

ONTARIO
SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

DUFF & PHELPS CANADA RESTRUCTURING INC. IN ITS
CAPACITY AS LIQUIDATOR OF
COVENTREE INC.

Applicant

APPLICATION UNDER SECTION 207 OF THE *BUSINESS*
CORPORATIONS ACT, R.S.C. 1990, c. B.16, AS
AMENDED

IN THE MATTER OF THE WINDING-UP OF
COVENTREE INC.

BOOK OF AUTHORITIES

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I N D E X

<u>TAB</u>	<u>DOCUMENT</u>
1.	<i>Fallis v. United Fuel Investments, Ltd.</i> , [1963] S.C.J. No. 39 (QL)
2.	<i>West Van Inc. v. Beswick Group Holdings Ltd.</i> , [2008] O.J. No. 3119 (S.C.J. (Commercial List)) (QL)
3.	<i>Sound Advice Inc. (Trustee of) v. 358074 Ontario Ltd.</i> , [1984] O.J. No. 2505 (Div. Ct.) (QL)
4.	<i>2011680 Ontario Inc. v. 968831 Ontario Inc.</i> , [2011] O.J. No. 3537 (S.C.J.) (QL)
5.	<i>Re R.J. Jowsey Mining Co. Ltd.</i> , [1969] O.J. No. 1358 (C.A.) (QL), aff'd [1970] S.C.R. v
6.	<i>Re Hillcrest Housing Ltd.</i> , [1992] P.E.I.J. No. 17 (S.C. (T.D.)) (QL), aff'd [1992] P.E.I.J. No. 83 (C.A.)
7.	<i>Business Corporations Act</i> , R.S.O 1980, c. 54, s. 229; <i>Business Corporations Act</i> , S.O. 1982, c. 4, s. 227; <i>Assignments and Preferences Act</i> , R.S.O. 1927, c. 134, ss. 23-27
8.	<i>Re Fund of Funds, Ltd.</i> , [2004] O.J. No. 2580 (S.C.J.) (QL)

Tab 1

Case Name:

Fallis v. United Fuel Investments, Ltd.

**G.A. Fallis and M. Deacon, Appellants; and
United Fuel Investments, Limited, Respondent.**

[1963] S.C.J. No. 39

[1963] S.C.R. 397

40 D.L.R. (2d) 1

Supreme Court of Canada

1962: December 6, 7, 11 / 1963: June 24.

**Present: Kerwin C.J.* and Taschereau, Martland, Judson and
Ritchie JJ.**

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

* Kerwin C.J. died before delivery of judgment.

Companies -- Petition for winding-up order -- Resolution of common shareholders -- Whether preference shareholders entitled to notice of meeting and a vote -- Whether a discretion in the Court to refuse order -- Winding-up Act, R.S.C. 1952, c. 296, s. 10(b) -- Companies Act, R.S.C. 1952, c. 53, s. 101.

Pursuant to a resolution of the common shareholders of the respondent company that the company be wound up under the provisions of the Winding-up Act, R.S.C. 1952, c. 296, a petition was made for a winding-up order. A notice of the meeting at which the resolution was passed had been sent to the common shareholders but not to the holders of class "A" and class "B" preference shares. The petition was rejected by the trial judge solely on the ground that although only the common shareholders were given voting rights by the letters patent, this did not govern a special meeting of shareholders under s. 10(b) of the Winding-up Act and that all shareholders, preferred as well as common, were entitled to notice and to vote at the meeting.

The Court of Appeal allowed an appeal from this decision and in an unanimous judgment held that the preference shareholders were not entitled to a notice of the meeting and a vote, that the special meeting of shareholders referred to in s. 10(b) was simply a special general meeting of the shareholders within the meaning of s. 101 of the Companies Act, R.S.C. 1952, c. 53, and, hence, the holders of non-voting preference shares were not entitled to notice or to vote. It was also held that where a majority of the common shareholders have passed a resolution under s. 10(b), any discretion the Court may have to refuse a winding-up order should not be exercised unless it can be shown that the action of the majority shareholders was fraudulent or equivalent to bad faith. Subject to this, the right to decide that a company should be wound up rests with the majority shareholders. By leave of this Court, an appeal was brought from the winding-up order made by the Court of Appeal.

Held: The appeal should be dismissed.

The Court agreed with the judgment of the Court of Appeal that the preference shareholders were not entitled to notice of the meeting and a vote. The submission that there exists in the Court an equitable jurisdiction which in the circumstances of this case should be exercised against the winding-up order failed. The Court has some discretionary power to refuse an order under all subsections of s. 10 with the exception of subs. (a), but where was such a discretion to be found on the application of a preferred shareholder who did not want to be redeemed? Redemption is a normal incident of preference shares. It was true that the "B" shares in contrast to the "A" shares were not redeemable in the ordinary sense. It was also true that they resulted from a reorganization. But the "B" shareholders were really trying to tell the company that in its prosperity it must carry on indefinitely because of their right to participate in the common dividends. A dismissal of the petition would inevitably be an affirmation of this position and would put upon the letters patent a construction that they could not bear, namely, that there could be no winding-up without the consent of the "B" shares.

Cases Cited

Symington v. Symington (1905), 13 Sc.L.T. 509; Loch v. John Blackwood Ltd., [1924] A.C. 783, distinguished; Castello v. London General Omnibus Co. (1912), 107 L.T. 575, distinguished and disapproved.

APPEAL from a judgment of the Court of Appeal for Ontario [[1962] O.R. 162, 31 D.L.R. (2d) 331.], reversing a judgment of McLennan J. dismissing a petition for a winding-up order. Appeal dismissed.

B.J. MacKinnon, Q.C., and B.A. Kelsey, for the appellants.
A.S. Pattillo, Q.C., and D.J. Wright, for the respondent.

Solicitors for the appellants: Wright & McTaggart, Toronto.

Solicitors for the respondent: Blake, Cassells & Graydon, Toronto.

The judgment of the Court was delivered by

JUDSON J.-- This is an appeal by two shareholders of the respondent company from a winding-up order made by the Court of Appeal [[1962] O.R. 162, 31 D.L.R. (2d) 331.] under s. 10(b) of the Winding-up Act, R.S.C. 1952, c. 296, pursuant to a resolution of the common shareholders of the company requiring the company to be wound up. The appellants are the holders of class "B" preference shares of the company. They were granted leave to appeal by this Court on March 16, 1962.

United Fuel Investments Limited was incorporated in 1928 under the provisions of the Companies Act, R.S.C. 1927, c. 27, for the purpose of acquiring and operating natural and other gas systems and participating in the management and operation of companies with similar undertakings. Immediately after its incorporation it acquired two subsidiaries by the purchase of all the issued shares of these companies. These companies were United Gas Limited and Hamilton By-Product Coke Ovens Limited. The first was a distributing company and the second was a company producing manufactured gas which it sold to the distributing company. I will refer to these three companies from now on as the holding company, the distributing company and the manufacturing company.

At incorporation the capital structure of the holding company was as follows:

	Authorized	Issued
Preferred shares, 6 per cent cumulative redeemable \$100 par value	250,000	90,000
Common shares no par value	250,000	100,000

All the issued shares, 90,000 preferred and 100,000 common, were issued to a firm of investment dealers for a price of \$8,250,000. The preferred shares were sold to the public and the investment

dealer retained the 100,000 common shares. These shares, in 1930, it sold to Union Gas of Canada, hereinafter referred to as "Union Gas". This was a large company engaged in Western Ontario in the distribution and production of natural gas.

As there were 100,000 common shares and only 90,000 preference shares, which only had a vote after four quarterly dividends were in arrear, the control of the holding company was always vested in the holders of the common shares. Because of competitive conditions in the Hamilton area from another company, Dominion Natural Gas Company Limited, neither the distributing company nor the producing company prospered as they might otherwise have done. The result was that Union Gas, as controlling company, the distributing company and Dominion Natural Gas made an agreement to provide for the reorganization of the business, capital and affairs of the holding company. It is unnecessary to go into more detail about this inter-company agreement but in these reasons the reorganization of the capital structure of the holding company is important and it is necessary to deal with it in some detail.

The reorganization was approved by order of the Court on January 17, 1939, and embodied in supplementary letters patent dated February 7, 1939. Before its approval, the arrears of dividends on the preference shares amounted to \$37. The holder of each 6 per cent preference share of the par value of \$100 received as a result of the reorganization:

- (i) 1 6 per cent cumulative redeemable class "A" preference share, par value \$50;
- (ii) 1 non-cumulative class "B" preference share, par value \$25;
- (iii) a dividend of \$2 cash per share, in full payment of \$37 in accrued and unpaid dividends.

The preference shareholders gave up as a result of this reorganization:

- (a) a capital amount of \$25 per share, a total of \$2,250,000;
- (b) arrears of dividends of \$35 per share, a total of \$3,150,000, or a total of \$5,400,000.

The following table shows the capital of the holding company before and after reorganization:

Before reorganization

100,00 common shares no par value	\$ 100,000
90,000 preference shares, \$100 par value	9,000,000
	<hr/>

	\$9,100,000

After reorganization	
90,000 common shares, without nominal or par value	\$ 50,000
90,000 6 per cent cumulative redeemable class "A" preference shares of the par value of \$50 each	\$4,500,000
90,000 non-cumulative class "B" preference shares of the par value of \$25 each	\$2,250,000
	<hr/>
	\$6,800,000

I have set out these figures in detail because the obvious disparity between the concessions made by the preference shareholders and the common shareholders is urged by counsel for the appellants as a ground for the refusal of the winding-up order. But this reorganization was worked out in 1937 and 1938 and approved by the Court after full consideration in 1939, (Re United Fuels Investments Limited [[1939] O.W.N. 52, 1 D.L.R. 779.]). The dissenting vote was only about one-fortieth of the issued preference shares and the opposition on the motion for approval came from one individual, who did point out that the common shareholders were giving up very little.

I am concerned here with the rights of the holders of the class "B" preference shares on this reorganization. These rights and their inter-relation with the rights of the class "A" preference shares are set out in the supplementary letters patent as follows:

Clause (a) provides for a 6 per cent cumulative preferential dividend on the class "A" shares and for the non-payment of any dividends on the class "B" and common shares until all arrears of the class "A" shares have been paid.

Clause (b) provides for dividends on the class "B" and common shares in these terms:

(b) Subject to the rights of the holders of the Class "A" Preference Shares, the moneys of the Company property applicable to the payment of dividends which the Directors may determine to distribute in any fiscal year of the

Company by way of dividends shall be distributed among the holders of the Class "B" Preference Shares and the Common Shares pro rata according to the number of Shares held.

Clause (c) provides for the priorities of the class "A" shares on a liquidation, dissolution or winding-up, gives them an additional \$10 per share if the winding-up is voluntary, and denies further participation in the assets.

Clause (d) then deals with the rights of the class "B" shares in the same events in these terms:

(d) Subject to the rights of the holders of Class "A" Preference Shares the holders of Class "B" Preference Shares shall have the right on the liquidation, dissolution or winding-up of the Company or other distribution of assets of the Company among Shareholders (other than by way of dividends out of moneys of the Company properly applicable to the payment of dividends) to repayment of the amount paid up on such Shares, and if such liquidation, dissolution, winding-up or distribution be voluntary, to an additional amount equal to \$5 per Share before the holders of any of the Common Shares or any other Shares of the Company junior to the Class "B" Preference Shares shall be entitled to repayment of the amounts or any part thereof paid up on such Common Shares or other junior Shares or to participate in the assets of the Company, but the holders of the said Class "B" Preference Shares shall not have the right to any further participation in the assets of the Company.

Clause (e) provides for purchase in the market of both the class "A" and class "B" shares at certain prices in these terms:

(e) The Company, pursuant to Resolution of the Board of Directors, may at any time purchase in the market the whole or from time to time any part of the Class "A" Preference Shares outstanding at a price not exceeding \$60 per Shares and unpaid cumulative dividends and costs of purchase, or of the Class "B" Preference Shares outstanding at a price not exceeding \$30 per Share and Costs of purchase. From and after the date of purchase of any Class "A" Preference Shares or Class "B" Preference Shares under the authority in this paragraph contained, the Class "A" Preference Shares or Class "B" Preference Shares so purchased shall be deemed to be redeemed and shall be cancelled.

Clauses (f), (g), and (h) provide for the redemption of the class "A" shares at \$60 per share on notice.

Clause (i) gives the class "A" shares a right to elect 2 directors if 8 quarterly dividends are in arrears and then deals with the voting rights of both class "A" and class "B" shares in these terms:

Save as aforesaid, no holder of Class "A" Preference Shares shall have any right to vote at or receive notice of any Annual or Special General Meetings of the Company. No holder of Class "B" Preference Shares shall have any right to vote at or receive notice of any such meetings.

It will be seen that the class "A" shares are redeemable both by purchase and on notice. The class "B" shares are only redeemable by purchase. The only other way of paying them off is on a winding-up. The class "A" shares have but limited voting rights and the class "B" shares have none at all unless, as McLennan J. held, they have a right to vote on a winding-up.

When the arrangement was submitted to the shareholders a letter was sent by the President of Union Gas (the controlling company) which held the 100,000 common shares (he was also the President of United Fuels, the holding company) with the following explanation:

From the foregoing and from the enclosed memorandum it will be seen that the proposed arrangement is not primarily a re-organization of capital as between the preferred and common shareholders but is a joint agreement by both classes of shareholders to give up certain rights in order to terminate a disastrous competitive situation with Dominion in the City of Hamilton.

The carrying out of the agreement will enable United Gas to control and extend the sale and distribution of all gas now served in the Hamilton area ...

Under the proposed arrangement, the preferred shareholders will have a preference on dividends to the approximate amount earned on the average during the past ten years. However, their participation in earnings will not be limited as at present because, through the medium of the new Class "B" shares, the preferred shareholders are also enabled to participate equally share per share with the common shareholders in any further distribution made possible by increased earnings.

I will not concern myself any further with the history of the class "A" shares but between 1942 and 1945, United Fuels (the holding company) purchased for cancellation 20,311 class "B" shares, leaving outstanding 69,689 of these shares.

In July 1960, Union Gas, the controlling company, made an offer both to the class "A" and class "B" shareholders. I am not interested in the terms of the offer to the class "A" shareholders. They were redeemable on notice. The offer to the class "B" shareholders was two and a half common shares of Union Gas plus \$2.50 for one United Fuel class "B". Ninety-eight per cent of the class "A" shareholders accepted but only 68 per cent of the class "B" shareholders accepted. The following table shows the particulars of the acceptances, the offer having remained open according

to its terms until September 30, 1960:

	Shares Out- standing	Shares Exchanged	Shares not Exchanged
Class "A" ... 90,000	86,814	3,186	
Class "B" ... 69,689	47,222	22,467	

Then followed the winding-up proceedings. Union Gas requisitioned the summoning of a meeting for November 8, 1960, to pass a resolution to wind up the company. The company then sent out a notice to the common shareholders but not to the remaining class "A" or class "B" shareholders. Only the common shareholders attended and voted. The vote of the common shareholders was as follows: 89,920 votes for to 8 votes against, with 8 shares not voting. Of the "yes" votes, 89,906 were cast by Union Gas or its nominees. United Fuel then petitioned the Court under s. 10(b) of the Winding-up Act for a winding-up order. McLennan J. rejected the petition solely on the ground that although only the common shareholders are given voting rights by the letters patent, this does not govern a special meeting of shareholders under s. 10(b) of the Winding-up Act and that all shareholders, preferred as well as common, were entitled to notice and to vote at the meeting. The Court of Appeal took a different view. It was a unanimous judgment delivered by Schroeder J.A. They held that the preference shareholders were not entitled to a notice of the meeting and a vote, that the special meeting of shareholders referred to in s. 10(b) is simply a special general meeting of the shareholders within the meaning of s. 101 of the Companies Act and, hence, the holders of non-voting preference shares were not entitled to notice or to vote.

They also held that where a majority of the common shareholders have passed a resolution under s. 10(b), any discretion the Court may have to refuse a winding-up order should not be exercised unless it can be shown that the action of the majority shareholders was fraudulent or equivalent to bad faith. Subject to this, the right to decide that a company should be wound up rests with the majority shareholders.

I agree with the judgment of the Court of Appeal that the preference shareholders were not entitled to notice of the meeting and a vote, and I have nothing to add to the reasons of Schroeder J.A. The main ground of appeal was that there exists in the Court and equitable jurisdiction, which in the circumstances of this case should be exercised against the winding-up order. The common shareholders submit that once they show a resolution of shareholders passed at a meeting properly called and conducted, they are entitled to a winding-up order or, in the alternative, if there is a discretion in the Court to refuse the order, it is exercisable only on very narrow grounds, which do not exist here.

Sections 10 and 13 of the Winding-up Act read:

10. The court may make a winding-up order,

- (a) where the period, if any, fixed for the duration of the company by the Act, charter or instrument of incorporation has expired; or where the event, if any, has occurred, upon the occurrence of which it is provided by the Act or charter or instrument of incorporation that the company is to be dissolved;
- (b) where the company at a special meeting of shareholders called for the purpose has passed a resolution requiring the company to be wound up;
- (c) when the company is insolvent;
- (d) when the capital stock of the company is impaired to the extent of twenty-five per cent thereof, and when it is shown to the satisfaction of the court that the lost capital will not likely be restored within one year; or
- (e) when the court is of opinion that for any other reason it is just and equitable that the company should be wound up.

13. The court may, on application for a winding-up order, make the order applied for, dismiss the petition with or without costs, adjourn the hearing conditionally or unconditionally, or make any interim or other order that it deems just.

I am satisfied that there is some discretionary power under all the subsections with the exception of subs. (a). If the charter has expired or the specified event has occurred a winding-up order must follow the application. There are, however, minor examples of the exercise of discretion under subss. (b), (c) and (d). There is a line of cases, beginning in 1894 and ending in 1918, set out in the footnote^{below}, where the assets of an insolvent company were being administered under the Assignments and Preferences Act. The Courts asserted a jurisdiction to reject a creditor's petition for a winding-up order, even where the insolvency was clear, because the application was contrary to the wishes of the majority of the creditors and against convenience and economy in the administration of the assets.

Note:

* Wakefield Rattan Co. v. Hamilton Whip Co. (1894), 24 O.R. 107; Re Maple Leaf Dairy Co. (1901), 2 O.L.R. 590; In re Strathy Wire Fence Co. (1904), 8 O.L.R. 186; Re Charles H. Davis Co. Limited (1907), 9 O.W.R. 993; Re Olympia Co. (1915), 25 D.L.R. 620 (Man.); Marsden v. Minnekahda Land Co. (1918), 40 D.L.R. 76 (B.C.).

Shareholders' petitions have been dismissed in cases apparently within the purview of the Act

on the ground of triviality of interest and regard for the wishes of the majority^{below}. I merely mention these cases in order to put them on one side, for they afford no help in this problem.

Note:

** In re London Suburban Bank (1871), L.R. 6 Ch. App. 641; In re Middlesborough Assembly Rooms Co. (1880), 14 Ch. D. 104; Re The Tomlin Patent Horse Shoe Co Ltd. (1886), 55 L.T. 314.

Nor do I think that *Symington v. Symington* [(1905), 13 Sc. L.T. 509.] and *Loch v. John Blackwood Ltd.* [[1924] A.C. 783.], strongly relied upon in the respondent's submission, deal with this particular problem. These were concerned with the "just and equitable" sub-section. Before they were decided it had been held in England that the "just and equitable" item was merely intended to include cases of the same kind as those covered in previous items of the section, (*In re Suburban Hotel Company* [(1867), L.R. 2 Ch. App. 737.]). *Symington v. Symington* and *Loch v. John Blackwood Ltd.* deny this rule of construction and give subs. 10(e) an independent operation which has been widely reorganized in a variety of situations. But this independent recognition of the scope of subs. 10(e) does not involve, as counsel for the respondent submitted, the denial of a "just and equitable jurisdiction" under subss. (b), (c) and (d).

The oddity of this case is that a winding-up order is sought for a very prosperous company. It was doing well until 1957 but with the bringing of natural gas into the area served by the company, a period of increasing prosperity and expansion began. The future looks very bright. The class "B" shareholders wish to retain their position and share in this prosperity with the common shareholders. The common shareholders wish to wind up the company and pay the class "B" shareholders off in accordance with the terms of the supplementary letters patent. The class "B" shares, with their right to participate in dividends, have some of the attributes of common shares but they are undoubtedly preference shares with defined rights on a winding-up.

The claims of the class "B" shareholders may be summarized as follows:

- (a) That to the extent of their right to participate in dividends, they are in the same position as the common shareholders and should not be eliminated from the company. They assert a right to the continued existence of this company.
- (b) That their sacrifices on the reorganization assured the continued existence of the company.
- (c) That during the period 1947 to 1957, the company retained in the business for the purpose of expansion out of earnings the sum of \$3,800,308. These earnings, if the company had not chosen to retain them, would have been available for the declaration of dividends to the "B" and common shareholders. A winding-up will deprive them of any participation in this accumulation.

The "B" shareholders also question the reason given by the common shareholders for the winding-up. Union Gas, the common shareholder, says that there is now no reason to continue United Fuel as a holding company with only one subsidiary. In 1959, because of the available supply of natural gas, the Coke company was sold. The result of a winding-up order will be to put all the assets of the holding company and its subsidiary distributing company into Union Gas after payment of all claims. There will undoubtedly be some saving and convenience of administration if this is done.

The "B" shareholders answer that this is not the true reason. United Fuel, the holding company, began as a company distributing gas as a result of the operations of two subsidiaries. It is still in the business of distributing gas through the operation of one subsidiary. This one subsidiary, instead of buying manufactured gas from another subsidiary, is buying it from an independent source, Ontario Natural Gas Storage, which happens to be a wholly owned subsidiary of Union Gas.

