing a surgical operation.

(d) Paul Hunt contemptuously disregarded the views of the petitioner in respect of a property development in Newtownards.

(e) Paul Hunt and Robert Davis operated a discotheque in licensed premises in Elmwood Avenue, Belfast contrary to repeated assurances given to the court by the petitioner that any entertainments in the premises would be of a low key and quiet nature. This undermined and damaged the petitioner's reputation and good standing with the court according to the petitioner.

(f) Paul Hunt had led the petitioner to believe that the petitioner was free to do with his shares what he wanted and relying on that the petitioner persuaded his son to give up a legal career and join the business. However, Paul Hunt in 1999 voted against a resolution authorising a transfer by the petitioner to his son of 5000 shares in McCabe. Paul Hunt also made clear that he did not agree to the petitioner's son becoming involved in the business.

(g) Paul Hunt obstructed the provision of financial information to the petitioner.

(h) In 1998 Robert Davis' salary was increased so as to be higher than that of Paul Hunt and the petitioner and by 1999 the annual differential had increased to over £262,733. The petitioner was neither informed nor agreed to that.

(i) Between 1995 and 1999 Paul Hunt had some £220,000 and Robert Davis some £478,000 paid in respect of pension contributions out of company funds. This was without the knowledge or approval of the petitioner who received the benefit of no such pension contributions.

(j) Between May 1993 and April 1999 Robert Davis' wife was fraudulently paid

£161,057 in salary although she was not employed by the companies.

(k) In 1989 Paul Hunt allocated shares in McCabe so that the petitioner was only entitled to 29% whereas Paul Hunt had 57%.

(l) Between 1985 and 1990 the petitioner was charged sums in excess of the true share value so as to achieve equality with Paul Hunt and was unjustly enriched in the sum of £175,000.

(m) By a manipulation of company profits for dividend purposes Paul Hunt received an unfairer share of dividends out of COB.

(n) The personal relationships between the petitioner and Paul Hunt have deteriorated markedly and really as a result of the aforesaid improper dealings.

(o) Paul Hunt has on a number of occasions excluded or attempted to exclude the petitioner from important management decisions in the company in a way which was incompatible with the relationship envisaged between the parties.

The petitioner says that his preference would be to achieve a restructuring of the company along mutually beneficial lines but that that would necessitate the agreement of other relevant parties. Failing that the petitioner says that he is agreeable to purchasing the interests of Paul Hunt, Seamus Hunt and Robert Davis on a pari passu basis if a fair evaluation could be arrived at. In default of those remedies he submits that justice and equity can only be achieved by the winding up of the companies.

The Shareholders' Agreement

By the shareholders' agreement of 2 May 1979 made between Paul Hunt, James Oliver Hunt, the petitioner and Wine Inns the parties thereto entered into an agreement "for the purposes of regulating the affairs of the company" in the manner therein mentioned. The agreement recited that Paul Hunt, James Oliver Hunt and the petitioner had been carrying on a business together as partners in the licensed trade and that the business had been sold to Wine Inns. The shareholders' agreement contained various provisions which were to prevail over the terms of the articles of association in the event of any conflict between the agreement

and the articles. The agreement contained provisions dealing with the entitlement of the parties in the event of the creation of further shares, the transfer of shares and the determination of a fair value of the shares under the transfer provisions. The agreement required a 75% majority approval of various matters listed including those set out in clause 8 which include the approval of any transaction of an unusual or long-term nature, the fixing of remuneration of any director and the making of any single capital commitment other than in the ordinary course of business and in any event in excess of £10,000.

Clause 10 of the shareholders' agreement ("the arbitration clause") is material to the present applications and it provides

> "Whenever any doubt, difference or dispute shall arise between the shareholders or any of them or between any of them and the personal representatives of any other shareholder affecting this Agreement or the construction hereof or any clause or thing herein contained or any other thing in any wise relating to or concerning the business of the company or the duties, rights or liabilities of any shareholder hereunder the matter in difference shall be referred to a single arbitrator to be agreed upon by the parties or in default of such agreement to be nominated at the request of any such party by the Chairman of the Ulster Branch of Chartered Accountants in Ireland. Such arbitration shall be held in Belfast in accordance with and subject to the provisions of the Arbitration Act 1950 or any statutory modification or re-enactment thereof for the time being in force."