We have, therefore, on one hand an allegation of a "freeze-out"; on the other, a submission that convenience of administration justifies the winding-up, and that in any event, the common shareholders are entitled to wind it up. I think the material discloses a good deal of substance in the allegations of the class "B" shareholders concerning the reasons for winding up this company but does this make any difference? They are holders of preference shares. It is true that they are not redeemable by notice but there has always been the right to buy the shares for cancellation and there has always been what, to me, is a clear provision in the constitution of the company for their prior payment on a winding-up and a premium if the winding-up is voluntary.

What does voluntary winding-up mean in these supplementary letters patent? It appears in the conditions relating to the preference shares and the common shares. In a Canadian context it must include a petition based on a shareholders' resolution under s. 10(b), for the Canadian Act, in contrast to the English Act, does not recognize any winding-up outside the Act.

Therefore, when the reorganization was put through in 1939, the rights of the "B" shareholders were clearly ascertained. They were subject to redemption on a voluntary winding-up. The supplementary letters patent contemplated the possibility of a voluntary winding-up. It appears very doubtful whether in 1939 anyone thought of a voluntary winding-up because of prosperity but that cannot alter the meaning of the charter of the company.

I assume that Union Gas is exercising its right, as the common shareholder of this company, to wind up the company in its own self-interest and for convenience and economy of administration. Can a preference shareholder who wants the company to continue prevent this being done?

Where can one find a discretion to refuse a winding-up order on the application of a preference shareholder who does not want to be redeemed? It is a normal incident of preference shares that they are subject to redemption. It is true that the "B" shares in contrast to the "A" shares are not redeemable in the ordinary sense. It is also true that they resulted from a reorganization. But the "B" shareholders are really trying to tell the company that in its prosperity it must carry on

indefinitely because of their right to participate in the common dividends. A dismissal of the petition would inevitably be an affirmation of this position and would put upon the supplementary letters patent a construction that they cannot bear, namely, that there can be no winding-up without the consent of the "B" shares. This is asking the Court to do what a shareholders' committee might well have tried to do at the time of the reorganization, if it had been able in 1938 to foresee conditions in 1958. If the company has the right to wind up now, as I think it has, the motives which were so strongly emphasized by counsel for the "B" shareholders have no relevance. Whenever a company chooses to redeem preference shares according to their terms, it is wasting time and effort unless the motive is self-interest.

Counsel for the class "B" shareholders relied on certain authorities in the United States relating to the dissolution of solvent, prosperous corporations. These cases are: *Theis v. Spokane Falls Gaslight Co.* [(1904), 74 Pac. 1004; 34 Wash. 23 (Wash. C.A.)]; *William B. Riker & Son Co. v. United Drug Co.* [(1912), 82 A. 930 (N.J.C.A.)]; *In re Paine* [(1918), 166 N.W. 1036 (Mich. C.A.)]; *In re Doe Run Lead Co.* [(1920), 223 S.W. 600 (Mo. C.A.)]; *In re Security Finance Co., Rouda v. Crocker* [(1957), 317 P. 2d 1 (Calif. C.A.) at p. 5.]. Without going into details, these cases are all concerned with a common problem, an attempt of a majority of common shareholders to get the assets of the corporation into another corporation in which they alone are interested and the minority is not, and to pay off the minority common shareholders in cash. This is an entirely different problem from the right to wind up for the purpose of redeeming preference shares.

The dangers inherent in the use of dissolution procedure in such a case are obvious. The first is that the assets may be sold by the majority to themselves under the cloak of a new corporation at an unfair price and the second is the denial to the minority of the opportunity to participate.

I am not overlooking the case of *Castello v. London General Omnibus Co. Ltd.* [(1912), 107 L.T. 575.], referred to in the reasons for judgment of the Court of Appeal. In that case the Court of Appeal in England refused to restrain a sale of assets to another company exclusively owned by the majority in the old company and compelled the minority in the old company to take a cash payment. It is true that the cash payment was, on its face, a very generous one but the shareholders did not want cash. They wanted to stay with the company instead of being paid off. The case is referred to with approval in the judgment of the Court of Appeal but it is not the present case and I do not think it should receive approval in this Court. As far as I can see, it has never been referred to in any English or Canadian text and has never been judicially noticed either in England or in Canada.

I would dismiss the appeal with costs, including the costs of the application for leave to appeal.

Appeal dismissed with costs, including the costs of the application for leave to appeal.

Tab 2

Case Name:

West Van Inc. v. Beswick Group Holdings Ltd.

Between

**West Van Inc., Applicant, and
Beswick Group Holdings Ltd. and 1745301 Ontario Inc.,
Respondents**

[2008] O.J. No. 3119

170 A.C.W.S. (3d) 525

Court File No. CV-08-7638-00CL

Ontario Superior Court of Justice
Commercial List

F.J.C. Newbould J.

Heard: August 11, 2008.
Judgment: August 13, 2008.

(30 paras.)

Corporations, partnerships and associations law -- Corporations -- Liquidation and dissolution -- Court order for liquidation -- Grounds -- Just and equitable winding up -- Property not disposed of -- Applicant sought declaration that operating and fixed costs of aircraft be paid by respondents or order that respondents buy applicant out or order to wind up corporation -- Corporation ordered wound up unless respondents chose to buy applicant's share in aircraft for \$1.25 million U.S. -- Aircraft owned by corporation, for which applicant and respondents owned 50 per cent each -- No agreement over operating costs so unable to make order for respondents to pay -- Relationship between parties broken down -- Applicant had offer of \$2.5 million for aircraft -- Winding up corporation just and equitable.

Applicant sought a declaration that the operating and fixed costs of the disputed aircraft be paid by the respondents or an order that the respondents buy the applicant out or an order to wind up the corporation. The parties formed a corporation in which they each owned 50 per cent and purchased an aircraft. The aircraft was purchased for personal use, not as a source of corporate income. The parties made no written agreement as to the fixed and operating costs associated with the aircraft. The respondents used the aircraft twice as much as the applicant. The applicant argued the relation-

ship between the parties was broken down as a result of the dispute about operating costs. The parties had been sharing the costs equally but, the applicant argued, this was only because the respondents refused to pay more. The respondents argued the disputed costs were a narrow issue, totalling only \$14,000, and the rest of the parties' relationship was fine. The applicant had obtained an offer to purchase the aircraft for \$2.5 million, U.S., approximately what the parties paid for it one year ago.

HELD: The corporation was ordered wound up, with the aircraft to be sold, unless the respondents chose to buy out the applicant's \$1.25 million share, based on the offer. The parties exchanged emails about fixed and operating costs, but nothing was ever agreed on before the aircraft was purchased. Since there was no agreement, directing a trial to that issue would be futile and no order could be made. Since both parties could easily afford the disputed \$14,000 in costs, the mere fact that the issue went to litigation demonstrated the breakdown in the relationship. Winding up the corporation was the just and equitable solution as it would make little sense for the parties to continue to co-own the aircraft for another four years just for personal use. The applicant's offer of sale was reasonable given the state of the market.

Statutes, Regulations and Rules Cited:

Business Corporations Act, R.S.O. 1990, c. B.16, s. 207(1)(b) (iv), s. 207(2), s. 209

Counsel:

James Zibarras, for the Applicant.

Gary H. Luftspring and *Sam R. Sasso*, for the Respondents.

REASONS FOR JUDGMENT

1 F.J.C. NEWBOULD J.:-- This application concerns a 1990 Cessna Citation II jet aircraft beneficially held by the applicant ("West Van") as to 50 percent and by Kevin and David Beswick through their numbered company, 1745301 Ontario Inc., as to 50 percent. The aircraft is held in 1745383 Ontario Inc. ("The Corporation"), one half of whose shares are owned by West Van and one half by the Beswick's numbered company, 1745301 Ontario Inc.

2 West Van brings this application for (i) a declaration that all operating and fixed costs and expenses related to the aircraft are to be paid by the owners based on their respective usage of the aircraft; (ii) in the alternative, an order directing the respondents to buy out the applicant's share of the aircraft for US \$1.25 million; (iii) in the further alternative, an order directing the dissolution of what is said to be a partnership between the parties, the winding up of the Corporation, the sale of the aircraft and payment of one half of the net proceeds to each of the owners.

Factual background of the dispute

3 The aircraft was purchased in August 2007 for Cdn. \$2.7 million. Royal Bank of Canada provided the financing and apparently took legal title to the aircraft. It leased the aircraft to the Corporation under a five year term from October 4, 2007 to October 1, 2012 at the rent of \$1 per year.

The parties agree that the Corporation has beneficial ownership of the aircraft and neither party took the position that Royal Bank should be a party to this application. I was advised that Royal Bank is prepared to see the aircraft sold and presumably arrangements would have to be made with it in order to achieve that goal.

4 The aircraft was not purchased to be used as a business asset from which income was intended to be derived. It was purchased for use by the owners although it is apparently chartered out during times that the owners do not want to use it and the charter revenue is used to reduce the fixed costs.

5 Although there has been a considerable exchange of e-mails and there have been draft agreements exchanged between the parties, there has never been any written agreement settling all of the issues regarding the use and payment of the costs for the aircraft. West Van says that the relationship between the parties was a partnership or a quasi-partnership relationship and that the relationship between the parties has broken down to the point where they are not able to agree on the terms of ownership and are not talking. A dispute over how each side should pay the fixed costs of the aircraft is said to be but one cause of the breakdown between the parties. The dispute over fix costs, being pilot and insurance costs, is whether they should be paid equally by each side or pro rata in accordance with the percentage of usage of the aircraft by each side.

6 The Beswick side says the dispute between the parties is a very narrow one involving the difference over fixed costs and that this difference amounts to approximately \$14,000 per year. It is said that there are no other differences between the parties. The parties have been paying the financing costs on a 50/50 basis and the direct costs through an hourly rate paid for use of the aircraft which covers the cost of fuel and maintenance. The Beswick side says that the costs will be accounted for at year end and it is possible that if the aircraft is chartered out to third parties sufficiently before year end, the charter income could be enough to cover all of the fixed costs so that there would be no difference between the parties.

7 To date the parties have been paying the fixed costs on a 50/50 basis but West Van says that that is being done because the Beswick side refuses to pay more and it is not being done because of any agreement by West Van to do so.

8 West Van obtained an offer from a buyer to purchase the aircraft for US \$2.5 million that was valid until July 1, 2008 at 5:00 p.m. While that offer has expired, West Van states that the purchaser is still prepared to acquire the aircraft at that price. With the Canadian dollar currently being below par with the U.S. dollar, West Van says that the purchase price offered is approximately the same as the purchase price of Cdn. \$2.7 million that they paid for the aircraft last fall.

9 The Beswick side says that this *de minimus* dispute should be resolved and can be, if necessary, by the trial of an issue but that the dispute is not of sufficient importance to the relationship to cause the Corporation to be dissolved and the aircraft sold.

Discussion

10 On the evidence before me, it is certainly not possible to conclude that there was an agreement as to how the fixed costs should be paid. To the contrary, it appears that there was no agreement and that directing a trial of the issue on that score would in all probability be futile. West Van relies upon an e-mail of August 8, 2007 sent by it before the parties proceeded to purchase the aircraft in which it was stated that the partner with the highest usage would pay their fair share of the over-

head. Mr. Zibarras concedes that there is no evidence that the Beswick side expressly agreed to that term before deciding to proceed with the purchase.

11 The evidence of Kevin Beswick is that there were meetings in July, 2007 and a draft partnership agreement was provided to the Beswicks by Mr. Kloefer on behalf of West Van. It is said that the discussions and the draft agreement amounted to representations that resulted in the parties becoming co-owners of the aircraft. The draft agreement involved different parties and related to a different aircraft and pre-dated the e-mail of August 8, 2008 and Mr. Kloefer's evidence was that the Beswick's had no experience with an aircraft and it was provided to the other side only as a sample of an aircraft agreement. Although the position of the Beswick side before me as stated by Mr. Luftspring was that the relationship between the parties is not that of a partnership but rather is a co-owner arrangement, the evidence is that the Beswick side prepared a draft "Aircraft Partnership Agreement" dated October 1, 2007 and sent it to Mr. Kloefer at West Van for his comments. The draft provided for fixed costs to be shared equally by the owners regardless of the time flown by each side, and Mr. Luftspring notes that Mr. Kloefer's comments on the draft did not change that. Mr. Kloefer, however, states that he was confused by the proposed method of dealing with expenses and made a note "should be discussed." Also, on November 7, 2007, he sent an e-mail to Mr. Beswick which included a statement as follows:

"The way this agreement is written the total costs of operating the aircraft are divided equally and not based on utilization. Seeing there are two of you and one Richard that does not seem equitable. Going back to the very beginning, it seems to me that you guys and Richard have very different ideas on how this relationship should work and how the aircraft finances should be handled, maybe everyone should consider some of the alternatives ... I know Richard will not sign this agreement."

12 In the end no written agreement was made and it appears that the parties were not *ad idem* on all matters. That did not change. Apparently there are differences on the accounting treatment when there has been a swap of planes between the aircraft in question and another aircraft owned by the West Van interests and there is also a difference regarding how costs are to be paid if one side uses the plane for more than eighty hours per year. There may be other differences that have not been discussed with me.

13 There is also a difference between the parties what to do with the aircraft. West Van wishes to sell the aircraft pursuant to the offer of US \$2.5 million that has been received. The Beswick side does not want to sell it.

14 The evidence is that the Beswick interests have used the aircraft about twice the number of hours used by West Van. This includes usage of the other aircraft that has been swapped from time to time over which there is apparently some difference as to the accounting treatment for it.

15 On the evidence before me, one cannot help but conclude that the differences between the parties are more than just \$14,000 of costs per year. Each side is hardly destitute. They agreed to purchase an expensive jet aircraft for their own use and it is inconceivable that they would go to the lengths that they have in this litigation if all that was involved between them was a \$14,000 difference per annum.

16 Mr. Luftspring says otherwise, and points to an e-mail sent by Mr. Kloepper to Kevin Beswick on May 2, 2008 dealing with the possible purchase of another aircraft by them in which he stated, "I guess in reality our partnership is going along just fine now ..." When asked about this in cross-examination, Mr. Kloepper said, "It was actually sort of a discussion, a follow-up discussion Kevin and I had had, because we said when the partners don't talk, they seem to get along just fine in terms of the relationship." This evidence is hardly a ringing endorsement of a good working relationship. It should also be noted that the principal of West Van is not Mr. Kloepper, but Richard Gladden.

17 Mr. Gladden, who is the principal of West Van with the financial interest in the aircraft, was asked on cross-examination if he would agree that by early December 2007, he had had enough of Mr. Beswick. His answer was no and that he had had enough of Mr. Beswick before the deal even closed. He said, "My stomach told me not to do the deal with them because it would be nothing but trouble, and that's in fact what happened."

18 From my review of the evidence, I conclude a number of things. Firstly, there has been no agreement on whether the parties are involved in a partnership, which West Van asserts is the case, or a co-ownership relationship, which the Beswicks assert is the case. There has been no agreement covering the operation of the aircraft. There is a difference regarding the treatment of some of the costs. More importantly, there appears to be a breakdown of the relationship between Mr. Gladden and the Beswicks. It is not possible on this record to determine who may be at fault for that breakdown. Mr. Luftspring asserted in argument that it was simply Mr. Gladden being a bully trying to get his way, but I cannot determine that from the record. It would appear that the problem, at least in part if not more so, is that the parties did not come to clear terms on the use and operation of the aircraft before they made their financial commitments.

What should be done?

19 I cannot make a determination as to how the fixed costs should be paid. I also do not think it practical to order a trial of an issue on that score. It appears from the evidence that it is highly unlikely that the parties ever agreed on that issue and that a trial as to what was agreed would be futile. In any event, settling that issue would not appear to resolve matters generally between the parties.

20 West Van asks that the Corporation be wound up and the plane be sold. It relies upon section 207(1)(b)(iv) of the OBCA which provides that a corporation may be wound up by order of the court where the court is satisfied that it is just and equitable for some reason, other than the bankruptcy of the corporation, that it should be wound up. West Van also relies upon section 207(2) which provides that upon an application under section 207, the court may make such order as it thinks fit. Section 209 further provides that the court may make any interim or other order as is considered just.

21 I have been referred to a number of cases and authorities, including *Abrahimi v. Westbourne Galleries Ltd.*, [1973] A.C. 360, *Wittlin v. Bergman*, [1995] O.J. No. 3095, *Rogers and Agincourt Holdings Ltd. et al.* (1977), 14 O.R. (2d) 489, *Animal House Investments Inc. v. Lisgar Developments Ltd.*, [2007] O.J. No. 3879, *Ambler v. Courtney Ballycroy Investments Ltd.*, [1997] O.J. No. 1821 and, *Condotrust Realty Investments Inc. v. 983177 Ontario Inc.*, [1997] O.J. No. 2454.

22 Each case, of course, must depend upon its own facts and the words "just and equitable" are words of the widest significance that must be given a broad interpretation. See: *Rogers and Agincourt Holding, supra*, per Lacourciere, J.A., in which he stated:

"It is quite proper, of course, to draw upon previous cases for general guidance but counsel and the Court must be careful not to construe the authorities as setting out a series of restrictive principles which would confine the phrase "just and equitable" to rigid categories, for each case depends to a large extent on its own facts."

23 Many of the cases speak of a winding up of a corporation in the circumstances in which the relationship between the parties was one of a partnership or in some cases a quasi-partnership. I do not read the cases as requiring this kind of a relationship in order for a winding up order to be made although it is often the case that it is the falling out of a quasi-partnership arrangement that leads to a court including that it is appropriate to wind up a corporation. While the Beswick side delivered a draft partnership agreement, it takes the position that there was no partnership but rather a co-ownership arrangement. In my view it is not clear what the arrangement was because the terms were never agreed and it is pointless to attempt to determine whether one can term the relationship as a quasi-partnership or a co-ownership one. That should not, however, preclude a winding up order if it is otherwise just and equitable.

24 This case does not involve a business asset acquired to produce an income for the owners, and thus does not involve a business that will likely deteriorate in value because of a shareholder dispute. What this case involves is an aircraft acquired for the personal use of the owners who cannot agree on a number of issues including a fundamental issue as to the nature of the ownership relationship, i.e. is it a partnership or a co-ownership relationship, how should all of the expenses be paid and now whether the aircraft should be sold.

25 This asset is not one with a sentimental value to either party. It is a recently acquired 1990 jet aircraft. The short-lived marriage of the parties regarding the aircraft is an unhappy one. Regardless of whether one side or the other is to blame, it makes little sense for these parties to continue co-owning the aircraft for their personal use for another four years. Their differences are not so minor as to preclude an order being made under section 207 of the OBCA. In my view, as the parties have not been able to agree on how the aircraft is to be operated, it should be sold.

26 The Beswicks have had no prior experience with aircraft ownership and have not provided any evidence as to the current market for aircraft. West Van has experience as an aircraft owner. Mr. Kloepfer has sworn that although the offer from the buyer for US \$2.5 million has expired, the buyer is still interested in purchasing the aircraft for that price. He states that the price is a good price in the market given that half as many jets have traded hands this year as compared to last year and prices for jets have dropped about 30 percent since last year. He states that there is an expectation that prices could drop even further given the constantly rising gas prices and the general state of the global economy.

27 Mr. Luftspring stated in argument that if there is to be any sale of the plane, his client should be given a right of first refusal to match any offer. On the assumption that there is a buyer still prepared to pay the U.S. \$2.5 million, that would mean that his client would be given the right to purchase the aircraft for the same price.

28 Providing the Beswick side with a right of first refusal generally on any future offer to purchase the aircraft would in my view not be commercially reasonable as it could tend to result in a lower offer being achieved and be to the financial detriment of West Van vis-à-vis the Beswicks.

However, giving the Beswick side the right to purchase the aircraft for U.S. \$2.5 million, which would amount to buying out West Van for US \$1.25 million, would allow them protection if they feel that US \$2.5 million is below market value or if they feel that holding the aircraft for future potential appreciation in value makes economic sense.

29 The appropriate order that is just and equitable in the circumstances of this case is to order that the aircraft now be sold for U.S. \$2.5 million and the Corporation thereafter be wound up unless the Beswick side opts to buy out West Van for U.S. \$1.25 million. The Beswicks should be given a brief but reasonable period of time to decide if they wish to buy out West Van and if the parties cannot agree on what that period of time should be, further submissions may be made to determine that. If the aircraft is to be sold for U.S. \$2.5 million, and the parties are unable to agree on the terms of the sale, further submissions may be made on that score as well. If there are any further matters to be resolved as result of this decision, I will hear further submissions regarding them.

30 West Van is entitled to its costs of this application. If the parties are unable to agree on quantum, West Van may make brief written submissions with appropriate support as to what the cost should be within 10 days. Reply submissions by the respondents should be made within a further seven days.

F.J.C. NEWBOULD J.

cp/e/qlkx1/qlprp/qlaxw/qlcas/qlaxw

Tab 3

Indexed as:

Sound Advice Inc. (Trustee of) v. 358074 Ontario Ltd.

**IN THE MATTER OF The Business Corporations Act, R.S.O. 1980,
Chapter 54, Section 208
AND IN THE MATTER OF an application to wind up 358074 Ontario
Limited
Between
Dunwoody Limited, Trustee of the Estate of Sound Advice Inc. a
Bankrupt, applicant (appellant), and
358074 Ontario Limited and George David Burt, respondents**

[1984] O.J. No. 2505

5 O.A.C. 288

No. 121/83

Ontario Supreme Court - High Court of Justice
Divisional Court

Southey, Hollingworth and Smith JJ.

Heard: May 29, 1984.
Judgment: October 3, 1984.

(11 pp.)

Counsel:

L. Klug, for the applicant (appellant).
J.D. Dean, for the respondents.

The judgment of the Court was delivered by

1 HOLLINGWORTH J.:-- This is an appeal from an order of Trainor J. made in Motions Court on the 31st day of January, 1983, in which he dismissed an application for an order that the respondent, 358074 Ontario Limited, ("Holdco") be wound-up. The applicant (appellant), Dunwoody Lim-

ited, had been appointed Trustee of Sound Advice Inc., a bankrupt, ("SAI") on March 10, 1982. SAI is a major shareholder of Holdco. The appellant applied for the winding-up order on the ground that it would be just and equitable for Holdco to be wound-up for a reason other than bankruptcy or insolvency.