**The applications to strike out the winding up petitions -**

The applicants rely in particular on the provisions of article 105(2) of the Insolvency (Northern Ireland) Order 1989 which provides as follows

> "(2) If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the High Court, if it is of the 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; but this does not apply if the Court 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."

The applicants point to the fact that the companies are all entirely solvent, profitable and asset rich companies which are suffering damage to reputation and financial stability as a result of the winding up petitions. They argue that they or the companies are willing and able to buy the petitioner's shares at full market value disregarding the fact that the petitioner holds a minority shareholding. They point to the fact that the petitioner himself in his petition seeks by preference a reconstruction of the companies or to buy out the other shareholders and only if he fails in obtaining those reliefs does he seek a winding up of the companies.

It has been frequently said that a winding up order is a remedy of last resort and there is little doubt that there would be potentially major financial disadvantages to all parties if a winding up order were made on the present petitions. The courts view with disapproval ill considered winding up petitions presented with little thought to the consequences and indeed a Practice Direction was issued in England & Wales in 1990 in which the court drew attention to the undesirability of including a prayer for winding up in a petition as an alternative to an order under section 459 of the Companies Act 1985 (equivalent to article 452 of the 1986 Order) where winding up was not really the relief desired by the petitioner.

This area of law was fully considered by the Law Commission firstly in its Consultation Paper on Shareholder Remedies (Con. Paper No.142) and then in its Report (Law Comm No.246). The Law Reform Advisory Committee for Northern Ireland produced a parallel report making similar recommendations for Northern Ireland. Under the Law Commission and Law Reform Advisory Committee's recommendations a winding up order would be added as an alternative remedy under article 452 or its English equivalent and a petitioner would require leave to join a claim for winding up in a minority relief petition. Such a procedure would have decided advantages as compared to the present law and practice which had led to what Dillon LJ in Copeland v Copeland and Craddock Ltd [1997] BCC294

described as "something of a growth industry in cases in which applications have been made by interlocutory summons or notice of motion to strike out contributories petitions claiming winding up of a company on just and equitable grounds." An application to strike out a pleading raises separate and distinct questions from those that arise in an application for leave to bring a claim. However, pending implementation of the recommendations of the Law Commission and Law Reform Advisory Committee, cases such as the present must be decided on abuse of process principles. Winding up petitions present special problems including adverse publicity to a company often exacerbated by public misunderstandings as to the effect of the petition and the retrospective effect of a winding up order when made unless transactions are validated under article 107 of the 1986 Order. There is, however, no difference in principle as to the test to be applied by the court in deciding whether or not to strike out such proceedings. Before the court will strike out proceedings it must be satisfied that there is no real possibility of the court granting the relief sought. The test has been variously expressed in numerous reported cases in which applications have been made to strike out such petitions. Thus, for example, in Copeland v Copeland and Craddock Ltd [1997] BCC294 Dillon LJ said that it must be "perfectly clear that the claim which is to be struck out cannot succeed." In the same case Bingham LJ said that the claim must be "unarguable whatever comes out relevant to the petition on discovery and in the course of oral evidence." In Virdi v Abbey Leisure Ltd [1990] BCLC 342 Balcombe LJ pointed out that the jurisdiction should not be exercised unless it is "perfectly clear that the claim cannot succeed". See also the recent decision in Guinness Peat Group v British Land Co [1999] 2 BCLC 243.

In the Copeland case counsel for the petitioner argued that the petitioner's preferred option was winding up because he conceived that it was more likely that he would obtain that order than an order to buy out the respondent's shares. It was a question of having an opportunity with everyone else interested of buying the business as a going concern. The judge at first instance had accepted the force of that argument and the Court of Appeal agreed

with the judge at first instance. Dillon LJ went on to state -

> "I do not for my part at this juncture regard it as unreasonable that the petitioner should desire to keep this prayer from his point of view as one of the preferred alternatives in his petition. I do not think it is possible to apply the strict logic that counsel urges on us: that, if a proper offer is made to buy out the petitioner's shares on the most favourable terms, it can never be reasonable for a petitioner to continue the petition for the winding up of the company on just and equitable grounds as an alternative to relief under section 459, even where the relief under section 459 is sought, as here, in the alternative: either that the opposing shareholders should be ordered to sell out to the petitioner or that the petitioner should be ordered to sell to the opposing shareholders at the most favourable price. If it is reasonable for the petitioner to pursue the petition for the purposes of obtaining an order under section 459 - that he be put in control of the company by the opposing shareholders being ordered to sell their shares to him - I do not feel that it is right, at any rate at this juncture to hold that it must inevitably be unreasonable for him to ask in the alternative that the company be wound up with the consequence that, on a sale of its business as a going concern on the open market, the petitioner will have an opportunity to bid for it. I am not satisfied that it is perfectly clear that this claim for a winding up order cannot succeed."

The respondents laid weight on the recent decision of the House of Lords in O'Neill v Phillips [1999] 2BCLC1, a case in which a minority shareholder sought relief claiming that the company's affairs were being conducted in a manner unfairly prejudicial to his interests. Ultimately the House of Lords held that the minority shareholder's claim that he had been driven out of the company by the majority shareholder had not been made good and on this basis the petitioner's claim was dismissed. The majority shareholder had additionally argued that in any event the petition should have been dismissed because the majority shareholder had made an offer to buy the shares of the minority shareholder at a fair value which was the whole of the relief to which the petitioner would be entitled. Lord Hoffman pointed out that the effect of an offer by the respondents to purchase the shares of the petitioner in a petition under section 459 was of great practical importance. When the respondent had made a reasonable offer the exclusion of the petitioner from the participation and the management of

the company would not be unfairly prejudicial and the respondent would be entitled to have the petition struck out. That was, of course, an exclusion case brought by a true minority shareholder and Lord Hoffman pointed out that "the unfairness does not lie in the exclusion alone but in the exclusion without a reasonable offer. If the respondent to the petition has plainly made a reasonable offer then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out."

That case was not a winding up case but a minority relief claim brought by a minority shareholder who was not in a quasi-partnership relationship with the other shareholders. It was not a case in which a petitioner was alleging a breakdown of mutual trust and confidence brought about by alleged misconduct or underhand activities of fellow quasi partners. Accordingly, that decision does not so clearly decide the present case in favour of the respondent that the winding up claim is unarguable.

Under article 105(2) the court before dismissing a winding up petition must be satisfied that there is some other "remedy" available to the petitioner. It is necessary to focus on the true meaning of the word "remedy" which is the redressing or making good of a wrong. Before one can properly redress a wrong it is necessary to consider all the factors in the case. A case such as the present involves a consideration of a large number of interconnecting factors including the personal relationship between the shareholders, their conduct in the past as between themselves and in relation to the companies, the future possibilities or probabilities in respect of the parties' continued collaboration (or lack of it) in the interests of the company, the impact of that on the future development and business of the companies and the pros and cons of the possible ways of resolving the problems brought about by the alleged misconduct or inappropriate behaviour of the respondents. All these factors will have to be taken into account in deciding what fairness and justice calls for by way of a redressing of any wrongs that may be established on foot of the petitioner's allegations. Achieving fairness and justice in the present case with all its complexities will involve a detailed consideration of all relevant matters. Fairness and justice could not be

achieved by recourse to a simplistic or formulaic conclusion that an offer to purchase the petitioner's shares at a fair value is so obviously reasonable, just and fair that it excludes the possibility of any other remedy (which in these petitions might at trial be shown to be a winding up order).

For these reasons the applications to strike out the petitions in so far as they claim winding up relief must be dismissed.

**The Application to Stay the Wine Inns Proceedings**

Under section 9(1) of the Arbitration Act 1996 it is provided -

> "A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings had been brought to stay the proceedings so far as they concern that matter."