2 SAI and Holdco were two of a number of companies incorporated by the respondent, Burt, to carry on business principally in the manufacture and sale of sound and video equipment and to own real estate in Canada and the United States. Before the appointment of the appellant as Trustee, Burt had been the only individual with any beneficial interest in these companies and he controlled their management.

3 The applicant alleged that Burt had operated Holdco and its subsidiaries solely for his own personal benefit and that he had "siphoned off" to himself the profits and assets of the companies by excessive salaries, bonuses and other benefits. The result, the appellant contended, was a justifiable lack of confidence by the appellant, as a shareholder, in the management by Burt of the affairs of Holdco, and the loss of the corporate substratum of Holdco and its subsidiaries.

4 The learned Motions Court Judge dismissed the application on the grounds that there was no evidence to indicate that Holdco was not a viable going concern, and that the alleged misconduct of Burt related to the affairs of subsidiaries of Holdco, as opposed to Holdco itself, and took place before the appellant acquired an interest in the shares of Holdco by being appointed trustee in bankruptcy of SAI. He also would have dismissed the application on the ground that the appellant could not show that it came to the Court with clean hands, because of litigation then pending involving the failure of the appellant to pay rent for a building of Holdco occupied by SAI, which was sold by a mortgagee under a power of sale. The respondents submitted that Holdco would have been able to keep up payments on the mortgage if the appellant had paid occupation rent.

5 I will now turn to the law. The relief sought in this appeal is pursuant to section 206(1) of The Business Corporations Act, S.O. 1982, c. 4, the relevant portions of which read as follows:

WINDING-UP BY COURT

206. (1) The corporation may be wound up by order of the court ...

(b) where the Court is satisfied ...

(4) it is just and equitable for some reason other than the bankruptcy or insolvency of the corporation that it should be wound up ...

6 I am cognizant of the proposition that:

... the remedy is drastic and hence must be addressed to a serious condition affecting the proper conduct or management of the company's affairs.

(see R.J. Jowsey Mining Co. Ltd., [1968] 2 O.R. 549 at 552, per Laskin J.A.)

7 The authorities indicate that the granting of a just and equitable winding-up may be founded on one or more of several grounds. The appellant puts forth two bases to support its application.

8 In its first ground, the appellant alleges that there is a justifiable lack of confidence in the management of the affairs of Holdco because of lack of probity, lack of good faith or other improper

conduct on the part of the director, Burt. In this regard, I find that Burt, despite the ailing financial condition of Holdco and its affiliates, carried out the following acts in his capacity as director:

1. He authorized the corporation to pay him excessive salaries, dividends and unsecured personal loans;
2. He caused the corporation to expend unreasonable sums for luxury items and to transfer the ownership of these items into his own name;
3. He caused the corporation or its affiliates to lose its real estate holdings and its shareholdings in other corporations;
4. He caused the corporation to provide benefits to a company owned by him.

9 In addition, during the course of examinations connected with the applications, Burt purported to be unfamiliar with crucial management functions and the corporate affairs of Holdco and its subsidiaries.

10 I have no doubt that the evidence entirely demonstrates misconduct sufficient to destroy a shareholder's confidence that the business, if left in the hands of Burt, would be conducted honestly and competently and in the interests of all the shareholders. Furthermore, I recognize that this is a well-established foundation for granting a winding-up order. (see *Loch et al. v. John Blackwood, Limited*, [1924] A.C. 783 at 788; *R.C. Young Insurance Limited*, [1955] O.R. 598 at 602; and finally, *B. Love Ltd. v. Bulk Steel & Salvage Ltd.* (1982), 38 O.R. (2d) 691 at 699-70).

11 It may well be that, as observed by the Motions Court Judge, the substance of the appellant's claim relates to the conduct of the management of SAI and not Holdco and that the matters of complaint took place long before the bankruptcy of SAI. I am of the view, however, that the Court must look at the business realities of the situation. In circumstances such as the instant case, where interlocking, closely-held corporations are controlled by a common director, I am of opinion that the Court may look at the past and present conduct of the common director in managing the affairs of both the holding corporation and its subsidiaries to assess the propriety of that conduct. I am guided in this respect by the following decisions:

1. *In Re Waipuna Investments Property Ltd.*, [1956] V.L.R. 115 at 120;
2. *Scottish Co-Operative Wholesale Society Ltd. v. Meyer and Another*, [1958] 3 All E.R. 66 at 71-72;
3. *Re R.J. Jowsey Mining Co. Ltd.* (1969), 2 O.R. 549 at 560, aff'd. 1970 S.C.R.

12 In any event, stripping the assets of a subsidiary reduces the value of the shares of the parent company and prejudices shareholders of the subsidiary who do not benefit from the pillaging.

13 Moreover, no authorities have been cited to me that establish the proposition that the conduct complained of must occur contemporaneously with the applicant's shareholding.

14 The second ground submitted by the appellant to support the relief sought is that the main object of Holdco has failed; consequently, the substratum of the corporation is gone and it is impossible for the corporation to carry on the real business for which it was formed; under such circumstances a winding-up order has been held to be an appropriate remedy: see *Dominion Steel Corp. Ltd.*, [1927] 4 D.L.R. 337. The facts in the present case indicating that the principal business purpose for the incorporation of Holdco and Holdco's substratum, have been lost include the following:

Holdco's operating subsidiaries, SAI and Avant Audio Speaker Company Limited, are bankrupt; Audio by Avant Inc. and Media Rare Inc. are inactive businesses; the mortgagee has sold a property on Yonge St. owned by Holdco and formerly occupied by SAI. Certainly, there is some evidence to afford the appellant relief on its second ground. With respect, no authorities have been referred to me supporting the position of the Motions Court Judge that the appellant must show that the respondent corporation is not a vital going concern in order to have it wound-up. On the contrary, there is clear authority that a solvent company may be wound-up on the basis that its substratum has failed: see *In Re German Date Coffee Company*, [1882] 20 Ch. D. 169.

15 I turn now to some specific submissions by counsel for the respondents that have not yet been addressed.

16 I agree that there never existed a partnership between the appellant and the respondents. I do not agree, however, that because the situation before the Court is not a partnership, in the guise of a limited company, the application should automatically be dismissed. I recognize that the just and equitable winding-up remedy is a relic of partnership law, but I do not think that a pre-existing partnership or a present association that is, effectively, a partnership is a condition precedent to the granting of a just and equitable winding-up order. The situation of a partnership in the guise of a corporation in which the relationship among the principals was originally founded on personal trust and confidence may well provide the scenario for the granting of an order. It is, however, just one of several grounds upon which the order may be granted (see *B. Love Ltd. v. Bulk Steel & Salvage Ltd.*, supra; *Ebrahimi v. Westbourne Galleries Ltd. et al.*, [1972] 2 All E.R. 492 at 500, quoted in *Re Graham and Technequip Ltd.* (1981), 32 O.R. 297 at 306).

17 It is argued by counsel for the respondent that the appellant mis-conducted itself by failing to pay the requisite occupation rent for the Yonge St. property thereby causing mortgage arrears and the commencement of power of sale proceedings. Consequently, submits the respondent, the appellant should be denied the just and equitable remedy it is seeking because it does not come to Court with clean hands. I am of the view that, although the submission of the respondent may be correct in law, it is not tenable on the facts as presented. In this regard, I accept the evidence of the appellant that there had, in fact, never been rent paid to Holdco and that, in any event, the burden of making the mortgage payments fell upon Burt and not the appellant. The evidence demonstrates that it was Burt who permitted Holdco to default on its mortgage in December, 1981. Moreover, the payment of occupation rent by the appellant would not have been sufficient to satisfy the mortgage arrears as of May 4, 1982. Thus, based on the evidence before me, I do not attribute any bad faith on the part of the appellant.

18 For the above reasons, I am of the view that it is just and equitable that Holdco be wound-up. In deference to the learned Motions Court Judge, I feel that he did not have the benefit of the very extensive material and detailed argument presented to us. The appeal is allowed. The order of the learned Motions Court Judge is therefore set aside and, in its place, there will be an order winding-up Holdco and appointing the appellant as liquidator of the estate and effects of Holdco for the purpose of winding-up its business and affairs and distributing its property. The respondent, Burt, will pay the costs of the appellant both here and below.

HOLLINGWORTH J.

SOUTHEY J.:-- I concur.

SMITH J.:-- I agree.

qp/s/mes

Tab 4

Case Name:

2011680 Ontario Inc. v. 968831 Ontario Inc.

Between

**2011680 Ontario Inc., Applicant, and
968831 Ontario Inc., formerly known as Cashcode Co. Inc. and
Saltsov Holdings Inc., Respondents**

And between

**Saltsov Holdings Inc., Applicant, and
2011680 Ontario Inc. and 968831 Ontario Inc., formerly known
as Cashcode Co. Inc., Respondents
APPLICATIONS UNDER section 207(1)(b) of the Ontario Business
Corporations Act, R.S.O. 1990, c. B.16**

[2011] O.J. No. 3537

2011 ONSC 4595

Court File No. 11-CV-9198CL

Ontario Superior Court of Justice

P.M. Perell J.

Heard: July 18, 2011.

Judgment: July 29, 2011.

(67 paras.)

Corporations' partnerships and associations law -- Corporations -- Liquidation and dissolution -- Court order for liquidation -- Right to distribution in money -- Application by shareholder for order winding up corporation and distribution of remaining assets allowed in part and counter-application by shareholder for same relief, but with adjustments made prior to distribution allowed in part -- Parties were equal shareholders in corporation that manufactured currency validator machines -- Parties received compensation through executive compensation, bonuses and dividends, with 2011680 receiving a greater share and taking compensation through salaries and dividends -- Just and equitable to wind up corporation -- Adjustment allowed for tax liability incurred as result of 2011680's taking dividends and incomplete adjustment of shareholders'

advances account in respect of tax liability -- Business Corporations Act, s. 207(1)(b).

Application by a shareholder for an order winding up the corporation and for an order distributing the corporation's remaining assets equally to the two shareholders and counter-application by the other shareholder for the same relief, but with adjustments to be made before the distribution of assets. In 1991, three individuals, Saltsov, Levitan and Letivan's father, established the corporation, Cashcode, which manufactured currency validator machines. Saltsov and the two Levitans each owned 50 per cent of the corporation, through their respective corporations. Over the years, Cashcode made distributions to its shareholders in a variety of means including executive compensation, bonuses and dividends. Cashcode paid salaries to Saltsov and the Levitans, with the Levitans receiving more than Saltsov, and the profits were divided 50-50. By 2003, animosity had developed between Levitan and Saltsov, such that both resigned as officers and an interim president was hired. When the relationship between the parties further deteriorated, the interim president was forced to resign and a receiver was appointed. Notwithstanding the appointment of a receiver, disputes continued, but an asset sale was eventually approved by the court. As part of the sales process, \$2.2 million was to be held back as a reserve with respect to a possible claim by the former interim president. After the sale was completed, the receiver was discharged and most of Cashcode's assets were distributed to the shareholders. As of the date of the commencement of the applications for the winding up, there remained a total of approximately \$3,859,198 in assets. Saltsov Corp sought an adjustment for the approximately \$500,000 more in cash distributions received by Levitan Corp during the period 2003 to 2005. In addition, Saltsov Corp sought an adjustment for the \$394,954 in taxes incurred by Cashcode as a result of Levitan Corp's receipt of money from Cashcode as a dividend. Levitan Corp took the position that there should be no adjustments as they were statute-barred because Saltsov Corp was aware of the claims in August 2006 and could have raised them during Cashcode's receivership.

HELD: Application and counter-application allowed in part. An order was granted winding up Cashcode as it was just an equitable to do so. In addition, the second, but not the first adjustment sought by Saltsov Corp was allowed as Levitan Corp was responsible for the tax liability incurred as a result of taking dividends and the tax liability in issue arose from an incomplete adjustment of Levitan Corp's shareholders' advances account. However, the first adjustment requested was inappropriate and unfitting as the parties' practice for many years had been for asymmetrical distributions of executive salaries which gave rise to a reasonable expectation of those asymmetrical distributions.

Statutes, Regulations and Rules Cited:

Business Corporations Act, R.S.O. 1990, c. B.16, s. 207, s. 207(1)(b), s. 207(2), s. 248(3)

Limitations Act, 2002, S.O. 2002, c. 24, Sch. B,

Counsel:

Brian N. Radnoff for 2011680 Ontario Inc.

Paul J. Pape and David S. Steinberg for Saltsov Holdings Inc.

REASONS FOR DECISION

P.M. PERELL J.:--

A. INTRODUCTION

1 The Applicant, 2011680 Ontario Inc. (the "Levitan Corporation") applies for an Order winding up the Respondent, 968831 Ontario Inc., formerly known as Cashcode Co. Inc. ("Cashcode") and for an order distributing the remaining assets of Cashcode, 50% to the Levitan Corporation, which is owned by Valery and Iosif Levitan, and 50% to the Respondent, Saltsov Holdings Inc., which is owned by Leon Saltsov.

2 Saltsov Holdings does not oppose the winding up, and indeed, it brings a Counter-Application for the same relief. It does not oppose the 50-50 distribution of the assets of Cashcode. However, it submits that before the 50-50 distribution, two adjustments should be made to the accounts of Cashcode.

3 The first adjustment is for cash distributions made for the period 2003 to 2005. Saltsov Holdings alleges that during this period, the Levitan Corporation shareholders and their wives received approximately \$500,000 more in cash from Cashcode than did the Saltsov Holdings shareholder and his wife, and, therefore, this inequality should be adjusted before any 50-50 distribution.

4 The second adjustment is to take into account that the Levitan Corporation shareholders received money from Cashcode as a dividend and this distribution exposed Cashcode to a tax liability that reduced its profits. Saltsov Holdings submits that since the dividends were for the benefit of the Levitan Corporation shareholders, therefore, they should repay Cashcode for the tax expense it occurred. Saltsov Holdings submits that \$394,954 should be charged to the Levitan Corporation's shareholder's advance account.

5 There is approximately \$3,859,198 in remaining assets, and in its amended counter-Application, Saltsov Holdings submits that this sum should be paid \$1,627,671 to Levitan Corporation and \$2,214,308 to Saltsov Holdings. More specifically, Saltsov submits that the cash assets should be distributed as follows:

* \$8,471 for accounts payable to professional advisors

- * \$8,748 in income taxes payable on interest income
- * \$527,371 to Saltsov Holdings [the first adjustment] to equalize distributions for 2003, 2004, and 2005
- * \$619,651 [incorporates the second adjustment] to Saltsov Holdings' shareholder as repayment of shareholder advances
- * \$560,385 to Levitan Corporation shareholders as repayment of shareholder advances
- * \$1,067,286 to Saltsov Holdings
- * \$1,067,286 to Levitan Corporation.

6 The Levitan Corporation submits that there should be no adjustments. It submits that the adjustments are statute-barred because Saltsov Holdings was aware of these claims by August 2006. It submits that the claims are barred by the doctrine of issue estoppel because they could have been raised during Cashcode's receivership. Further, it submits that the evidence is missing to support any adjustments and any adjustments would be inconsistent with past practice and the reasonable expectations of the shareholders of Cashcode. The Levitan Corporation shareholders regard Saltsov Holdings' adjustment claims as a vexatious attempt to re-litigate the shareholders' dispute that pre-occupied the parties for many years.

7 For the Reasons for Decision that follow, I grant the Order winding up Cashcode, and I allow the second but not the first adjustment sought by Saltsov Holdings. The outcome is that Levitan Corporation should be paid \$1,891,356.50 and Saltsov Holdings should be paid \$1,950,622.50 from the cash assets. More specifically, the cash assets should be distributed as follows:

- * \$8,471 for accounts payable to professional advisors
- * \$8,748 in income taxes payable on interest income
- * \$619,651 to Saltsov Holdings as repayment of shareholder advances
- * \$560,385 to Levitan Corporation as repayment of shareholder advances
- * \$1,330,971.50 to Saltsov Holdings
- * \$1,330,971.50 to Levitan Corporation

B. EVIDENTIARY BACKGROUND

8 The Levitan Company commenced this Application on May 3, 2011. It relied on the affidavit of Alan Litwack sworn on May 3, 2011. Mr. Litwack has been the lawyer for Valery and Iosif Levitan for approximately 15 years and was closely involved in the events of the dispute between the Levitans and Mr. Saltsov. Mr. Litwack swore additional affidavits. He was cross-examined on his affidavits.

9 Mr. Valery Levitan swore an affidavit on June 8, 2011. He was cross-examined on his affidavit.

10 Mr. Danny Baratz, who had been Cashcode's auditor, swore an affidavit on June 30, 2011. He was cross-examined on his affidavit.

11 Mr. Saltsov affirmed affidavits on May 27, 2011 and on June 3, 2011.

12 Mr. Peter Perley, who acted as an interim president of Cashcode during its receivership, swore two affidavits. He was cross-examined.

13 Mr. Steven Roth, Cashcode's accountant, who was first retained in 2006, was examined as a witness for the Application.

C. FACTUAL BACKGROUND

14 In 1991, Mr. Saltsov and the Levitans established Cashcode, which manufactured currency validator machines. Mr. Saltsov, who was in charge of engineering and manufacturing, owned 50%. Valery Levitan and his father, Iosif Levitan owned 50%. Valery Levitan managed the day-to-day operations with the assistance of his father, Iosif, who was the titular president of Cashcode and whose active involvement in the business lasted until around 1998.

15 Over the years, Cashcode made many distributions to its shareholders in a variety of means including executive compensation, bonuses, and dividends. In the 1990s, the practice developed that salaries would be paid to the Levitans and to Mr. Saltsov. Then, after the salaries, the profits were divided 50-50. The amount of salaries, however, was asymmetrical, and the Levitans received more than Mr. Saltsov, even though Valery Levitan was just a titular executive. Nevertheless, between 1998 and 2002, the directors of Cashcode, that is, Valery and Iosif Levitan and Mr. Saltsov approved this practice by unanimous directors' resolutions. Why Mr. Saltsov agreed to an asymmetrical distribution is not explained, but he did.

16 By 2003, Cashcode had become a very successful company, but, unfortunately Valery Levitan and Leon Saltsov had grown to distrust and it would seem hate one another, and they could not agree about Cashcode's future. In September 2003, their animosity led both to resign as officers, but they agreed to hire Abe Rolnick as an interim president to manage Cashcode. Mr. Rolnick would continue the plan to sell the business to a third party.

17 The 2003 plan did not succeed, and in November 2003, the Levitans commenced an oppression remedy application. They contended that notwithstanding his resignation, Mr. Saltsov was interfering with the business and with the prospects of selling the business. On December 11, 2003, by Order made in the oppression remedy application, Mr. Saltsov was ordered to comply with the shareholders' agreement.

18 In January 2004, Mr. Saltsov indicated that he no longer had confidence in Mr. Rolnick's neutrality and wished him to resign. When this did not occur, in May 2004, Mr. Saltsov sued the Levitans and Mr. Rolnick for, among other things, breach of fiduciary duty. He also sued Mr. Litwack and his law firm Minden Gross Grafstein and Greenstein LLP for, among other things, interference with contractual relations.

19 Mr. Rolnick resigned, and he would eventually bring an action for wrongful dismissal. The Levitans moved to have a receiver appointed, and with Mr. Saltsov's consent, in June 2004, RSM Richter was appointed receiver to continue the plan to sell Cashcode and to manage Cashcode's ongoing business.

20 After its appointment, RSM Richter retained CTM Inc. whose personnel, Peter Perley and Mark Weigel, provided services to manage the affairs of Cashcode. Mr. Perley was appointed the Company's interim president, and Mark Weigel was made the Company's interim controller to provide interim management of the Company's business and assets and to assist with the court supervised sale.

21 Notwithstanding the appointment of a receiver, disputes continued about Mr. Saltsov's continued involvement with the operations of Cashcode and about the Levitans' concerns about the process for a sale of the business.

22 Another dispute concerned the continuing practice of paying executive salaries to the Valery and Iosif Levitan and to Mr. Saltsov. Given the receivership, none of these individuals were in fact acting as executives, but they continued to receive salaries, which they were dividing with their wives, who also were not actually providing executive services. Mr. Saltsov complained to the Receiver -- not about the warring shareholders and their wives receiving salaries -- but about the distribution being asymmetrical. RSM Richter took a hands-off position about this issue.

23 In March, 2005, Mr. Saltsov raised concerns about the neutrality of Cashcode's auditor Danny Baratz. When Mr. Saltsov threatened to commence legal proceedings against him, Mr. Baratz resigned as Cashcode's auditor. Eventually, PriceWaterhouseCoopers was retained as auditor. (An action was commenced against Mr. Baratz, but the action was dismissed for delay on December 27, 2007).

24 Meanwhile, a possible sale aborted, and RSM Richter recommended a new sales process by sale of assets, which Mr. Saltsov opposed. He also alleged that the Levitans were conspiring to cause him harm. In its 13th Report to the court, RSM Richter reported that Mr. Saltsov was interfering with Cashcode's operations and that his conspiracy allegations were wrong.

25 The court approved several modifications to the sales process, and on January 19, 2006, the court approved an asset sale. As part of the sales process, \$2.2 million (U.S.) was to be held back as a reserve with respect to a possible claim by Mr. Rolnick.

26 The sale was completed, and the Receiver was discharged on March 28, 2006. The monies for Mr. Rolnick's claim and for certain other contingencies were held back. Most of Cashcode's assets were eventually distributed to the shareholders. (The unaudited 2007 Financial Statements indicate that the shareholders' equity was \$86 million).

27 Throughout its appointment, all of RSM Richter's activities were approved by the court, and

none of the orders approving its activities were appealed. In its Reports, the Receiver mentioned many of Mr. Saltsov's concerns. It rejected some concerns, and as noted above, it took a hands-off approach to others.