Under section 9(4) on an application under that section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable or being performed.

These provisions are in marked contrast to section 4 of the Arbitration Act (Northern Ireland) 1937 which was the relevant statutory provision applicable in Northern Ireland immediately before the 1996 Act and which was in force when the shareholders' agreement was entered into. Under that section the court retained a discretion to refuse a stay in appropriate circumstances. Section 9 of the 1996 Act removes the discretion formerly vested in the court to refuse a stay of proceedings. Under section 86(2) of the 1996 Act in the case of domestic arbitration agreements (of which the shareholders' agreement would be one) the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or

> "(b) that there are other sufficient grounds for not requiring the parties to abide by the arbitration agreement."

The Government decided not to implement the provisions of section 86 and thus the provisions of section 9 apply equally to domestic arbitration agreements. Had section 86 been implemented the decision in the present case would in all probability have been the same as a decision reached under section 4 of the 1937 Act.

The winding up relief sought in the Wine Inns proceedings is relief which only the court can grant under article 102 of the 1986 Order on foot of a petition presented in accordance with article 104. The other relief sought under article 452 is likewise relief which only the High Court can grant on foot of a petition which the court is satisfied is well founded (see article 454).

Mr Simpson argues that the dispute between the parties is one falling within the terms of the arbitration clause and that it must be arbitrated even if the arbitrator could not grant relief under either section. In this context he relied on "The Eras Eil" actions [1992] 1 Ll.L.R 570, an exceedingly complex case involving a large number of issues one of which related to the question whether a stay should be granted in respect of one of the disputes. The parties had agreed to arbitration of such a dispute in Illinois. The argument was that under Illinois law the law did not give any power to order a contribution under the Civil Liability (Contribution) Act. It was argued that this should have the consequence that a stay would be inappropriate. Mustill LJ rejected this saying -

> "As we understand it, the proposition advanced is that the parties cannot have intended to submit claims to arbitration of a kind which, if the chosen tribunal were to entertain them would be bound to fail. We do not agree. Parties not infrequently find that by choosing a foreign substantive or procedural law their rights are less than they would have been if they had made a different choice or had allowed the contract to remain silent. This does not mean that the words which express their choice do not mean what they say, but merely that the parties had not worked out in advance the full consequences of an election to have the issues resolved otherwise than in England. By including an Illinois arbitration clause C acquired all the advantages and assumed all the disadvantages of Illinois law both substantive and procedural. If they had wanted a different set of advantages and disadvantages they should have chosen some other forum or chosen none at all and waited to be sued in England. The fact that in one respect their choice has proved to be unfortunate is not in our judgment a sound reason to read "all disagreements" as meaning anything other than what it says."

Mr Simpson argues that by parity of reasoning if the parties agree to submit all disputes to arbitration under clause 10 then they took the consequence that they could only obtain such relief as fell within the jurisdiction of the arbitrator to grant.

If Mr Simpson's arguments are correct the result can hardly be considered fair or reasonable. Under the 1937 Act there is little doubt that the court would have refused a stay in the present case, firstly, because of the close interconnection of the Wine Inns proceedings with the other proceedings affecting the other companies being proceedings not covered by any equivalent arbitration clause and secondly because of the unavailability of winding up or article 452 remedies in an arbitration. Thus for example in Olver v Hillier [1959] 2 All ER 220 in a partnership dispute the plaintiff began dissolution proceedings in the court and sought the appointment of a receiver. The partnership agreement included an arbitration clause. The court refused an application to stay the proceedings having regard especially to the facts that the action claimed dissolution on just and equitable grounds, the power of deciding which was expressly conferred on the court by section 35(f) of the Partnership Act 1890 and that the appointment of a receiver was sought, a remedy which it was not open to the arbitrator to grant.

When the shareholders' agreement and clause 10 thereof was entered into in 1979 the parties therefore had not contractually agreed to exclude the possibility of a winding up on just and equitable grounds if there were grounds for such relief.