28 In the Receiver's 14th Report, RSM Richter noted its understanding about the consequences of the decision by the Levitan Corporation shareholders to receive dividend income. The Report states:

Simply put, Richter understands that the annual profit of Cashcode before tax and management bonuses is intended to be distributed equally to the Shareholders either by way of bonuses or dividends. The Levitans have taken their share of the profit by way of dividends, which are after-tax payments from Cashcode's perspective. Therefore, Cashcode remits the applicable corporate taxes (including fines and penalties, if any, due to late payment) and pays the net amount (the dividend) to the Levitans and their holding company.

29 The Receiver's 14th Report also noted how Mr. Saltsov was to be responsible for any taxes associated with the management bonuses. The Report states:

Mr. Saltsov, on the other hand, takes his share of the profit in the form of a bonus. The Company pays the statutory withholdings (income tax) from the "gross" bonus and remits the net payment to Mr. Saltsov. Richter believes that for consistency any such withholdings or payment triggered by the bonus should be deducted from what is paid to Mr. Saltsov (in order to make Cashcode 'neutral', in the same way as it is with the Levitans). These amounts should, in Richter's view, include required source deductions and the required payments on account of EHT.

30 In March, 2006, Mr. Saltsov sued Mr. Rolnick with respect to his conduct while president of Cashcode.

31 In July, 2007, Mr. Rolnick sued Cashcode for lost salary, benefits and his anticipated bonus on Cashcode's sale. Defending Mr. Rolnick's action was now the sole activity of Cashcode, which had become a numbered company no longer manufacturing machines or carrying on business.

32 Apart from the Rolnick litigation, it is not clear from the record before me what preoccupied the parties for the next almost three years.

33 On April 19, 2010, Rolnick's claim against Cashcode was dismissed.

34 The Court of Appeal dismissed Rolnick's motion for leave to appeal on September 13, 2010.

35 On May 3, 2011, the Levitan Corporation brought an application for the winding up of Cashcode. On May 30, 2011, Saltsov Holdings brought its own winding up application by way of

counter-application. As at May 25, 2011, Cashcode was holding a total of \$3,863,200.35 in cash in two bank accounts.

36 In his affidavit in support of the counter-application, Mr. Saltsov states that it was always agreed that Cashcode's shareholders would be treated equally from a profit sharing perspective. He states, however, that for the years 2003, 2004 and 2005, the Levitan Corporation shareholders received \$527,371 more in actual distributions than did the Saltsov Holdings shareholders. He submits that this amount should be credited to Saltsov Holdings in the final distribution of Cashcode. In his affidavit, he stated: "I believe that it is only fair that the final distribution of the Company's assets take into account this prior imbalance in distributions, as that would be consistent with the basic overriding principle of equality which was supposed to govern."

37 In support of its claim for the first adjustment, Saltsov Holdings referred to an apparently unsolicited report prepared by CTM that analyzed the distributions between the two shareholder factions for the years 2003, 2004, and 2005.

38 In support of its claim for the second adjustment, Saltsov Holdings relied on an affidavit from Peter Perley. In that affidavit, Mr. Perley says that \$394,954 should have been charged (debited) against the Levitan Corporation's shareholders' advances account. The rationale for this debit is that in 2004, the Levitan Corporation shareholders received: (a) executive compensation; and (b) dividend income while, in contrast, the Saltsov Holdings shareholders received: (a) executive compensation; and (b) bonuses. Dividends and bonuses attract different tax consequences for Cashcode (as well as the shareholders personally). Cashcode, therefore, had to pay corporate tax on account of the dividends payable to the Levitans.

39 Mr. Perley explained in his affidavit that, but for the fact that a holdback for tax liability was underestimated, the accounting treatment of the distribution to shareholders for 2004 supports the approach of the second adjustment sought by Saltsov Holdings; i.e., that the Levitan Corporation shareholders should be responsible for having caused Cashcode to incur an additional liability for tax. Thus, Mr. Perley states in paragraphs 13, 14, and 15 of his affidavit:

13. For 2004, the gross dividend payable to the Levitans was \$7,085,000 from which the Company was to pay any related taxes, interest, and penalties. At the time that dividend was declared, the resulting corporate taxes were *estimated* at \$2,559,000. That amount was deducted from the gross dividend. Similarly, it was then estimated that total interest and penalties payable as a result of the dividend would be \$45,000, and that amount was also deducted from the gross dividend. The gross dividend payable to the Levitan shareholder group was therefore reduced by the sum of those amounts, being \$2,604,000 (\$2,559,000 + \$45,000).
14. In fact, the *actual* corporate taxes ultimately paid by the Company in connection with the Levitans' 2004 dividend were higher than the amount estimated, by \$192,119. The Company ultimately paid \$2,751,119 in such taxes, which is

\$192,119 more than the \$2,559,000 estimated and deducted from the gross amount. ...

15. Similarly, the *actual* interest and penalties charged for 2004 totaled \$247,835 (\$73,034.08 charged by CCRA + \$174,801.20 charged by Ontario). This is \$202,835 higher than the \$45,000 initially estimated and deducted from the gross dividend payable to the Levitans.

40 The points to note here are: (1) that the second adjustment sought by Saltsov Holdings is aimed at completing what turned out to be an allegedly incomplete adjustment of the Levitan Corporation's shareholders' advances account. In other words, an adjustment was made to this account in 2004 to reflect the tax hit that would be taken by Cashcode but the adjustment did not go far enough. The estimate was \$192,119 low; and (2) because the taxes remitted were low, Cashcode had to pay penalties and interest of \$202,835, which also had been underestimated.

41 Mr. Perley stated that the current, unadjusted, balance in the Levitans' shareholders advance account was \$955,339, but based on his analysis, the adjusted balance should have been \$560,385. (It may be noted that if this adjustment is made, the Levitans will recover half of it because of the increase in the balance of funds to be divided 50-50 between the shareholders).

42 On behalf of the Levitan Corporation, Mr. Litwack delivered several reply affidavits to respond to Mr. Saltsov's allegations about two adjustments. In his June 7, 2011 affidavit, Mr. Litwack stated that the payments of salaries, expenses and benefits were all agreed to by the directors and shareholders and there was never any agreement or understanding they would be reversed. He says that from the outset, the parties agreed that they and their relatives would receive payment of salary, expenses, and benefits and the remaining profits would be distributed 50-50. Mr. Litwack points out that Mr. Saltsov signed the cheques by which the payments were made and that during most of this period, the business of Cashcode was under the day-to-day control of the receiver.

43 Mr. Litwack acknowledges in an affidavit that Mr. Saltsov had been complaining about the inequality of the distributions for the years 2003, 2004, and 2005, but he submits that Mr. Saltsov could have raised this issue before and not waited until the Levitans brought a winding-up application. Mr. Litwack says that the CTM analysis was unauthorized and inadequately researched because Mr. Weigel did not consult with Cashcode's accountant. He says that the Levitan Corporation shareholders refused to have Cashcode pay for this report.

44 Mr. Litwack states in an affidavit that the requested adjustment for Cashcode's exposure to tax was a matter raised during the receivership. In the Receiver's 13th Report, which was approved by the court, RSM Richter stated: "the method of distributing profits by way of bonus and dividend, which existed prior to the Appointment Order, should not be changed except by Shareholder Agreement or by Court Order, since the pre-existing tax distribution arrangements reflected what is in reality a four-way arrangement (that is, among Cashcode and each of three shareholders)." (I

pause here to note that is another example of the Receiver taking a hands-off position to Mr. Saltsov's concerns).

45 Mr. Litwack also notes in an affidavit that on April 9, 2007, Saltsov's counsel wrote to an arbitrator chosen to arbitrate certain disputes arising out of the sale of Cashcode's assets. Mr. Saltsov wanted to arbitrate whether he was entitled to any adjustment as a result of the manner in which Valery and Iosif Levitan had taken their distributions of profit from the company from 2003 to 2005. Ultimately, the parties could not agree about what matters to submit to arbitration, and there was no arbitration.

46 In responding to Mr. Perley's affidavit about the adjustment for taxes, Mr. Litwack states that he was not aware of any prior request being made for the adjustment proposed. He says that he was not aware of this issue ever being raised with the Levitans before Mr. Perley's affidavit and that before his Counter-Application, Mr. Saltsov never raised the issue.

47 Mr. Baratz also delivered an affidavit in opposition to Mr. Perley's affidavit. In his affidavit Mr. Baratz attempts to make three major points. First, Mr. Baratz submits that to the extent that Mr. Perley relied on adjustments that Mr. Baratz had done while he was Cashcode's accountant and described in Mr. Baratz's correspondence, this reliance was mistaken and not helpful because the correspondence concerned 2003, and thus could not be helpful as to what should be done in 2004. He stated that he did not know whether the approach he took for 2003 was used for the 2004 fiscal year when he was no longer Cashcode's accountant.

48 Second, Mr. Baratz submits that Mr. Perley's analysis was not supported or corroborated by any evidence from Cashcode's financial records.

49 Third, Mr. Baratz submits that insofar as the proposed adjustment includes \$202,835 because of interest and penalties, this charge should not be imposed on the Levitans because it was the Receiver's delay in making tax instalment payments and not the Levitans who caused the interest and penalty.

50 Mr. Perley responded to Mr. Baratz's affidavit with a further affidavit for the purpose of showing that the adjustment for the tax liability that he proposed was indeed substantiated by the Cashcode records and that the adjustment reconciled with the Company's audited 2004 Financial Statements. Mr. Perley also expressed the opinion that the Levitans should be responsible for the interest and penalties assessed because but for the Levitan Corporation shareholder's decision to receive dividends instead of salary bonuses these charges would not have been incurred.

D. DISCUSSION

51 Under s. 207 of the *Business Corporations Act*, R.S.O. 1990, c. B.16, the court may order that a corporation be wound up where it is just and equitable to do so. There is no dispute that it is just and equitable to wind-up Cashcode.

52 Pursuant to s. 207(2) of the Act, on a winding-up, the court is empowered to make any order as it thinks fit. Section 248(3) of the Act provides the court with broad remedial powers to make any order it thinks fit to rectify unfairness. I will apply this discretionary jurisdiction, and then my explanation for my conclusion to allow the second but not the first adjustment sought by Saltsov Holdings is relatively straightforward.

53 I am satisfied from the evidentiary record that the Levitan Corporation shareholders were to be responsible for the tax liability incurred as a result of taking dividends. This approach is confirmed by the Receiver's 14th Report. I am satisfied from Mr. Perley's evidence, that the adjustment for Cashcode's tax liability was underestimated and that, but for the decision to receive dividends rather than bonuses, the tax, interest, and penalties would not have been incurred, and all of the shareholders would have had more to divide upon the winding-up of Cashcode. I am satisfied that Mr. Perley has correctly calculated the adjustment that should be made.

54 It is simply fair and equitable that this adjustment be made. I conclude that the adjustment is fair whether or not it was also a matter of an understanding between the parties and whether or not Mr. Saltsov raised his objection for the first time as a part of the winding-up applications.

55 But for their bitterness towards Mr. Saltsov, which may or may not be justified, it is an honourable adjustment to make and one to which the Levitan Corporation shareholders should accede. Since they did not do so, as part of its jurisdiction on the winding-up, the court will help them do the right thing and fulfill the undertaking they made to pay for Cashcode's tax liability.

56 I do not regard the *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B or the principle of issue estoppel as barring this adjustment being made.

57 Beginning with the principle of issue estoppel. *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 (S.C.C.) is a leading case on issue estoppel. In this case, the Supreme Court of Canada held that where a party establishes the pre-conditions for an issue estoppel, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied. The court should stand back and, taking into account the entirety of the circumstances, consider whether application of issue estoppel in the particular case would work an injustice.

58 In my opinion, it would be unjust to apply an issue estoppel in the circumstances of the case at bar. The court has never adjudicated on the merits of the adjustment and nothing can be taken from the fact that the court approved the numerous Receiver's Reports, since the Receiver was neutral on this matter. There is no collateral attack in considering the matter now, and the Levitan Corporation's reliance on issue estoppel is an interference with the court's ability to do justice on the winding-up application.

59 Turning to the Levitan Corporation's reliance on a limitation period barring the claims of Saltsov Holdings, I will assume without deciding that had Saltsov Holdings brought an oppression remedy proceeding for the relief now being sought, it would be statute-barred.

60 However, neither party is bringing an oppression remedy claim. Rather, they are asking the court to exercise its statutory and essentially equitable jurisdiction to wind-up Cashcode and make ancillary orders as are just. It is to be remembered that a limitation period defence does not extinguish the legal right. The expiry of a limitation period does not make the plaintiff's claim a nullity, but it provides the defendant with a defence that if pleaded and proven will bar the plaintiff's claim: *Beardsley v. Ontario Provincial Police* (2001), 57 O.R. (3d) 1 (C.A.) at paras. 20-21. It should also be noted that on a winding-up application, it is not necessary for the court to make a finding of oppression in order to make whatever order it deems just and equitable. In *King City Holdings Ltd. v. Preston Springs Garden Inc.*, [2001] O.J. No. 1464 (S.C.J.) at para. 13, Justice R. MacKinnon stated:

A Court may make whatever order it deems "just and equitable". This gives the Court to grant a wide range of discretionary remedies which are available to it in "oppression remedy" cases. Such remedies could include an order that all shares be sold, or that all assets be sold, that the Corporation or other shareholders purchase the shares of the applicant shareholder or that the unanimous shareholders' agreement be amended. No finding of oppression need be made by the Court. It is clear that the parties no longer trust one another, have lost confidence in each other's ability to deal fairly, and can no longer act properly and in a business-like manner. There is clear deadlock in the operation of this Corporation.

61 I regard the fact that as an oppression remedy claim, the adjustment now being sought may be statute-barred as relevant to the exercise of the court's jurisdiction but as not precluding the exercise of that jurisdiction. In my opinion, but for its technical limitation period defence, the Levitan Corporation's shareholders would have no defence to the claim that they had the responsibility to reimburse Cashcode for the taxes it paid with respect to the distribution of dividends.

62 The first adjustment, however, is a different matter, and it is inappropriate and unfitting for Saltsov Holdings to ask for this adjustment. The practice of the parties for many years had been for asymmetrical distributions of executive salaries. For many years, Mr. Saltsov signed off as a director of Cashcode to these asymmetrical distributions, whether out of indifference, magnanimousness, or gratitude for the Levitans' assistance in launching the enterprise. For whatever reason, the Levitan Corporation shareholders had a reasonable expectation of these asymmetrical distributions and they have more than a technical defence to this claim by Saltsov Holdings.

63 During the period in which the Receiver was managing the affairs of Cashcode, none of the parties were actually earning their salaries, and if Mr. Saltsov wished the notional salaries to stop, then he should have taken the hint from the Receiver to bring a motion.

64 Again, without deciding the point, I will assume that the claim for this adjustment would be statute-barred as an oppression claim. However, the Levitan Corporation shareholders do not need

this technical defence, but it adds weight to my decision not to grant the first adjustment. I conclude that it would not be just and equitable for the Levitan Corporation shareholders to account for the asymmetrical distribution of management salaries to them and to their wives.

E. CONCLUSION

65 For the above Reasons for Decision, I order that Cashcode be wound up with an adjustment in accordance with these Reasons.

66 If the parties cannot agree about costs, they may make submissions in writing beginning with the Levitan Corporation's submissions within 15 days of the release of these Reasons followed by Saltsov's submissions within a further 15 days.

67 As it may assist the parties to know, my current view is that there should be no order as to costs.

P.M. PERELL J.

cp/e/qljxh/qlvxw

Tab 5

Re
R.J. Jowsey Mining Co. Ltd.

[1969] O.J. No. 1358

[1969] 2 O.R. 549

6 D.L.R. (3d) 97

Ontario
Court of Appeal
Mackay, Laskin and

Jessup, JJ.A.

April 22, 1969.

J.J. Robinette, Q.C., and C.E. Woollcombe, for appellant.

R.N. Starr, Q.C., for applicant, respondent.

1 LASKIN, J.A.:-- This is an appeal by R.J. Jowsey Mining Company Limited (hereinafter referred to as "Jowsey") from an order of Hartt, J., dated December 9, 1968, directing the winding-up of Jowsey on the application of a shareholder and former director, F.H. Jowsey (hereinafter referred to as the "applicant"). The order was made under s. 256(d) of the Corporations Act, R.S.O. 1960, c. 71, which reads as follows:

256. A corporation may be wound up by order of the court,

- (d) where in the opinion of the court it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up.

The learned trial Judge concluded, after a lengthy consideration and careful assessment of the facts (which his written reasons reflect) that there was no middle course; the application for the winding-up had to be either granted or dismissed. During the hearing of the appeal a question was raised as to the scope of the Court's power on a winding-up application, and, particularly, whether what I may for convenience call a regulatory or disciplinary order might be made against Jowsey and its direc-

tors, or whether the power to adjourn the application (conferred by s. 258) conditionally or unconditionally, could be exercised to make the adjournment sine die.

2 The question so raised requires a consideration of s. 258; and I quote it and, for additional context, s. 259(1):

258. The court may make the order applied for, may dismiss the application with or without costs, may adjourn the hearing conditionally or unconditionally or may make any interim or other order as is deemed just, and upon the making of the order may, according to its practice and procedure, refer the proceedings for the winding-up and may also delegate any powers of the court conferred by this Act to any officer of the court.

259(1) The court in making the winding-up order may appoint one or more persons as liquidator of the estate and effects of the corporation for the purpose of winding-up its affairs and distributing its property.

I hold the view that s. 258, implementing s. 256 and being in turn supplemented by s. 259, is concerned with orders directed to a winding-up and not to an alternate remedy. The orders ("interim or other order as is deemed just") which may be made under s. 258 on a winding-up application (short of dismissal of the application) are ancillary orders, referable to a winding-up and which may result ultimately in dismissal or granting of the application according to whether the terms of such ancillary orders are or are not observed. I do not read s. 258 as empowering the Court to stay a winding-up application and introduce an entirely independent remedy that will operate outside of a prospective winding-up.

3 *Re Michael P. Georgas Co. Ltd.*, [1948] O.R. 708, [1948] 4 D.L.R. 296, 29 C.B.R. 70, cited by counsel for the appellant in support of a wide construction of s. 258, does not stand in the way of the view that I take of that provision. On appeal in that case from a winding-up order, based on proof of a dead- lock in the management of a company, the appellant gave an undertaking for co-operation and satisfied the Court of his good faith in respect of the management of a company that was showing good profits. With advice to the parties to rearrange the directorship to avoid dead-locks in the future, the Court allowed the appeal and dismissed the application. The present Ontario Corporations Act does not, in my opinion, permit the Court to do under s. 258 what is expressly permitted under British legislation as illustrated in *Scottish Cooperative Wholesale Society v. Meyer*, [1959] A.C. 324. I note that the proposed new Corporations Act under a pending Bill in the Ontario Legislature (of which I may take judicial notice), entitled the Business Corporations Act, 1968, does not make any change in respect of the Court's power on a compulsory winding-up. Sections 203 and 205 of the Bill reproduce with minor changes the present ss. 256 and 258.

4 Reference may aptly be made to s. 278 which permits the Court "at any time during a winding-up" to stay the proceedings altogether or for a limited time upon terms. Although I do not think that an independent remedy can be substituted, s. 258 does provide considerable scope for interim adjustments or directions. Its reference to "other orders" must be given substance, and, having regard to the context of the section I would construe those words as pointing to orders in furtherance of or otherwise in connection with a present or prospective winding-up order.

5 Despite the more than century old prototype of our s. 258 in English legislation, we were not referred to any case in which the words "other order" were construed to permit a remedy outside of the compass of an immediate or prospective winding-up order. Assuming, however, that the words should be read literally and detached from what I think is their context, I am not persuaded that the present case is one where a substitute or alternative remedy should be prescribed. Any possibility of the Court becoming a superior board of directors should be avoided. The same admonition holds where orders referable to a possible winding-up are contemplated. None the less, the Court is empowered to use the threat of a winding-up as a consequence of disobedience to directions which, as discussed during the argument, might prohibit dealings by Jowsey with other companies in an interlocking relationship with it or with persons associated with or related to those presently in control of Jowsey. If such directions must be broadly drawn to be effective against the evil complained of, there is a question whether they may not so stultify operations of a company as to make a winding-up order preferable.

6 I propose to consider, first, the propriety of a winding-up order rather than an outright dismissal of the application, and if the latter be rejected, then the advisability of imposing terms of conduct on pain of a winding-up order if they should be violated. The "just and equitable" power of the Court connotes a broad discretion which I do not think is limited to required proof of actual wrongdoing. The formula is not one that can be easily translated into any set of principles; rather, it fixes a standard whose application must always be an anxious matter on particular facts.

7 When is it "just and equitable" for the Court to order a company to be wound up? The remedy is drastic, and hence must be addressed to a serious condition affecting the proper conduct or management of the company's affairs. This is a generality on which I wish to expand in considering the applicable case law and the particular circumstances under which the application herein was brought. Most of the cases brought to the Court's attention by counsel involved small or private companies, exhibiting conflict or deadlock among a small number of shareholder-directors or among the owner-members of a family corporation: see *Loch v. John Blackwood, Ltd.*, [1924] A.C. 783, [1924] 3 W.W.R. 216; *Re James Lumbers Co. Ltd.*, 58 O.L.R. 101, [1926] 1 D.L.R. 173; *Re Martello & Sons Ltd.*, [1945] O.R. 453, [1945] 3 D.L.R. 626, 27 C.B.R. 204; *Re Toronto Finance Corp.*, 65 O.L.R. 351, [1930] 3 D.L.R. 882; *Re R.C. Young Insurance Ltd.*, [1955] O.R. 598, [1955] 3 D.L.R. 571, 35 C.B.R. 72. The present case involves a public company which, admittedly, is under one-man control. True, this control is exercised formally through interlocking corporate directorates, but there is no reason to indulge in make-believe that there is independence in decision-making. The propelling force is David W. Smith. Jowsey's business and assets may be said to be substantially his; and what evidence there is in the short period of his control before the present application was launched, would indicate that he treated the whole concern as belonging to him:

see *Baird v. Lees*, [1924] S.C. 83; *Thomson v. Drysdale*, [1925] S.C. 311.