As pointed out in Ashvale Investments Ltd v Elmer Contractors Ltd [1988] 2 All ER 577 the question whether a dispute between the parties to a contract falls within an agreement to arbitrate is primarily a question of construction of the arbitration clause itself in the circumstances of a particular case. May LJ at 581 said -

> "In seeking to construe a clause of a contract, there is not scope for adopting either a liberal or a narrow approach, whatever that may mean. The exercise which has to be undertaken is to determine what the words used mean. It can happen that in doing so one is given to the conclusion that the clause is ambiguous, that it has two possible meanings. In those circumstances the court has to prefer one above the other in

> accordance with settled principles. If one meaning is more in accord with what the court considers to be the underlying purpose and intent of the contract, or part of it, than the other, then the court would choose the former rather than the latter. In some circumstances the court may reach its conclusion on construction by applying the contra proferentem rule. These are however well recognised principles of construction; they are not the consequences or examples of adopting any particular approach to the question of construction, save to ascertain the true intention of the parties and the correct meaning of the words used."

Mr Simpson contends that clause 10 refers to arbitration in three categories of disputes,

(i) disputes between shareholders affecting the agreement or its construction;

(ii) disputes affecting any other thing in any wise relating to or concerning the business of the company; and

(iii) disputes affecting the rights, duties or liabilities of any shareholder under the agreement.

Mr Deeny argues that the word "hereunder" at the end of the subclause relates both to the disputes affecting the business and disputes about the rights and liabilities of the shareholders under the agreement. He thus restricts disputes relating to the business to disputes raising matters under the agreement.

A dispute giving rise to a winding up or article 452 petition requires the court to focus at least in part and usually in large measure on the personal relationships of the parties. As pointed out in Ebrahimi v Westbourne Galleries Ltd [1972] 2 All ER 492 the "just and equitable" grounds for winding up entitles the court to subject the exercise of legal rights to equitable considerations, that is considerations of a personal nature arising between one individual and another which might make it unjust or inequitable to insist on legal rights or to exercise them in a particular way. In petitioning for a winding up on the just and equitable grounds a member is not confined to such circumstances as affects him as a shareholder. He is entitled to rely on any circumstances of justice or equity which affect him in his relations

with the company or with the other shareholders.

The arbitrator under clause 10 is required to focus on disputes relating to the *business of the company* whether that be the matter of business of the company specifically covered by the agreement as contended by Mr Deeny or not as contended by Mr Simpson. That, however, is a different task from that entrusted to the court in a petition relying on the just and equitable grounds. The dispute giving rise to the winding up petition in such a case raises wider issues and calls for a wider and different enquiry. On that basis I hold that the dispute which is the subject of the winding up and article 452 petitions is not one that falls to be referred to as the arbitrator.

Furthermore, if the factual circumstances are such that it is just and equitable that the company be wound up then subject to article 105(2) the court shall make a winding up order. It would require very clear and specific words for the parties to be held to have agreed that a party should be debarred from pursuing a statutory remedy, assuming, without deciding, that a shareholder can contract out of the right to pursue such statutory remedies. The agreement was entered into prior to the 1996 Act and for the reasons discussed above it is clear that the shareholders could not be taken to have agreed that they were contracting out of the right to bring proceedings for the statutory reliefs. Since such disputes could only be pursued by court proceedings and since the parties were not contracting out of the right to pursue them, by necessary implication the disputes covered by clause 10 could not have been intended to include disputes falling within the exclusive jurisdiction of the court.

Accordingly I refuse the application to stay the Wine Inns proceedings under section 9 of the 1996 Act.

Had I come to a different conclusion in respect of the construction of the arbitration clause questions would arise as to what, if any, effect article 6 and article 1 protocol 1 of the European Convention would have on sections 6 and 9 of the 1996 Act and on the construction of the contract. Prima facie section 9 would have effectively prevented the petitioner from vindicating through the court his statutory right as an incident of his ownership of the shares

to apply to the court for relief. Moreover it would arguably have interfered with his private rights of property in the shares. In view of the conclusions which I have reached it is unnecessary to consider further these difficult and interesting questions.

GIRB3044 2000 Nos. 402, 403, 404

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