8 It is idle to assert that the voice of a good many shareholders has not been heard in this case; it could not avail. We face therefore a situation where a public company is in the hands of one man who has lately taken control. It is a company whose main asset is a large block of valuable shares in another company. Denison Mines Limited, having an immediately realizable market value of some three million dollars. The blunt position of the applicant (who with his father, recently deceased, was the moving force in Jowsey until displaced by Smith on November 1, 1966) is that there is now some equity for the shareholders which should be distributed to them; and unless this is done the assets will disappear. This position involves a grave allegation against Smith, or, perhaps I should

say, the Smith group personified by Smith. If Smith had built up the liquid portfolio of Jowsey, and could be said to have attracted shareholders by his efforts on behalf of the company, it would require much more than is laid against him in respect of the management of Jowsey in this case to support this winding-up application. But the fact is that Smith came into a settled situation, and through an expenditure of about \$418,000 took remote but effective control of Jowsey. He is not to be faulted for this bargain venture, but he is subject to public accountability, and the central question in my mind is whether the application herein was premature in the sense that there was insufficient accumulation of evidence to justify a winding-up.

9 The applicant relies on matters that occurred before Smith obtained control of Jowsey and on what occurred in the one week of his control before the application herein and a motion for an interim injunction were brought. Smith had first become interested in Jowsey in April, 1964, when, together with some associates, he acquired about 850,000 shares. There were at the material time, in excess of three and one-half million issued shares of Jowsey. The Smith group sought majority representation on the Jowsey board of directors but discussions proved fruitless, and in May, 1964, it sold its Jowsey shares to International Bond and Equity Corporation Limited (hereinafter referred to as "International") which was controlled by M.M. Sinclair and associates. The Sinclair group succeeded where the Smith group failed, and four of Sinclair's nominees became directors of Jowsey whose board then consisted of them and the applicant and his father. Within a short time a clash occurred when the Sinclair nominees proposed that Jowsey buy from Rix Athabasca Uranium Mines Limited (hereinafter referred to as "Rix") 800,000 shares of Torbrit Mines Limited for the sum of \$465,000. International controlled Rix and Rix controlled Torbrit, all being Sinclair group companies. If Jowsey were to buy the Torbrit shares from Rix, the latter could purchase from International, with Jowsey's money, the Jowsey shares that International had bought from the Smith group, and International would be reimbursed but still remain in control. The proposal was opposed by the applicant; and, in the result, an agreement was made between the two factions on June 25, 1964, that there would be no purchases in companies with interlocking directorates unless approved by five directors of Jowsey.

10 So matters stood when in the following year Torbrit acquired from International the latter's Jowsey shares. A proxy fight for control of Jowsey ensued at its annual meeting in July, 1965. Litigation followed when the applicant, as chairman, ruled against the validity of Sinclair group proxies and declared elected a board which he had nominated. The matter was heard by Wilson, J., who made an interim direction on consent that an annual meeting of Jowsey be held on November 1, 1966. It was much later that the learned Judge delivered judgment on the merits declaring that the July, 1965 meeting was illegal. In the meantime, the Smith group came back into the picture, more effectively than in its first effort, by purchasing from International the controlling interest in Rix. This gave it control of Torbrit, and in turn control of Jowsey. The sum of \$418,000, paid to International for this control, came from the treasury of New Nipiron Mines Limited and was taken without authorization. Smith controlled New Nipiron and it was not until January 6, 1967 (which, incidentally, is the date of Smith's affidavit in these proceedings), that a minute of New Nipiron showed that company as approving and confirming the purchase of 1,100,000 shares of Rix for \$418,000. Hartt, J., in his reasons, pointed to the discrepancies between Smith's assertions in his affidavit and those in certain filing statements to the Toronto Stock Exchange, and drew the eminently supportable inference that Smith treated New Nipiron as his own, as indeed he treated Rix and Torbrit, whose control he obtained with New Nipiron's money. The precipitating events in respect of the present litigation took place before the formal introduction of New Nipiron as controlling share-

holder of Rix. It was in October, 1966, that the Smith group bought the controlling interest in Rix. It moved at once to take control of Jowsey, and was in managerial control at least when the annual meeting took place, with an independent chairman presiding, on November 1, 1966. The applicant and the Smith group vied for proxies. The latter voted 1, 597, 596 shares, most of them in one proxy; the applicant who himself held 81,000 shares, produced authority to vote 1,014,191 shares. It appeared from the material that the beneficial owners of about half a million shares were unknown so that there was no doubt of the Smith group's control when its holdings are viewed against the 3,587,013 issued shares of Jowsey.

11 At the annual meeting, which was held at 11 a.m. and which confirmed the Smith group's control of Jowsey, nothing was said to the shareholders about any intended disposition of Jowsey's main asset, its realizable shares in Denison, nor was there any intimation of investment plans or other ways of improving Jowsey's position. Shortly after the annual meeting and on the same day, the Smith group's board of directors of Jowsey authorized the sale of up to 15,000 shares of Denison. The minute does not indicate that this disposition was associated with any scheme of reinvestment or other use of the proceeds for the benefit of the company. The shares of Denison were then about \$62.50 on the market and the yield was not very high, and, no doubt, a good case could have been made for some diversification of Jowsey's holdings. The directors gave no public or even internally recorded clue as to their plans. If there was any need of ready money, it is a fact that Jowsey then had some \$50,000 in cash in its treasury and owned a \$200,000 deposit receipt of a chartered bank.

12 It was when the directors proceeded to sell Denison shares as authorized that the present action was brought and an interim injunction obtained (and later continued) to halt the consummation of sales of 10,100 shares of Denison. It was strongly urged by counsel for the applicant that not only the conduct of the Smith group but that of the Sinclair group was relevant to the issue in these proceedings. I take this to mean at least that the same or almost the same group of companies, International, Rix and Torbrit, and New Nipiron, Rix and Torbrit, was being manipulated to secure interlocking control of Jowsey. It does not follow, however, that conduct of the Sinclair group can be visited upon the Smith group without evidence of complicity or association between them. In a case such as this one, and on the arguments advanced here, the juridical personality of each of the companies is not a telling consideration; rather the concern must be with the human directors who translated their wishes into corporate action.

13 Smith and his associates were but nominal shareholders of New Nipiron when its money was used to buy control of Rix. However, they operated New Nipiron through their control of New York Oils Limited which was the majority shareholder of the issued stock of New Nipiron. When they used New Nipiron's money to buy control of Rix, they also used an additional \$150,000 of New Nipiron funds to buy oil rights from its parent. I should point out that control of New Nipiron was acquired about a year before the Smith group moved to obtain control of Jowsey. The trial Judge was bound to consider, as he did, whether the Smith group's use of New Nipiron for the benefit of New York Oils was a factor in support of the winding-up application in the light of the fact that New Nipiron was put forward by Smith as controlling shareholder of Rix and thus of Torbrit and Jowsey.

14 The trial Judge was satisfied, on balance, that it was just and equitable that Jowsey should be wound up and it is difficult to say that his conclusion on the evidence was wrong. Certainly, this is not a case for the outright dismissal of the application for a winding-up order. What remains to be

considered is whether terms should be prescribed for holding a winding-up order in abeyance. It is clear the Court can, in a proper case, adjourn the application sine die on terms and make an order such as that proposed in this case by my brother Jessup. This could well be a prescription in a dead-lock case, or where a balance must be struck between winding-up and assuring proper management of a profitable or at least a viable company. However, no such situation is presented here.

15 I would add to what I have already said on matters of principle that the taking of control of a public company itself lays a burden of fair dealing on the person or group who secures it, beyond any duty that devolves upon them as directors in the day to day operations of the company. I am the less reluctant to uphold the conclusion of Hartt, J., when Jowsey, so far as the material discloses, is not a particularly active mining company, and there would be no disturbance of any significance (certainly, none was indicated on the argument) to any ongoing activity by a winding-up order.

16 It was not shown, nor even alleged, that any prejudice to shareholders in general would result from a winding-up. The proposition stated in Gower, *Modern Company Law*, 2nd ed., p. 540, that it is a serious step (to be taken only if a strong case is made out) to wind up a solvent company against the wishes of the majority shareholders should be viewed from the standpoint of an ongoing business which would be disrupted. That is not the case here. Moreover, to adopt the words of another writer, "there is nothing sacrosanct about a corporation as a form of association. It is simply another mode by which individuals can engage in business": see article by Hornstein in 40 Col. L. Rev. 220 (1940) at p. 250.

17 I am, in the result, confirmed in Hartt, J.'s view of the present case as one where there is a fund on which minority shareholders have a claim, and which will in all probability disappear into some unrealizable security or investment if the application for a winding-up order is dismissed. That would not be a ground for acting under s. 256(d) if portfolio changes were an ordinary risk of shareholding in Jowsey or even if the Smith group had laid out a plan of investment or development intended to benefit the company and its shareholders. The method of securing control of Jowsey and the possessive attitude almost immediately reflected in the handling of its main asset are not compatible with a sense of public responsibility in the management of a public company. I refer to the use of New Niprion's money as well as to the intended conversion of Jowsey's shares in Denison.

18 Although Hartt, J., in his reasons did not consider the possibility of putting Jowsey (or, realistically, the Smith group) on terms on pain of a winding-up order, I do not think that there is here any purpose in doing so rather than to direct an immediate winding-up.

19 I would dismiss the appeal with costs.

20 JESSUP, J.A.:-- This is an appeal from an order of Hartt, J., winding up the appellant company under the authority of s. 256(d) of the Corporations Act, R.S.O. 1960, c. 271, which provides: 256. A corporation may be wound up by order of the court,

- (d) where in the opinion of the court it is just and equitable for some reason, other than the bankruptcy or insolvency of the corporation, that it should be wound up.

The broad effect of that section was stated by Neville, J., in *Re Bljriot Mfg. Aircraft Co. Ltd.*, (1916), 32 T.L.R. 253 at p. 255:

The words "just and equitable" are words of the widest significance, and do not limit the jurisdiction of the Court to any case. It is a question of fact, and each case must depend on its own circumstances.

21 In this case the really material facts and circumstances are fully and fairly set forth in Hartt, J.'s reasons for judgment and no purpose would be served by repeating them. The main charge that the respondent contends arises from those facts and circumstances is that Smith and his fellow directors were guilty of conduct showing a want of probity and justifying a lack of confidence of the minority shareholders in the conduct and management of the company's affairs in that the directors attempted a raid on the company treasury, for the benefit of Smith or one of his companies, which was only aborted by the injunction order of Aylesworth, J.A. After an anxious consideration of the facts canvassed by Hartt, J., and of the additional circumstances urged by counsel for the respondent, I am of the opinion that they only raise a suspicion of such intended misconduct on the part of the directors. As observed by Gower, *Modern Company Law*, 2nd ed., p. 540 "... to wind up a solvent company contrary to the wishes of the majority shareholders is a serious step which the courts will only take if a strong case is made out". I cannot conclude the respondent has satisfied the heavy onus which is involved in the grave charge I have mentioned.

22 What can be squarely put against Smith is that as a director and officer of New Nipiron Mines Limited, a public company which he controlled, he took \$418,000 from its treasury without the authority of its directors or shareholders in order to acquire a controlling interest in the appellant company. That was misconduct as a director although of another company. If he was not using the funds of a public company of which he was an officer and director for his own account then he was guilty of a want of probity in a private capacity in making the affidavit filed in these proceedings and in making two Toronto Stock Exchange filing statements. I agree with the findings and inferences of Hartt, J., in these respects [[1969] 1 O.R. 437 at pp. 442-3, 3 D.L.R. (3d) 23 at pp. 28-9]:

It is argued by counsel for the applicant that Smith's credibility and probity must be considered in the light of the fact that he was something less than completely truthful when he made the following statement in his affidavit dated January 6, 1967:

"In or about the month of October, 1966, I purchased from International 1,100,000 shares of the capital stock of Rix comprising the control block of shares of Rix for a total consideration of \$418,000 cash. At the time of my purchase Rix had effective control of Torbrit and Torbrit was the largest single shareholder of Jowsey Mining."

This statement that Smith personally was the purchaser of the Rix stock from International was repeated in two subsequent Toronto Stock Exchange filing statements and in the Stock Exchange bulletin dated October 26, 1966. The documentation relating to the purchase was all in the name of Smith but the purchase was actually paid for and conducted by New Nipiron.

On cross-examination Smith explains that his reason for stating that he personally was the purchaser was because he had not, at the time that the allegedly false

statements were made, obtained the formal approval of the board of directors of New Nipiron to this transaction, although he had discussed the matter informally with the board of directors and had no doubt that formal approval would be forthcoming. The rather belated minute recording formal approval was dated January 6, 1967. The explanation is glib, but completely unrelated to the realities. The New Nipiron board was composed of persons who were on the board at Smith's sufferance to do his bidding, as were the boards of Rix, Torbrit and Jowsey Mining after November 1, 1966. To suggest that any of these boards of directors were capable of exercising any independence of judgment apart from that dictated by Smith is, at least, unrealistic. The statements of Smith were in fact either false with the intention to mislead or, more probably, were merely the overt expression of Smith's real feelings toward all the companies which he controlled. That they were in fact his companies, to do with them and their treasuries as he saw fit; completely oblivious of the fact that they are public companies containing the monies of those members of the general public who saw fit to invest therein and of which the directors were reputedly trustees.

23 The rule in England governing applications to wind up a company on the ground of want of confidence in its management based on a want of probity of its directors was stated in the Privy Council by Lord Shaw of Dunfermline in *Loch v. John Blackwood, Ltd.*, [1924] A.C. 783 at p. 788, [1924] 3 W.W.R. 216:

It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up.

The same rule for Ontario was perhaps stated more broadly by Laidlaw, J.A., delivering the judgment of the Court in *Re R.C. Young Insurance Ltd.*, [1955] O.R. 598 at p. 602, [1955] 3 D.L.R. 571 at p. 573:

3. As the foundation of applications for winding-up on the "just and equitable" rule there must be a justifiable lack of confidence in the conduct and management of the company's affairs.

4. That lack of confidence must be grounded on the conduct of the directors in regard to the company's business. It may rest on lack of probity, good faith or other improper conduct on the part of a majority of directors.

In any event in the *Young Insurance* case no question arose with respect to the want of probity of directors either in their private capacities or as directors of other corporations and the rule laid down

by Laidlaw, J.A., cannot therefore be taken to state the law in those situations. In my opinion and on the principle that justifiable lack of confidence is the basis for the remedy, without deciding the effect of want of probity in their private affairs by the directors of a company, if such want of probity touches their conduct in the capacity of officers or directors although of a company different from that sought to be wound up, then it may justify relief under the statute. In this case the misconduct of Smith in the affairs of New Nipiron justifies a want of confidence of the minority shareholders of the appellant company in his uncontrolled management of the latter company and requires an equitable remedy.

24 In making the order appealed from, Hartt, J., said [[1969] 1 O.R. 437 at p. 444, 3 D.L.R. (3d) 23 at p. 30]:

Unlike the situation in Great Britain and Australia, there appears to be no authority in our law for the Court to in any way make an order regulating the conduct of the company's future affairs. The application must be dismissed or the company ordered to be wound up. There is no middle ground.

It is not clear whether he had considered, and concluded there was no jurisdiction for other relief under, s. 258 of the statute which provides: 258. The court may make the order applied for, may dismiss the application with or without costs, may adjourn the hearing conditionally or unconditionally or may make any interim or other order as is deemed just, and upon the making of the order may, according to its practice and procedure, refer the proceedings for the winding up and may also delegate any powers of the court conferred by this Act to any officer of the court.

The section had its origin over 75 years ago in the substantially identical language of s. 14 of "An Act respecting Insolvent Banks, Insurance Companies, Loan Companies, Building Societies, and Trading Corporations", 1882 (Can.), c. 23. While I have been unable to find any case where it or its even older English counterpart has been invoked, in my opinion the section is in very broad terms with the intent that, at least as the term of a stay of proceedings, a Court may order the equitable remedy that is most just having regard to all the circumstances of the case and once it appears that justice and equity require the intervention of the Court in a company's affairs.

25 In all the circumstances of this case I would make an order setting aside the order of Hartt, J., and in the following terms. Counsel may speak to the matter of other or additional terms.

1. Adjourning Sine die the application to wind up the company on the condition that within 15 days and thereafter until otherwise ordered by a Judge of the Supreme Court the minority shareholders shall be represented on the board of directors of the company by two nominees and subject always to continuation before a Judge of the Supreme Court of the application for winding-up on default of such condition or on new facts arising including any contravention of the order hereinafter mentioned.

2. Prohibiting, without leave of a Judge of the Supreme Court and until otherwise ordered by such a Judge, the company, its directors, officers, agents and servants from:

- (a) selling, leasing, discounting, transferring, assigning, lending or in any way disposing of any asset of the company or any interest in any such asset to,
- (b) mortgaging, pledging, charging or hypothecating any such asset or any interest in any such asset with, to or for the purposes or benefit of,
- (c) purchasing, leasing, acquiring or borrowing on behalf of the company any asset, any interest in any such asset, any service or any shares of capital stock from,
- (d) creating any liability or indebtedness, whether original or by guarantee, to,
 - (i) any company which owns or directly or indirectly controls the company or which is associated with the company within the meaning of the Income Tax Act, R.S.C. 1952, c. 148, as amended,
 - (ii) any company owned or directly or indirectly controlled by any officer or director of the company or by any person married or related to any such officer or director,
 - (iii) any company owned or directly or indirectly controlled by any officer or director of any company which owns or directly or indirectly controls the company or which is associated with the company as aforesaid, or by any person married or related to any such officer or director,
 - (iv) any officer or director of the company or any person married or related to any such officer or director, or,
 - (v) any officer or director of any company mentioned in (i), (ii), or (iii) or any person married or related to any such officer or director.

3. Setting aside the order of Wilson, J., dated November 23, 1966, but staying this provision for 30 days.

26 In all other respects I would dismiss the appeal with costs.

Appeal dismissed.

UNREPORTED JUDGMENTS—JUGEMENTS NON PUBLIÉS

The following judgments rendered during the year will not be reported

Les jugements suivants rendus durant l'année ne seront pas publiés

- Ballem v. Texas Gulf Sulphur Company* (Alta.), 72 W.W.R. 273, appeal dismissed with costs, 16.12.70, appel rejeté avec dépens.
- Brawley v. Brawley* (Ont.), appeals dismissed, 6.3.70, appels rejetés.
- Burton v. Lapointe et al.* (Ont.), appeal dismissed with costs, 10.6.70, appel rejeté avec dépens.
- Cameron et al. v. Robidas* (Que.), [1970] C.A. 97, appeal dismissed with costs, 1.5.70, appel rejeté avec dépens.
- Carr-Harris Products Ltd. v. Reliance Products Ltd.* (Exch.), appeal dismissed with costs; cross-appeal dismissed without costs, 10.11.70, appel rejeté avec dépens; appel incident rejeté sans dépens.
- Cohen v. La Reine* (Que.), appeal dismissed, 19.11.70, appel rejeté.
- Courchesne, Larose Limitée v. Guildhall Insurance Co. et al.* (Que.), [1969] B.R. 255, appeals dismissed with costs, 18.3.70, appels rejetés avec dépens.
- Cyrville Sand Co. Ltd. et al. v. National Capital Commission* (Exch.), appeal dismissed with costs, 17.11.70, appel rejeté avec dépens.
- Dubchuck, Baird and Goodwin v. The Queen* (Ont.), appeal dismissed, 16.6.70, appel rejeté.
- Eden Roc Investments Ltd. et al. v. Traders Realty Ltd.* (Ont.), appeal dismissed with costs, 1.6.70, appel rejeté avec dépens.
- First Torland Investments Ltd., Second Torland Investments Ltd., and Third Torland Investments Ltd. v. Minister of National Revenue* (Exch.), [1969] 2 Ex. C.R. 3, appeals dismissed with costs, 3.11.70, appels rejetés avec dépens.
- Gascon et al. v. Gascon* (Ont.), appeal dismissed with costs, 2.6.70, appel rejeté avec dépens.
- Golden Eagle Refining Co. of Canada Ltd. v. Murphy Oil Co. Ltd.* (Que.), [1970] C.A. 106, appeal dismissed with costs, 26.10.70, appel rejeté avec dépens.
- Johnston et al. v. Royal Bank of Canada et al.* (Ont.), appeal dismissed with costs, 11.2.70, appel rejeté avec dépens.
- Jowsey Mining Company Ltd. v. Jowsey* (Ont.), [1969] 2 O.R. 549, appeal dismissed with costs, 11.6.70, appel rejeté avec dépens.
- Lewis et al. v. Van Damme* (B.C.), appeal dismissed with costs, 4.12.70, appel rejeté avec dépens.
- Lurvey v. The Queen* (Man.), appeal dismissed, 13.10.70, appel rejeté.
- Mandeville v. Montreal City and District Savings Bank* (Que.), appeal dismissed with costs, 28.10.70, appel rejeté avec dépens.
- McMartin v. The Queen* (B.C.), appeal dismissed, 4.5.70, appel rejeté.
- Micro Chemicals Ltd. v. Hoffman La Roche Ltd.* (Exch.), 41 Fox Pat. C. 134, 59 C.P.R. 202, appeal dismissed with costs, 4.6.70, appel rejeté avec dépens.

Tab 6

Indexed as:
Hillcrest Housing Ltd. (Re)

**IN THE MATTER OF the Winding-up Act, R.S.P.E.I. 1974, Cap.
W-7;
AND IN THE MATTER OF Hillcrest Housing Ltd.**

[1992] P.E.I.J. No. 17

97 Nfld. & P.E.I.R. 124

308 A.P.R. 124

31 A.C.W.S. (3d) 960

Action No. GDC-3960

Prince Edward Island Supreme Court - Trial Division

MacDonald C.J.T.D.

Heard: June 26, 1991

Judgment: January 22, 1992

(21 pp.)

Courts -- Jurisdiction -- Whether Court had jurisdiction to grant interim costs in petition by minority shareholder to wind-up company -- Equity.

This was an application by the petitioner for interim costs in an petition to wind up a company of which the petitioner was a minority shareholder. The petitioner alleged that he lost confidence in the management of the company, that there were violations of company law and bylaws and that he feared loss of his investment. At issue was whether the Court had jurisdiction to order interim costs.

HELD: The Court did have inherent jurisdiction to order interim costs. Nowhere in the Winding-up Act could it be found that indemnity could not be awarded in the circumstances. The defendant was using the company's money to conduct his defence while the petitioner had to fund his costs from his own resources. Such a situation cried for equitable relief. The petitioner had a reasonable case.

STATUTES, REGULATIONS AND RULES CITED:

Business Corporations Act, S.O. 1982, c. 4. Corporations Act, R.S.O. 1960, c. 71, s. 258. Courts of Justice Act, S.O. 1984, c. 11. Supreme Court Act, R.S.P.E.I. 1988, c. S-10, ss. 2(1), 53(1). Winding-Up Act, R.S.C. 1970, c. W-10, s. 13. Winding-Up Act, R.S.P.E.I. 1974, c. W-7, s. 25.

CASES CITED:

Attorney General of Canada v. Cardinal Insurance Company (1983), 20 B.L.R. 9; Re R.J. Jowsey Mining Co. Ltd. (1969), 2 O.R. 549; Hill v. Hill (1988), 63 O.R. (2d) 618; Cook v. Ip (1985), 52 O.R. (2d) 289, 22 D.L.R. (4th) 1; Re Schmarr, [1902] 1 Ch. 326 (C.A.) Foss v. Harbottle (1843), 2 Hare 461, 67 E.R. 189 (Ch. D.); Wallersteiner v. Moir (No. 2), [1975] 1 Q.B. 373, [1975] 1 All E.R. 849 (C.A.); Turner v. Mailhot (1985), 50 O.R. (2d) 561.

TEXTS CITED:

Pennington's Company Law 4th ed. (Butterworths, 1979) p. 585, 588; Palmer's Company Law 24th ed. Vol. 1 (Stevens & Sons, 1987), p. 976; Gower's Principles of Modern Company Law 4th ed. (Stevens & Sons, 1979), p. 647; Corporate Law in Canada (Butterworths, 1984), p. 517, p. 648, p. 518.

David W. Hooledy and James T. Revell, for the Petitioner.

William G. Lea, Q.C. and Kenneth L. Godfrey, for the Respondents.

MACDONALD C.J.T.D.:-- On August 17, 1982, Richard Wedge presented a petition under the Winding-up Act, R.S.P.E.I. 1974, Cap. W-7 to wind up Hillcrest Housing Limited ("Hillcrest"). The petitioner and his family members have approximately a one-third interest in Hillcrest. The remaining two-thirds interest is basically held by Dr. Hubert MacNeill and his family members. There are some other shareholders but their holdings are small. The grounds for making a court ordered winding-up order are stated as being a loss of confidence by Wedge in the management of Hillcrest, violations of company law and by-laws of Hillcrest by the Board (the "MacNeills"), the exclusion of Wedge and his family from participation in the management of Hillcrest and fears of loss of his investment in Hillcrest through the action of the MacNeill group.

The action has dragged on for many years and at the present time the respondent (Hillcrest) is presenting its evidence. Wedge has now made an application to me for interim costs. The question is whether interim costs may be awarded under s. 25 of the Winding-up Act, and, if so, what evidence is relevant to the exercise of the court's discretion in awarding interim costs.

Section 25 of the Winding-up Act:

Section 25 reads as follows:

25. The court may make the order applied for or may dismiss the petition with or without costs, may adjourn the hearing conditionally or unconditionally, or may make any interim or other order, and upon the making of the order may, accord-

ing to its practice and procedure refer the proceedings for the winding up and delegate any powers of the court conferred by this Act to any officer of the court.

The petitioner, Wedge, states that s. 25 confers a broad jurisdiction upon the court which would allow it to award interim costs and, in particular, emphasizes the words "... may adjourn the hearing conditionally or unconditionally or may make an interim order or other order that it deems just ...".

The petitioner cites the case of *Attorney General of Canada v. Cardinal Insurance Company* (1983), 20 B.L.R. 9, where Justice White of the Ontario Supreme Court was considering conditions that he should attach to a winding-up order which would allow the company to preserve its rights against third parties. In *Cardinal*, s. 13 of the Winding-Up Act, R.S.C. 1970, c. W-10 is for all intent and purpose similar to s. 25 of the Prince Edward Island Act. Justice White interpreted the section he was dealing with broadly and inserted a condition in the winding-up order in order to do justice.

The respondent, however, refers to an earlier case from the Ontario Court of Appeal, namely, *Re R. J. Jowsey Mining Co. Ltd.* (1969), 2 O.R. 549. There Laskin, J.A. speaking for himself and MacKay, J.A. dealt with s. 258 of the Corporations Act, R.S.O. 1960, C-71, a section similar to s. 25, except that after the words "or may make any interim or other order" in our Act the Ontario Act stated "as is deemed just". However, I do not see the latter words as playing any part in the Jowsey decision. At p. 550 Laskin, J.A. stated:

I hold the view that s. 258, implementing s. 256 and being in turn supplemented by s. 259, is concerned with orders directed to a winding-up and not to an alternate remedy. The orders ('interim or other order as is deemed just') which may be made under s. 258 on a winding-up application (short of dismissal of the application) are ancillary orders, referable to a winding-up and which may result ultimately in dismissal or granting of the application according to whether the terms of such ancillary orders are or are not observed. I do not read s. 258 as empowering the Court to stay a winding-up application and introduce an entirely independent remedy that will operate outside of a prospective winding-up.

In both *Cardinal* and *Jowsey* conditions upon a winding-up order were under consideration. Whether or not a wide construction should be placed on s. 25, I do not see the *Jowsey* decision as being a detriment to the petitioner's position in the present matter. The present matter does not concern a final winding-up order nor does it relate to any type of winding-up order with conditions, nor is it related to any other remedy in substitution for a winding-up order.

In *Jowsey*, Laskin, J.A. stated that the section under review did provide "considerable scope for interim adjustments". At p. 551 he stated:

Its reference to 'other orders' must be given substance, and, having regard to the context of the section I would construe those words as pointing to orders in furtherance of or otherwise in connection with a present or prospective winding up order.

The order sought here is for interim costs. It is not an order for winding-up or any other type of independent remedy in substitution for the winding-up order. It can be more properly classified as an order in furtherance of a prospective winding-up order.

The respondent makes the further argument that the matter of interim costs is not provided for in s. 25 or in any other section of the Winding-up Act. Section 25, the respondent states, only refers to the granting of costs when an order of winding-up has been made or dismissed. I am unable to accept such a position. Merely because the Act deals with the award of costs when the application is allowed or dismissed does not mean that the court cannot award costs in any other instance. In fact, provision is made for the award of "any interim or other order".

Section 53(1) of the Supreme Court Act, R.S.P.E.I. 1988, Cap. s-10 reads:

53.(1) Subject to the express provision of any statute, the costs of and incidental to all proceedings authorized to be taken in court or before a judge are in the discretion of the court or judge, and the court or judge has full power to determine by whom and by what extent the costs shall be paid. [Emphasis added]

I do not see s. 25 of the Winding-up Act as expressly taking away the inherent authority of the court to award costs.

Section 2(1) of the Supreme court Act sets forth the jurisdiction of the Court:

2.(1) The Supreme Court of Prince Edward Island as constituted before this Act shall continue as a superior court of record having criminal and civil jurisdiction, with all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Prince Edward Island.

A similar provision in the Ontario Courts of Justice Act, S.O. 1984, c. 11, s. 2(1) was considered by Fitzgerald, L.J.S.C. in the case of *Hill v. Hill* (1988), 63 O.R. (2d) 618 and at p. 620 he stated:

This general jurisdiction has been broadly interpreted to include all powers necessary to do justice between the parties, and except where provided specifically to the contrary in valid legislation, the court's jurisdiction is unlimited and unrestricted in substantive law.

In *Cook v. IP* (1985), 52 O.R. (2d) 289, 22 D.L.R. (4th) 1, the Ontario Court of Appeal was dealing with a situation where the Ontario Health Insurance Plan (O.H.I.P.) refused to produce to the defendant in a personal injuries action the medical records of the plaintiff despite the plaintiff's authorization. The court stated that there was an inherent jurisdiction to ensure that all relevant documents were before it. While acknowledging that the Legislature could by statute prohibit the production of medical records, the court stated that such prohibition must be clear and unambiguous. Therefore, except where provided specifically to the contrary, the court's jurisdiction is unlimited and unrestricted in substantive law in civil matters.

One final reference to this point is found in the case of *Re Schmarr*, [1902] 1 Ch. 326 (C.A.). In that case an Act excepted certain situations from the power of the court to award costs. In effect the Act made no reference to certain situations while allowing the court to award costs in other situations. Vaughan Williams, L.J. at p. 328 said:

It is true that s. 80 authorizes the court to give costs only in cases other than those which are excepted. But then comes s. 5 of the Act of 1890, [similar to s. 53(1) of the Supreme Court Act] which in my opinion places these excepted costs in the discretion of the court or judge.

Stirling, L.J. at p. 329 had this to say:

It seems to me that s. 80 only abstains from conferring jurisdiction in such a case, but that it does not amount to a legislative prohibition of giving any costs even of proceeding in court in the excepted cases.

Section 25 of the Winding-up Act does not provide any clear statement of legislative intent to disallow the awarding of interim costs. In the circumstances the jurisdiction of the court has not been ousted, leaving the court with its inherent jurisdiction. Section 25 only abstains from conferring jurisdiction in a case where interim costs are asked for under s. 25 of the Winding-up Act. This leaves the court with its discretion to award costs in the present matter. I find that s. 25 allows the awarding of interim costs but, if it does not, it does not expressly exclude making an award leaving the court with its inherent discretion to do so.

In my opinion the matter can be resolved in the above manner. However, because the parties have dealt with the matter in a different manner I will deal with their presentations. The applicant's main submission was that the Winding-up Act permitted the awarding of costs and drew an analogy with the awarding of costs in a derivative action.

The applicant submitted that the principles applicable to derivative actions in the award of costs should be applied in the present matter. The respondent states that the derivative action cases have no application to a winding-up action. It is necessary to review the basis upon which costs have been awarded in a derivative action to determine if the same principles might be applicable here.

For a proper understanding of a derivative action one must start with the rule enunciated in the case of *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189 (Ch. D.). In *Pennington's Company Law*, 4th ed. (Butterworths, 1979) at p. 585 the author states:

The rule of law known as the rule in *Foss v. Harbottle* is one which has resulted from the refusal of the court to interfere in the management of a company at the instance of a minority of members who are dissatisfied with the conduct of the company's affairs by the majority or by the board of directors ...

The justification of the rule is the need to preserve the right of the majority to decide how the company's affairs will be conducted, and the ineffectiveness of any attempt by the court to interfere when its decision could be set aside by a resolution of the members.

Therefore, if a complaint is made against the directors of a company alleging that they have, for example, exhibited a lack of care or skill, the company is the proper plaintiff against the directors and in cases involving internal company disputes the company is also the correct plaintiff. *Foss*

v. Harbottle is the type of case resulting from a harm that has been done to the company and the resulting action is being brought to restrain the continuance of that harm.

In addition to the latter type of action, there is an alternative action where the individual shareholder seeks to enforce the company's right by suing in a representative form on behalf of himself and all other shareholders in the company against the wrongdoer. Again, referring to Pennington's Company Law at p. 588 the following appears:

In certain circumstances an individual member may bring an action to remedy a wrong done to his company or to compel his company to conduct its affairs in accordance with its constitution and the rules of law governing it, even though no wrong has been done to him personally, and even though the majority of his fellow members do not wish the action to be brought. The form of his action in these exceptional cases is peculiar, because the plaintiff does not sue in his own right alone, but on behalf of himself and all his fellow members other than those, if any, against whom relief is sought. If the member sues for relief against the company, it must, of course, be made a defendant; if he seeks to enforce a corporate claim against other persons, the company must still be joined as a co-defendant so that it may be bound by the judgment, and so that it may enforce any order giving relief against the substantive defendants.

The individual member's action in these exceptional cases may be described as representative, because it is brought on behalf of persons other than himself. When relief is sought against third parties for the company's benefit, the action may also be described as derivative, because the individual member sues to enforce a claim which belongs to the company, and his right to sue is derived from it. Representative suits were invented by the Court of Chancery during the eighteenth century and the early years of the last century to enable an action to be brought when the parties wronged by the defendant had the same or similar interests, but were so numerous that they could not conveniently join in the action as co-plaintiffs.

In Palmer's Company Law, 24th ed. Vol. 1 (Stevens & Sons, 1987), the following explanation of the derivative action is given at p. 976:

The plaintiff is seeking to enforce, not his own right of action, but a right of action vested in or derived from the company. Hence in modern discussions the action is referred to as a derivative action. The alleged wrongdoers are made the defendants in the action, but the company itself is joined as a nominal defendant in order that it can be bound by the judgment. If the action succeeds, any property or damages recovered go, not to the plaintiff, but to the company.

Similarly, in Gower's Principles of Modern Company Law, 4th ed. (Stevens & Sons, 1979), it is stated at p. 647:

The plaintiff shareholder is not acting as a representative of the other shareholders but as a representative of the company ... this type of action has been given the distinctive name of a 'derivative action', recognizing that its true nature is that the individual member sues on behalf of the company to enforce rights derived from it.

As pointed out by Professor Welling in his book *Corporate Law in Canada* (Butterworths, 1984), because the cause of action belongs to the corporation, the principle of corporate personality would ordinarily prevent the shareholder from suing. At p. 517 he states:

However, American judges (where the term derivative action appears to have originated) seem to have cut through the technical difficulty and looked at the economic reality of the situation. They noted that the shareholder is effectively prejudiced, in that any corporate loss is likely to be reflected in lower share prices or lower dividends. Consequently, they were able to identify a second-level right in the shareholder, 'derived' through the corporate entity, to sue the wrongdoer.

Turning to look at the type of wrongs that justify a derivative action, Gower's *Principles of Modern Company Law* sets forth the conditions that normally must be present. First, the wrong complained of must be such as to involve a fraud on the minority, which could not be validly waived by the company in a general meeting. Such conduct is illustrated in the following actions set forth at p. 648 in Gower:

- (a) Expropriation of the property of the company or, in some circumstances, that of the minority,
- (b) Breach of the directors' duties of subjective good faith, and
- (c) Voting for company resolutions not bona fide in the interest of the company as a whole.

A second condition that must be met to permit a derivative action to proceed is that it must be shown that the alleged wrongdoers control the company. A third condition is that the company must be made a defendant in the action. The reason being that as it is not the plaintiff, the action being in the shareholder's name, it must be a defendant so that the court might award judgment in its favour. Fourthly, the plaintiff shareholder should sue in a representative capacity on behalf of himself and all other members other than the real defendants. Fifthly, the right to bring a derivative action is afforded the individual member as a matter of grace.

These requirements for a derivative action are relevant when looking at the grounds for the successful bringing of a winding-up action, for, in many respects, a derivative action and a winding-up action are similar. While the applicant admits to the distinctiveness of the actions, one being a statutory remedy while the other is not, both actions are available when some wrongdoing has occurred. In such a case the plaintiff selects his action depending on the remedy that is sought.

As earlier stated, the applicant submits that the principles used in awarding costs in a derivative action can be equally applied to a winding-up action. The leading case relating to derivative actions and costs is that of *Wallersteiner v. Moir* (No. 2), [1975] 1 Q.B. 373, [1975] 1 All E.R. 849 (C.A.). In that case the court held that in a minority shareholder action it could order the company to indemnify the plaintiff against costs incurred in the action. Generally, the basis for that conclusion

was because the wrongdoer controlled the company the plaintiff's action was a representative one on behalf of the company for a wrong done to the company and consequently it was a proper exercise of judicial discretion based on the principles of equity (Lord Denning at p. 858). Lord Denning equated an award of costs with the indemnity to which a trustee is entitled from a cestui que trust who is sui juris. At p. 859 Lord Denning stated:

Seeing that if the action succeeds, the whole benefit will go to the company, it is only just that the minority shareholder should be indemnified against the costs he incurs on its behalf. If the action succeeds, the wrongdoing directors will be ordered to pay the costs; but if they are not recovered from him, they should be paid by the company ...

But what if the action fails? Assuming that the minority shareholder had reasonable grounds for bringing the action - that it was a reasonable and prudent course to take in the interest of the company - he should not himself be liable to pay the costs of the other side, but the company itself should be liable, because he was acting for it and not for himself. In addition, he should himself be indemnified by the company in respect of his own costs even if the action fails.

Lord Buckley also equated the position of a minority shareholder with that of a trustee who sues to protect his trust estate but has no personal interest in the relief sought. Lord Buckley found the minority shareholder's action was a procedural device to get over the difficulty that as a practical matter no authority could be obtained from the company to bring the action in its name. A similar conclusion can be reached in the case of a winding-up action that is not voluntary. The minority shareholder, as stated, is not entitled to the benefits that may come from the action, however, the expenses of making any recovery fall upon the minority shareholder. If the action fails, the minority shareholder is also at risk of paying the defendant's costs.

Lord Buckley came to the same conclusion as Lord Denning, that a minority shareholder should not be inhibited to bring justified actions merely because of the threat of costs. He, along with Lord Denning, stated that the minority shareholder plaintiff should apply to the court at the commencement of the action for an order that the company indemnify the plaintiff against the costs of the action, whether the action succeeds or not. The test they adopted was whether the action was reasonable and prudent in the company's interest.

The present matter has long escalated beyond the stage of the commencement of the action. However, I do not see that as an impediment to the application. In fact, I, at this stage of the action, am in a much better position to determine whether the action is reasonable than I would have been ten years ago. I see the procedure set forth in the Wallersteiner case as being open-ended. The court gave a wide latitude to the plaintiff by allowing the application to be made at the commencement of the action before any evidence was submitted. Further, Lord Denning emphasized that the application should not be allowed to escalate into a minor trial. It is not to be overlooked that in the Wallersteiner case the action had proceeded to judgment when the application for costs was made. It is also interesting to note that Lord Scarman stated that the plaintiff in the Wallersteiner case should have indemnity for costs already incurred as well as future costs.

In *Wallersteiner* the court's conclusion was that equity and the court's discretion were in favour of making the requested order. While the present action is based upon s. 25 of the Winding-up Act, equity and the court's discretion are also of prime importance. Nowhere in the Winding-up Act can be found a provision that indemnity cannot be awarded in the present circumstances. Section 25 specifically states that the court may make "any interim or other order".

In equity, the applicant here is in the same position as was the plaintiff in *Wallersteiner*. In the latter case it was held to be undesirable that a minority shareholder should be inhibited from taking an action, if it was found to be a reasonable one, merely because of the costs involved. The same reasoning should be applied to the present case. The petitioner, J. H. Richard Wedge, who petitions in his own name is in no different position from the minority shareholder who commenced the action in *Wallersteiner*. It may be that the present petitioner has a greater stake or interest than the minority shareholders in *Wallersteiner*, but the fact remains that he is a minority shareholder.

The petitioner should be treated as bringing the petition on behalf of the shareholders, of which there are more than those that are included in the Wedge family group. The respondent has strenuously argued that the petitioner's action, if successful, would result in the company's death, and that such a result cannot be said to be a benefit to anyone. I cannot accept such a position. If the respondent company is guilty of violation of company law and the by-laws of the company, or if the company through its directors, who constitute the majority interest, are guilty of misconduct, can it be said that there is a benefit to permit such conduct to continue? It would be an injustice to permit such to continue. The prevention of it would be of benefit to the company.

In considering the equity of the situation, the petitioner's position is that he is attempting to establish misconduct and is faced with a defendant who is using the company's resources to defend the petitioner's action. In doing so the company, through the majority shareholders, is in effect paying for the cost of the defence by using the petitioner's money. For every dollar spent in defence of the petitioner's action, approximately thirty-three cents is coming from what would ordinarily be the petitioner's share of the company's profit. On the other hand, the petitioner must fund his costs from his own resources. Such a situation cries for equitable relief.

A number of Canadian cases were cited where "derivative actions" were before the courts. As pointed out by Professor Welling in *Corporate Law in Canada*, Canadian courts have used the English and American terminology of derivative action to describe the statutory representative action brought by a complainant under one of the reformed Canadian corporate statutes. At p. 518 he states:

The Canadian courts are not talking about a shareholder's right derived through the corporation and limited by ordinary principles of corporate law; the Canadian courts are using the term 'derivative action' to describe a right derived from the statute, a right limited by extraordinary statutory rules.

I refer to Professor Welling's distinction mainly for the purpose of illustrating that the Canadian cases have dealt with rights that have specifically come from statutes. For example, in the cases of *Turner v. Mailhot* (1985), 50 O.R. (2d) 561, the Ontario Business Corporations Act, 1982, C-4, provided that in an action brought under the Act the court could make an order requiring the corporation or its subsidiary to pay "reasonable legal fees and any other costs reasonably incurred by the complainant in connection with the action". Because the cases cited dealt with statutory

based provisions, they are basically of little benefit to the present action. The common law approach in *Wallersteiner* is the appropriate authority to follow as guidance in awarding costs if the award were to depend on the analogy of a winding-up action being the same as a derivative action.

Following the latter approach, in considering whether the court has jurisdiction to award costs, either past or future, to the applicant, the factors that I find the applicant would show are first, that the action is one of a minority shareholder seeking redress for wrongs done to the company. Here the action is by a minority shareholder allegedly for wrongs done to the company and himself. The question of the alleged wrongs being justified is to be decided by the second factor, namely, whether the petitioner has a reasonable case. Without, in any way, deciding the issue I find that the applicant at this stage has a reasonable case. A third factor to be established would be to prove that the directors of the company refused to bring the action. There may not be any direct evidence on this point, however, it goes without question that the directors would never have approved of this action and, in fact, have fought it at every stage of the proceedings.

The applicant has suggested additional factors that should be considered, the first being that he has acted in good faith. This is one of the factors enunciated in the Ontario Business Corporations Act and is embodied, in my opinion, within the first factor I listed of the applicant having a reasonable case. A second factor set forth by the applicant, and obviously one that he is willing to prove, is that he is in financial difficulty. In *Wallersteiner* the financial difficulty of the minority shareholder was not expressed as being a factor in considering whether or not indemnity should be awarded. It was mentioned that the minority shareholder had reached the end of his financial tether, but that was not made a condition of any award. There is no question that in the present case a great deal of money has been expended. So long as the three factors that I have mentioned have been met, the financial status of the applicant should have no bearing.

In conclusion, based on the submission that an action for winding up is closely aligned with a derivative action insofar as the basis for the actions are clearly similar, I find that the court for equitable reasons can award interim costs in this matter. Such costs may be awarded under s. 25 of the Winding-up Act on the general basis that it is equitable in the circumstances to do so. Whether or not all of the factors that must be established in a derivative action have been proven or established in the present instance is not necessarily relevant. I see the principle enunciated in *Wallersteiner* as being the relief of an injustice by the granting of equity. Whether or not it is necessary to go through an exercise to equate a derivative action with a winding-up action, may not be necessary so long as the court is willing to recognize that equity must be done.

The respondent wished the court to set forth the factors relevant to the present motion. I have done so and conclude that there is no further evidence necessary on the question of jurisdiction. However, the respondent correctly points out that the question of what costs should be ordered to be paid has not been dealt with. This question relates not only to the present action but to other actions involving the same parties or companies of the principals involved. There is also the question of whether the order should apply to past or future costs or both. It will be necessary to hear from the parties further on this issue.

The respondent states that it would have evidence on the availability of another remedy. I cannot imagine what evidence it would have of an alternative remedy, although it might have a legal submission of such. In any event, I believe it is too late to make such a submission.

MACDONALD C.J.T.D.

Indexed as:
Hillcrest Housing Ltd. v. Wedge (P.E.I.C.A.)

Between
Hillcrest Housing Limited, Appellant, and
J.H. Richard Wedge, Mary Wedge, Paul Wedge, Brian Wedge,
Richard H. Wedge, Michelle Strain, and Nicolle Morrison,
Respondents

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94 D.L.R. (4th) 165

100 Nfld. & P.E.I.R. 355

10 C.P.C. (3d) 298

34 A.C.W.S. (3d) 571

Action No. AD-0351

Prince Edward Island Supreme Court - Appeal Division

Carruthers C.J.P.E.I., Mitchell and Mullally JJ.A.

Heard: May 4, 1992

Judgment: June 29, 1992

(21 pp.)

Company law -- Winding-up legislation -- Interim order -- Costs -- Interim costs.

Trial judge awarded interim costs on a winding-up petition under s. 25 of the Winding Up Act. Jurisdiction of the Court to award interim costs questioned. Court of Appeal held that the Court does have jurisdiction to award interim costs. Held that an order for interim costs is in the nature of an order in furtherance of or otherwise in connection with a present or winding-up order.

Cases cited:

Ramawad v. The Minister of Employment and Immigration, [1978] 2 S.C.R. 375; Re R. J. Jowsey Mining Co. Ltd., [1969] 2 O.R. 549; Attorney General of Canada v. Cardinal Insurance Co. (1982), 20 B.L.R. 9; Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc. et al (1985), 51 O.R. (2d) 23; Re Ontario Energy Board (1985), 51 O.R. (2d) 333; Township of Bruce v. Thornburn et al (1986), 57 O.R. (2d) 77.

Statutes cited:

Winding-up Act, R.S.P.E.I. 1988, Cap. W-5; Immigration Act, R.S.C. 1970, c. I-2; Winding-up Act (Canada); The Consolidated Hearings Act, 1981; Courts of Justice Act, 1984 (Ont.), c. 11.

Kenneth L. Godfrey, for the Appellant.
David W. Hooley, for the Respondents.

CARRUTHERS C.J.P.E.I. (dismissing the appeal):-- This appeal involves the jurisdiction of the Court to award interim costs under s. 25 of the Winding-Up Act, R.S.P.E.I. 1988, Cap. W-5.

BACKGROUND

On August 17, 1982, Richard Wedge presented a petition under the Winding-Up Act, *supra*, to wind up the appellant, Hillcrest Housing Limited. The hearing of the petition has not been completed as of this date, but it is substantially completed.

On May 17, 1991, the appellant filed a notice of motion seeking, among other things, an order conditionally adjourning the proceeding.

On May 28, 1991, two of the respondents, namely Richard Wedge and Mary Wedge, filed a notice of motion seeking an order for interim costs of the proceedings pursuant to s. 25 of the Winding Up Act. The motion was supported by an affidavit of Brian Wedge, one of the respondents. The affidavit of Brian Wedge was also in response to the appellant's motion for a conditional adjournment. The respondents, therefore, sought an order for interim costs either as a separate order or as a condition of any adjournment that the Court might grant.

The trial judge allowed the appellant's motion and granted a conditional adjournment but he did not make costs a condition of the adjournment.

The trial judge then heard the respondents' motion for interim costs on June 26, 1991. The appellant submitted that the Court does not have any jurisdiction to grant interim costs on a winding up petition. The trial judge took the jurisdictional issue under advisement and gave a decision on January 22, 1992, whereby he held that the Court does have jurisdiction to award such costs.

The appellant now appeals from that decision and submits that the trial judge erred in law in holding that the Court has jurisdiction to award such interim costs.

A question arose at the commencement of the hearing of this appeal as to whether or not the Appeal Division should entertain this appeal before the conclusion of the hearing of the petition. The Court decided has never been dealt with in this jurisdiction before.

ISSUES

The appellant has advanced several grounds of appeal but the crucial issue is whether the provisions of s. 25 of the Winding-Up Act confer jurisdiction on the Court to award interim costs on a winding up petition.

Section 25 of the Winding-Up Act states as follows:

- (25) The court may make the order applied for or may dismiss the petition with or without costs, may adjourn the hearing conditionally or unconditionally, or may make any interim or other order, and upon the making of the order may, according to its practice and procedure refer the proceedings for the winding-up and delegate any powers of the court conferred by this Act to any officer of the Court.

The appellant submits that the provisions of s. 25 of the Winding-Up Act do not give the Court any jurisdiction to award costs prior to a determination of the merits of the case. The respondents, on the other hand, submit that the provisions of s. 25 of the Winding-Up Act give the Court a broad jurisdiction which includes the power to award interim costs.

Counsel have been unable to cite to the Court any authorities where such a provision as s. 25 has been used to grant the relief sought by the respondents. This does not mean, however, that s. 25 of the Winding-Up Act does not contain such jurisdiction.

The language of s. 25 of the Winding-Up Act would appear to confer a broad jurisdiction on the Court. The section may be broken down as follows: The Court may,

- (1) make the order applied for (i.e. a winding-up order) with costs;
- (2) make the order applied for (i.e. a winding-up order) without costs;
- (3) dismiss the petition with costs;
- (4) dismiss the petition without costs;
- (5) adjourn the hearing conditionally;
- (6) adjourn the hearing unconditionally;
- (7) make any interim order;
- (8) make any other order;

And upon the making of the order, according to the practice and procedure, may

- (9) refer the proceedings for the winding-up to any officer of the Court;
- (10) delegate any powers of the court conferred by the Act to any officer of the court.

It is clear that the Court does have jurisdiction to award costs in certain instances on a winding-up application. The issue to be resolved is the scope or extent of this jurisdiction. Does it extend to an award of interim costs?

The appellant submits that costs can only be awarded when an order of winding-up has been granted or dismissed. It submits that the Legislature specifically addressed the issue of costs by stating that the petition may be allowed or dismissed with or without costs and, therefore, the court does not have any further jurisdiction in the matter of costs on a winding-up application. It also submits that the maximum "*expressio unius est exclusio alterius*" applies and relies on the decision

of Mr. Justice Pratte of the Supreme Court of Canada in *Ramawad v. The Minister of Employment and Immigration*, [1978] 2 S.C.R. 375 as authority for its submission.

The trial judge did not accept these submissions. He states on p. 4 of his judgment as follows:

The respondent (now the appellant) makes the further argument that the matter of interim costs is not provided for in s. 25 or in any other section of the Winding-Up Act. Section 25, the respondent (now the appellant) states, only refers to the granting of costs when an order of winding up has been made or dismissed. I am unable to accept such a position. Merely because the Act deals with the award of costs when the application is allowed or dismissed does not mean that the court cannot award costs in any other instance. In fact, provision is made for the award of 'any interim or other order'.

The wording of s. 258 of the Corporations Act, R.S.O. 1960, c. 71, which is almost identical to the wording of s. 25 of the Winding-Up Act, was considered by the Ontario Court of Appeal in *R. J. Jowsey Mining Co. Ltd.*, [1969] 2 O.R. 549. This case deals with an application for a winding-up order. The trial judge concluded that it was just and equitable that Jowsey should be wound up. He held that there was no middle ground and the application for winding up had to be either granted or dismissed. His decision was appealed and the scope of the Court's power on a winding up application was considered. Mr. Justice Laskin (as he then was) states on p. 550:

During the hearing of the appeal a question was raised as to the scope of the Court's power on a winding-up application, and particularly, whether what I may for convenience call a regulatory or disciplinary order might be made against Jowsey and its directors, or whether the power to adjourn the application (conferred by s. 258) conditionally or unconditionally, could be exercised to make the adjournment sine die.

Mr. Justice Laskin was of the view that s. 258 (similar to s. 25 P.E.I. Act) was concerned with orders directed to a winding-up and not to an alternate remedy. He held that s. 258 did not empower the Court to stay a winding-up application and introduce an entirely independent remedy that would operate outside of a prospective winding-up. He continues on pp. 551-552 as follows:

Reference may aptly be made to s. 278 which permits the Court 'at any time during a winding up' to stay the proceedings altogether or for a limited time upon terms. Although I do not think that an independent remedy can be substituted, s. 258 does provide considerable scope for interim adjustments or directions. Its reference to 'other orders' must be given substance, and, having regard to the context of the section I would construe those words as pointing to orders in furtherance of or otherwise in connection with a present or prospective winding-up order.

Despite the more than century old prototype of our s. 258 in English legislation, we were not referred to any case in which the words 'other order' were construed to permit a remedy outside of the compass of an immediate or prospective winding-up order. Assuming, however, that the words should be read literally and detached from what I think is their context, I am not persuaded that the present case

is one where a substitute or alternative remedy should be prescribed. Any possibility of the Court becoming a superior board of directors should be avoided.

The appellant relies on the judgment of Mr. Justice Laskin for a limited scope for s. 25 of the Winding-Up Act. It submits that the words 'interim or other orders' should only be interpreted to mean orders relating to the conduct of the affairs of the company which, if obeyed, could result in the dismissal of the petition and, if disobeyed, could result in it being granted. The appellant further submits that the respondents' application for interim costs is not directed to the conduct of the affairs of the company, but rather to the conduct of the litigation, and, therefore, is outside the scope of s. 25 of the Winding-Up Act.

I do not read the Jowsey case as restricting the Court's jurisdiction to award interim costs. Mr. Justice Laskin was referring to alternate remedies to a winding-up order. He refers to an entirely independent remedy that would operate outside of a prospective winding-up. He expresses the view that such orders are outside the scope of the Court's jurisdiction but he does agree that orders in furtherance of or otherwise in connection with a present or prospective winding-up order are within the Court's jurisdiction. I would find it difficult to classify an order for interim costs as an alternate remedy to a winding-up order or as an entirely independent remedy that would operate outside of a prospective winding-up. I agree with the trial judge that an order for interim costs would be more in the nature of an order in furtherance of or otherwise in connection with a present or winding-up order and, therefore, within the Court's jurisdiction. It is true that the provisions of s. 25 of the Winding-Up Act do not expressly state that the Courts may award interim costs but this, in itself, does not amount to a legislative prohibition which would prevent the Court from awarding interim costs. The Ramawad decision involved the validity of a deportation order and questioned the ability of a Minister of the Crown to delegate powers vested in him to persons not mentioned in the legislation. Mr. Justice Pratte states on p. 381:

In *R. v. Harrison*, [1977] 1 S.C.R. 238 my brother Dickson, speaking for the court said, at p. 245, that 'a power to delegate is often implicit in a scheme empowering a Minister to act'. Whether such power exists however or, in other words, whether it may be presumed that the act will be performed not by the Minister but by responsible officers in his Department will depend on the intent of Parliament as it may be derived from amongst other things, the language used in the statute as well as the subject matter of the discretion entrusted to the Minister.

Mr. Justice Pratte then went on to hold that the general framework of the Act and of the regulations was clear evidence of Parliament's intent that the discretionary power entrusted to the Minister was to be exercised by him unless there was any statutory authority to the contrary. He then held that the provisions of s. 67 of the Immigration Act, R.S.C. 1970, c. I-2 denied the Minister the right to delegate the powers vested in him to people not mentioned in s. 67. Section 67 reads:

- (67) The Minister may authorize the Deputy Minister or the Director to perform and exercise any of the duties, powers and functions that may be or are required to be performed or exercised by the Minister under this Act or the regulations, and any such duty, power or function performed or exercised by the Deputy Minister or the Director under the authority of the Minister shall be deemed to have been performed or exercised by the Minister.

I do not agree with the appellant that the foregoing decision of Mr. Justice Pratte now prevents this Court from awarding interim costs to the respondents. Section 67 of the Immigration Act clearly sets forth that the Minister may only authorize the Deputy Minister or the Director to do certain things. There is no indication at all that the Minister may delegate these duties, powers and functions to any one else. On the other hand, the legislature, pursuant to s. 25 of the Winding-up Act, bestowed upon the Court the jurisdiction to make any interim order and to make any other order and I am satisfied that this jurisdiction encompasses the power to make an award of interim costs in the circumstances of this case. I am of the opinion that such an interpretation is well within the scope of the interpretation that Mr. Justice White of the Ontario Supreme Court gave the provisions of s. 13 of the Winding-up Act (Canada), which are similar to s. 25 of the Winding-up Act (P.E.I.), in *Attorney General of Canada v. Cardinal Insurance Co.* (1982), 20 B.L.R. 9 where he states on p. 12:

Now in my respectful opinion, s. 232 of the Business Corporations Act of Ontario is fair and a proviso inspired by that section would cover the failure of justice that I deem exists if I merely make an order winding-up the company. I intend to interpret the words 'or other order that it deems just' as found in s. 13 of the Winding-Up Act broadly enough for me to in effect grant the relief in the way of the condition for the benefit of the shareholders of Cardinal Insurance Company that I could grant if I were dealing with the winding-up of a company to which the Business Corporations Act of Ontario had application. Of course, s. 232 of that Act has no application whatsoever to the proceedings before me. That Act, however, does provide for me a guide of what probably is the justice of the matter.

The appellant also relies on the following three decisions of the Ontario High Court of Justice, Divisional Court, for the proposition that the Court has no jurisdiction to award interim costs.

Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc. et al (1985), 51 O.R. (2d) 23.

Re Ontario Energy Board (1985), 51 O.R. (2d) 333.

Township of Bruce v. Thornburn et al (1986), 57 O.R. (2d) 77.

These three cases all deal with costs. The first two deal with the power of boards and tribunals to award interim costs to enable intervenors to appear. The Consolidated Hearings Board held in *Save the Valley* case that it had jurisdiction to order the applicant to fund, by way of an award of costs in advance, the participation of two citizens groups in the proceedings before it. The appellant submitted that the Board did not have any jurisdiction to award money in advance under the guise of costs. The parties agreed that the jurisdiction to award costs as set out in the statute was the only basis upon which the impugned orders could be made.

Section 7 of The Consolidated Hearings Act, 1981 provided:

7(3) Subject to this Act and the regulations, a joint board may determine its own practice and procedure.

- (4) A joint board may award the costs of a proceeding before the joint board.
- (5) A joint board that awards costs may order by whom and to whom the costs are to be paid.
- (6) A joint board that awards costs may fix the amount of the costs or direct that the amount be taxed, the scale according to which they are to be taxed and by whom they are to be taxed.

Mr. Justice Holland noted that the words used to authorize the Board to award costs were remarkably similar to those in s. 141(1) of the Courts of Justice Act, 1984 (Ont.), c. 11, from which the Courts derive their costs jurisdiction. He states on p. 30:

As I turn to the issues to be addressed I do so with the acceptance that the language employed by the Legislature is clear and unambiguous. It is of significance that the words there used to authorize the Board to award costs are remarkably similar to those in s. 141(1) of the Courts of Justice Act, 1984 (Ont.), c. 11, from which courts derive their 'costs' jurisdiction. In s. 7 of the Consolidated Hearings Act, 1981, no words appear to lend credence to the suggestion that the Legislature intended to grant to the Board any special powers beyond that traditionally exercised by courts and it would require very clear and cogent language, embodied in the legislation, to do so. Under this Act, the tribunal's power over costs cannot exceed that of the Supreme Court of Ontario. The Legislature may, of course, give such powers to a tribunal, but in my opinion, it has not done so in the Consolidated Hearings Act, 1981, s. 7.

Mr. Justice Holland then deals with the legal meaning of costs and states on pp. 31-32:

A point of commencement must be that 'costs' as used in the legal sense, is a word having a well-defined meaning. From the earliest times, it has been recognized that the power to award 'costs' must be found in a statute.

The characteristics of costs developed over many years are:

- (1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.
- (2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.
- (3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.
- (4) They are not payable for the purpose of assuring participation in the proceeding.

He then states that there are special cases where an award of costs has been made without regard to one or some of these characteristics. He refers to the following: matrimonial causes, trustee cases, appeals in forma pauperis or by special leave and security for costs.

Mr. Justice Holland then concluded that the Board did not have the jurisdiction to make the impugned orders as its discretion to award costs did not extend that far. He states on p. 43:

The Board in the application before us clearly attempted to fund intervention in advance of a hearing and before the Board has had an opportunity to determine the value of the contributions to be made by the intervenor to the issue before it. While the Board has a broad discretion in its power to award costs, I am satisfied that this Board has not awarded 'costs' here, but rather has attempted to compel the applicant to provide intervenor funding, something which the Board has no jurisdiction to do.

It is for the Legislature, in clear language, to so empower a board or tribunal, should it be found desirable as a matter of further policy.

Mr. Justice Holland also gave the decision in the *Re Ontario Energy Board* case and he states on p. 336:

For reasons given in the *Hamilton-Wentworth* decision, delivered concurrently this day, which apply equally to the issue in this stated case, the answer is in the negative. The board cannot lawfully order interim costs to be so paid.

What the stated case contemplates, if lawful, is that the Ontario Energy Board would have the power, under the guise of exercising its 'costs' jurisdiction, to provide intervenor funding in advance of a hearing, under certain circumstances, and for the purpose of ensuring contribution to a full and fair hearing of the issue before it.

These two cases can be distinguished from this case in at least two instances: one, is the content of the legislation in question, and, secondly, is the fact that the case now before the Court cannot be classified as a case of intervenor funding. The appellant submits that in reality this appeal is also concerned with intervenor funding or as counsel for the appellant called it "litigation funding". It is my understanding that the intervenor funding was granted to the intervenors regardless of the outcome of the case whereas the interim costs sought by the respondents in this case are not final and will be subject to whatever decision the trial judge makes on costs when he disposes of the winding-up petition. I do not agree that the term "litigation funding" is appropriate terminology when one considers the background of this case and what is really taking place.

The plaintiff in the *Township of Bruce* case sought a declaration from the Court identifying the subscribers of a municipal telephone system or declaring that the subscribers could not be identified. On application, an order was made adding certain parties as defendants to represent the unidentified subscribers and directing that all reasonable costs incurred by them should be paid by the system, regardless of the outcome. The order was appealed and one of the issues on appeal was whether the local judge was right in ordering that the reasonable incurred and future costs of the Bryce group should be paid by the BMTS upon final judgment in the action, regardless of the outcome. The local judge, in awarding the costs, held that the case was analagous to a trustee situation, which was found by Mr. Justice Holland in the *Save the Valley* case to be an exception to the general rule. Mr. Justice Southey held for the Divisional Court that the case did not fall within the trustee cases or any of the other exceptions referred to in the decision of the Divisional Court in *Save the Valley* case and that the local judge had no jurisdiction to make the order he made.

The Township of Bruce case can also be distinguished from this case as well as it did not deal with statutory provisions similar to s. 25 of the Winding-up Act.

I, therefore, am of the opinion that these three decisions of the Ontario Divisional Court do not assist the appellant in this case. I would, therefore, dismiss this ground of appeal.

I do not consider it necessary to deal with the other grounds of appeal concerning jurisdiction to award interim costs since I have found that s. 25 of the Winding-up Act bestows jurisdiction upon the Court to award interim costs on a winding-up proceeding.

The appellant also advances two other grounds of appeal. It submits that:

- (1) the trial judge erred in law in holding that the petitioners (respondents) have a reasonable case prior to the respondent (appellant) leading evidence on the motion; and
- (2) the trial judge erred in law in holding that it is too late for the appellant to make submissions as to the existence of an alternative remedy.

The trial judge set forth several factors for consideration when deciding whether or not the Court should exercise its jurisdiction to grant interim costs. One of these factors is whether the respondents have a reasonable case. The trial judge, at p. 17 of his decision, dealt with this factor as follows:

Without, in any way, deciding the issue I find that the applicant at this stage has a reasonable case.

The appellant now submits that the trial judge erred in deciding this factor without giving it an opportunity to call evidence on the factor. While it may have been preferable for the trial judge to have given the appellant an opportunity to call further evidence, I am not satisfied that the appellant has been prejudiced by this failure to do so. This case has been before the Court for a number of years and its history to date clearly illustrates that the trial judge was in a position to determine whether the respondents had a reasonable case or not. The evidence had practically all been presented to the trial judge at the time of the motion and he has been involved in a lengthy non-suit motion as well. One obviously does not have to hear all the evidence in order to determine whether a reasonable case exists or not. I would dismiss this ground of appeal.

The appellant submits that it should have an opportunity to present evidence to show that the respondents do not have a reasonable case in that there were more appropriate remedies than a winding-up action available to the respondents. The trial judge held on pp. 18-19 of his decision as follows:

The respondent states that it would have evidence on the availability of another remedy. I cannot imagine what evidence it would have of an alternative remedy, although it might have a legal submission of such. In any event, I believe it is too late to make such a submission.

The appellant has not placed anything before the Appeal Division which would lead me to conclude that the trial judge erred in reaching such a conclusion and I would, therefore, dismiss this ground of appeal.

I, therefore, dismiss the appeal. Counsel may speak to the Court on the matter of costs on the appeal if they wish to do so.

CARRUTHERS C.J.P.E.I.

We concur: MITCHELL and MULLALLY JJ.A.

Tab 7

(2) If inspectors have been appointed, the depository under subsection (1) shall be one approved by them.

Approval
of bank by
inspectors

(3) Such deposit shall not be made in the name of the liquidator individually, but a separate deposit account shall be kept of the money belonging to the corporation in his name as liquidator of the corporation and in the name of the inspectors, if any, and such money shall be withdrawn only by order for payment signed by the liquidator and one of the inspectors, if any.

Separate
deposit
account
to be kept;
withdrawal
from
account

(4) At every meeting of the shareholders of the corporation, the liquidator shall produce a pass-book, or statement of account showing the amount of the deposits, the dates at which they were made, the amounts withdrawn and the dates of withdrawal, and mention of such production shall be made in the minutes of the meeting, and the absence of such mention is admissible in evidence as *prima facie* proof that the pass-book or statement of account was not produced at the meeting.

Liquidators
to produce
bank
pass-book

(5) The liquidator shall also produce the pass-book or statement of account whenever so ordered by the court upon the application of the inspectors, if any, or of a shareholder of the corporation. R.S.O. 1970, c. 53, s. 237.

Idem

229. For the purpose of proving claims, sections 25, 26 and 27 of the *Assignments and Preferences Act* apply with necessary modifications, except that where the word "judge" is used therein, the word "court" as used in this Act shall be substituted. R.S.O. 1970, c. 53, s. 238.

Proving
claim
R.S.O. 1980,
c. 33

230. Upon the application of the liquidator or of the inspectors, if any, or of any creditors, the court, after hearing such parties as it directs to be notified or after such steps as the court prescribes have been taken, may by order give its direction in any matter arising in the winding up. R.S.O. 1970, c. 53, s. 239.

Application
for direction

231.—(1) The court may at any time after the commencement of the winding up summon to appear before the court or liquidator any director, officer or employee of the corporation or any other person known or suspected to have in his possession any of the estate or effects of the corporation, or alleged to be indebted to it, or any person whom the court thinks capable of giving information concerning its trade, dealings, estate or effects.

Examination
of persons
as to estate

(2) Where in the course of the winding up it appears that a person who has taken part in the formation or promotion of the corporation or that a past or present director, officer, employee, liquidator or receiver of the corporation

Damages
against
delinquent
directors,
etc.

Idem

(5) The liquidator shall also produce the pass-book or statement of account whenever so ordered by the court upon the application of the inspectors, if any, or of a shareholder of the corporation. R.S.O. 1980, c. 54, s. 228 (2-5).

Proving claim
R.S.O. 1980,
c. 33

227. For the purpose of proving claims, sections 23, 24 and 25 of the *Assignments and Preferences Act* apply with necessary modifications, except that where the word "judge" is used therein, the word "court" as used in this Act shall be substituted. R.S.O. 1980, c. 54, s. 229.

Application
for direction

228. Upon the application of the liquidator or of the inspectors, if any, or of any creditors, the court, after hearing such parties as it directs to be notified or after such steps as the court prescribes have been taken, may by order give its direction in any matter arising in the winding up. R.S.O. 1980, c. 54, s. 230.

Examination
of persons
as to
estate

229.—(1) The court may at any time after the commencement of the winding up summon to appear before the court or liquidator any director, officer or employee of the corporation or any other person known or suspected to have in his possession any of the estate or effects of the corporation, or alleged to be indebted to it, or any person whom the court thinks capable of giving information concerning its trade, dealings, estate or effects.

Damages
against
delinquent
directors,
etc.

(2) Where in the course of the winding up it appears that a person who has taken part in the formation or promotion of the corporation or that a past or present director, officer, employee, liquidator or receiver of the corporation has misapplied or retained in his own hands, or become liable or accountable for, property of the corporation, or has committed any misfeasance or breach of trust in relation to it, the court may, on the application of the liquidator or of any creditor, shareholder or contributory, examine the conduct of that person and order him to restore the property so misapplied or retained, or for which he has become liable or accountable, or to contribute such sum to the property of the corporation by way of compensation in respect of such misapplication, retention, misfeasance or breach of trust, or both, as the court thinks just. R.S.O. 1980, c. 54, s. 231.

Proceedings
by
shareholders

230.—(1) Where a shareholder of the corporation desires to cause any proceeding to be taken that, in his opinion, would be for the benefit of the corporation, and the liquidator, under the authority of the shareholders or of the inspectors, if any, refuses or neglects to take such proceedings after being required so to do, the shareholder may obtain an order of the court authorizing him to take such proceeding in the name of the liquidator or corporation, but at his own expense and risk, upon such terms and conditions as to indemnity to the liquidator or corporation as the court prescribes.

DUTIES AND POWERS OF ASSIGNEE AND INSPECTOR.

20.—(1) It shall be the duty of the assignee immediately to inform himself, by reference to the assignor and his records of account, of the names and residences of the assignor's creditors, and, within five days from the date of the assignment, to call a meeting of the creditors for the appointment of inspectors and the giving of directions with reference to the disposal of the estate by mailing prepaid and registered to every creditor known to him a notice calling the meeting to be held in his office or some other convenient place to be named in the notice not later than twelve days after the mailing thereof, and by advertisement in the *Ontario Gazette*. Duty to call meeting of creditors. Notice thereof.

(2) All other meetings to be held shall be called in like manner. R.S.O. 1914, c. 134, s. 21. Other meetings.

21.—(1) The creditors at any meeting may appoint one or more inspectors who shall superintend and direct the proceedings of the assignee in the management and winding up of the estate, and may also at any subsequent meeting for that purpose revoke the appointment of any inspector. Appointment of inspectors. Revocation.

(2) Where the appointment of an inspector is revoked or where an inspector dies, resigns his office or leaves Ontario the creditors at any meeting may appoint another inspector to take his place. Appointment of another inspector.

(3) An inspector shall not directly or indirectly purchase any part of the stock-in-trade, debts or other assets of the assignor. R.S.O. 1914, c. 134, s. 22. Inspector not to purchase assets. 38 V. (Dom.) c. 16, s. 35.

22.—(1) In case of a request in writing signed by a majority of the creditors having claims duly proved of \$100 and upwards, computed according to the provisions of section 24, it shall be the duty of the assignee, within two days after receiving such request, to call a meeting of the creditors for a day not later than twelve days after he receives the request, and in case of default the assignee shall incur a penalty of \$25 for every day after the expiration of the time limited for calling the meeting until it is called. Meeting of creditors by request of majority thereof. Penalty for not calling meeting.

(2) In case a sufficient number of creditors do not attend the meeting mentioned in section 20, or fail to give directions with reference to the disposal of the estate, the judge may give such directions as he may deem necessary for that purpose. R.S.O. 1914, c. 134, s. 23. Power of judge.

23. At any meeting of creditors the creditors may vote in person or by proxy authorized in writing, but no creditor whose vote is disputed shall be entitled to vote until he has filed with the assignee an affidavit in proof of his claim, stating the amount and nature thereof. R.S.O. 1914, c. 134, s. 24. Voting at meeting.

Scale of
votes.

24.—(1) Subject to the provisions of section 10 all questions at meetings of creditors shall be decided by the majority of votes, and for such purpose the votes of creditors shall be calculated as follows :

For every claim of or over \$100 and not exceeding \$200,
one vote.

For every claim of or over \$200 and not exceeding \$500,
two votes.

For every claim of or over \$500 and not exceeding \$1,000,
three votes.

For every additional \$1,000 or fraction thereof, one vote.

Upon claims
acquired
after
assignment.

(2) No person shall be entitled to vote on a claim acquired after the assignment unless the entire claim is acquired, but this shall not apply to persons acquiring notes, bills or other securities upon which they are liable.

Casting vote.

(3) In case of a tie the assignee or, if there are two assignees, the assignee nominated for that purpose by the creditors, or by the judge if none has been nominated by the creditors, shall have a casting vote.

Valuing
securities.

(4) Every creditor in his proof of claim shall state whether he holds any security for his claim or any part thereof; and if such security is on the estate of the assignor, or on the estate of a third person for whom the assignor is only secondarily liable, he shall put a specified value thereon and the assignee, under the authority of the creditors, may either consent to the creditor ranking for the claim after deducting such valuation, or he may require from the creditor an assignment of the security at an advance of ten per centum upon the specified value to be paid out of the estate as soon as the assignee has realized such security; and in such case the difference between the value at which the security is retained and the amount of the gross claim of the creditor shall be the amount for which he shall rank and vote in respect of the estate.

Right to re-
value in cer-
tain cases.

(5) If a creditor's claim is based upon a negotiable instrument upon which the assignor is only indirectly or secondarily liable, and which is not mature or exigible, such creditor shall be considered to hold security within the meaning of this section, and shall put a value on the liability of the person primarily liable thereon as being his security for the payment thereof; but after the maturity of such liability and its non-payment, he shall be entitled to amend his claim and revalue his security.

When credi-
tor holding
security fails
to value
same.

(6) Where a person claiming to be entitled to rank on the estate holds security for his claim, or any part thereof, of such a nature that he is required by this Act to value the same, and he fails to value such security the judge, upon

summary application by the assignee or by any other person interested in the estate, of which application at least three days' notice shall be given to the claimant, may order that, unless a specified value be placed on such security and notified in writing to the assignee within a time to be limited by the order, the claimant shall, in respect of the claim, or the part thereof for which the security is held, in case the security is held for part only of the claim, be wholly barred of any right to share in the proceeds of such estate.

Powers of judge thereon.

(7) If a specified value is not placed on such security, and notified in writing to the assignee according to the exigency of the order, or within such further time as the judge may by subsequent order allow, the claim, or the part, as the case may be, shall be wholly barred as against such estate but without prejudice to the liability of the assignor therefor.

Consequences of neglect of order.

Liability of assignor.

R.S.O. 1914, c. 134, s. 25.

PROOF OF CLAIM.

25.—(1) Every person claiming to be entitled to rank on the estate shall furnish to the assignee particulars of his claim proved by affidavit and such vouchers as the nature of the case admits of.

Proof of claim.

(2) Where a person claiming to be entitled to rank on the estate does not, within a reasonable time after receiving notice of the assignment and of the name and address of the assignee, furnish to the assignee satisfactory proofs of his claim as provided by this and the preceding sections, the judge upon summary application by the assignee or by any other person interested in the estate, of which application at least three days' notice shall be given to the claimant, may order that unless the claim be proved to the satisfaction of the judge within a time to be limited by the order, the claimant shall no longer be deemed a creditor of the estate and shall be wholly barred of any right to share in the proceeds thereof.

Limiting time for proof of claim.

(3) If the claim is not so proved within the time so limited, or within such further time as the judge may by subsequent order allow, the same shall be wholly barred, and the assignee shall be at liberty to distribute the proceeds of the estate as if no such claim existed, but without prejudice to the liability of the assignor therefor.

Consequences of neglect to prove claim.

(4) The two next preceding subsections shall not interfere with the protection afforded to assignees by section 51 of *The Trustee Act*.

Not to interfere with Rev. Stat. c. 150.

(5) A person whose claim has not accrued due shall nevertheless be entitled to prove under the assignment and to vote at meetings of creditors, but in ascertaining the amount of any such claim a deduction for interest shall be made for

Creditor may prove claim not due.

the time which has to run until the claim becomes due. R.S.O. 1914, c. 134, s. 26.

Contestation
of claim.

26.—(1) At any time after the assignee receives from any person claiming to be entitled to rank on the estate proof of his claim notice of contestation of the claim may be served by the assignee upon the claimant.

Limitation.

(2) Within thirty days after the receipt of the notice, or within such further time as the judge may allow, an action shall be brought by the claimant against the assignee to establish the claim, and a copy of the writ in the action, or of the summons in case the action is brought in a division court, shall be served on the assignee; and in default of such action being brought and writ or summons served within the time limited the claim to rank on the estate shall be forever barred.

Service on
solicitor of
assignee.

(3) The notice by the assignee shall contain the name and place of business of a solicitor upon whom service of the writ or summons may be made; and service upon him shall be deemed sufficient service. R.S.O. 1914, c. 134, s. 27.

Right of
assignee
to compel
plaintiff to
proceed
with action
against
assignor.

(4) Where prior to the assignment an action has been commenced against the assignor and is pending at the time of the assignment, the assignee may, by notice served upon the plaintiff in such action, require him to proceed, and he shall be bound to proceed in that action to establish his claim, instead of bringing an action against the assignee as provided for by subsection 2 of this section, and the plaintiff may thereupon apply to the court in which the action is brought for an order adding the assignee as a party defendant in the action, and the assignee may be so added upon such terms as to the costs which may be subsequently incurred as the court or a judge thereof, or the judge making the order, shall direct. 1914, c. 21, s. 29.

Procedure
where
assignee
is satisfied
but assignor
desires to
dispute.

27.—(1) If the assignee is satisfied with the proof adduced in support of a claim, but the assignor disputes the same, the assignor shall do so by notice in writing to the assignee, stating the grounds upon which he disputes the claim; and such notice shall be given within ten days after the assignor is notified in writing by the assignee that he is satisfied with the proof adduced, and not afterwards unless by leave of the judge.

Where
assignee does
not require
action to be
brought.

(2) If upon receiving such notice of dispute the assignee does not deem it proper to require the claimant to bring an action to establish his claim he shall notify the assignor in writing of the fact, and the assignor may thereupon, and within ten days of his receiving such notice, apply to the judge for an order requiring the assignee to serve a notice of contestation.

(3) The order shall be made only if, after notice to the assignee, the judge is of opinion that there are good grounds for contesting the claim. Conditions.

(4) If the assignor does not make such an application the decision of the assignee shall, as against him, be final and conclusive. Where decision of assignee shall be final.

(5) If upon the application the claimant consents in writing the judge may, in a summary manner, decide the question of the validity of the claim. Decision of judge on validity of claim.

(6) If an action is brought by the claimant against the assignee the assignor may intervene at the trial, either personally or by counsel, for the purpose of calling and examining or cross-questioning witnesses. R.S.O. 1914, c. 134, s. 28. Intervention by assignor at trial of action.

28.—(1) No property or assets of an estate assigned under the provisions of this Act shall be removed out of Ontario without the order of the judge, and the proceeds of the sale of any such property or assets, and all moneys received on account of any estate shall be deposited by the assignee in an incorporated bank within Ontario, and shall not be withdrawn or removed without the order of the judge, except in payment of dividends and charges incidental to winding up the estate. Retention of assets in the Province and deposit of moneys.

(2) An assignee or any person acting in his stead who violates the provisions of this section shall incur a penalty of \$500. Penalty.

(3) One-half of the penalty shall go to the person suing therefor and the other half shall belong to the estate. Application of penalty.

(4) In default of payment of the penalty and all costs incurred in any action or proceeding for the recovery thereof, within the time limited by the judgment, the court in which the action is brought may order that such assignee or person may be imprisoned for any period not exceeding thirty days, and such assignee or person shall be disqualified from acting as assignee of any estate while such default continues. R.S.O. 1914, c. 134, s. 29. Imprisonment in default of payment of penalty.

29. Upon the expiration of one month from the first meeting of creditors, or as soon as may be thereafter, and afterwards from time to time at intervals of not more than three months, the assignee shall prepare, and keep constantly accessible to the creditors, accounts and statements of his doings as such assignee, and of the position of the estate. R.S.O. 1914, c. 134, s. 30. Accounts to be kept accessible.

30. The law of set-off shall apply to all claims made against the estate, and also to all actions instituted by the assignee for the recovery of debts due to the assignor, in the same manner and to the same extent as if the assignor were plain- Set-off.

Tab 8

Case Name:
Fund of Funds, Ltd. (Re)

**IN THE MATTER OF the Fund of Funds, Limited
AND IN THE MATTER OF the Business Corporations Act,
R.S.O. 1990, Chapter B.16, as amended**

[2004] O.J. No. 2580

[2004] O.T.C. 515

2 C.B.R. (5th) 191

131 A.C.W.S. (3d) 860

2004 CarswellOnt 2483

Court File No. 73-RE-1612

Ontario Superior Court of Justice

Ground J.

Heard: May 26-27, 2004.

Judgment: June 16, 2004.

(24 paras.)

Company law -- Winding-up legislation -- Practice -- Creditors -- Liquidator -- Duties (incl. fiduciary duties).

Application by the liquidator of Fund of Funds limited for directions arising out of the Fund's liquidation, which had been continuing under court supervision since 1973. Fund operated as an open-end mutual fund during the 1960s and 1970s. The majority of investors in Fund purchased their shares through a custodial mechanism. In 1970, Fund declared a dividend in specie of the shares of Global Natural Resources Limited on a one-for-one basis, representing 19,356,086 Global shares. When Fund was ordered to be wound-up in 1973, Fund fundholders had not as yet collected 14,000,000 of the Global shares. A trustee was appointed and the balance warrant was reduced to

1,633,869 Global shares. To date, the liquidator had paid nine distributions to Fund fundholders, totalling US \$160 million. As of July 31, 2003, 14,267 accounts, out of the total of 77,145, had never come forward for identification and payment. There were a further 19,000 fundholders with whom the liquidator had lost contact. The liquidator had undertaken a search and identification program to fund fundholders. It continued to hold reserve funds. The annual costs of the liquidation were US\$600,000. Further recoveries were possible, although remote, in the liquidation.

HELD: Application allowed. The claims of fundholders who had not received the Global shares or cash in substitution were creditors' claims. In view of the substantial time that had elapsed since the declaration of the dividend and in view of the liquidator's concerted effort to contact fundholders, a claims bar order was to be issued, establishing appropriate notices and time periods for a procedure to bar claims to the unclaimed funds held by the liquidator. Any surplus funds remaining after the claims bar date and the disposition of all claims made was to be applied toward a further distribution to all fundholders. The liquidator was ordered to bring an application to establish the claims bar date. It was to provide notice of the application, by such reasonable and economic means as it determined, to all fundholders.

Statutes, Regulations and Rules Cited:

Assignments and Preferences Act, R.S.O. 1990, c. A-33, ss. 23, 24, 25.

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F-31, s. 10.

Global Natural Resources Limited Trust Act, 1981.

Ontario Business Corporations Act, R.S.O. 1990, c. B.16, ss. 217, 218, 221(1), 228, 235, 238(5), 238(6), 244.

Public Guardian and Trustee Act, R.S.O. 1990, c. P.51, s. 5.

Statute of Limitations.

Trustee Act.

Counsel:

George Cihra and Benjamin Glustein, for the Liquidator.

William J. Meyer, for Active Fundholders.

Brian C. Westlake and J. Prestage, for Inactive Fundholders.

H.R. Poultney, for Non-Responding Fundholders.

Louis Leibowitz, Office of the Public Guardian and Trustee.

REASONS

1 GROUND J.:-- This Motion for Directions arises out of the liquidation of the Fund of Funds Limited ("FOF") which has been continuing under the supervision of this court since mid 1973.

History of the Matter

FOF was incorporated under the laws of Ontario on August 9, 1962. It was one of the entities of the IOS Group organized under the aegis of Bernard Cornfeld and operated out of executive offices in Geneva, Switzerland.

In 1972, Cornfeld was ousted from control of the IOS Group by Robert Vesco, an American entrepreneur.

The authorized capital of FOF comprised a significant number of Class "A" non-voting preferred shares and a small number of voting common shares. Originally, FOF had 350 common shares issued and outstanding, all of which by 1968 were held by IOS Panama, a related company. The public which had invested millions of dollars in the Class "A" preferred shares of FOF (the "FOF Fundholders") were without a vote and FOF was totally under the control of IOS.

FOF operated as an open-end mutual fund during the 1960s and early 1970s. Through one investment in FOF the investor could participate in the performance of a number of mutual funds and mutual fund management companies which would be continuously evaluated and re-evaluated on the basis of their past performance and their future growth potential. FOF later set up its own proprietary funds, each wholly owned by FOF.

The majority of investors in FOF purchased their shares through a custodial mechanism called the IOS Investment Program. The prospectus of FOF dated May 2nd, 1968, which appears to be the last published prospectus of FOF, describes the IOS Investment Program under the heading "How to Invest in the Fund" as follows:

"Shares may be acquired conveniently through the IOS Investment Program. A wide range of investment programs and account registrations are offered to suit varying individual and institutional investor needs throughout the world. The IOS Investment Program was especially developed for people of any nationality who want to put surplus money, in any amount, to work for the future - for those who are interested in planning for tomorrow. The Program is a computer-oriented custodial bookkeeping service under which Fund shares are bought, sold and held for safekeeping".

IOS Investment Program

2 When an investor received an Investment Program Certificate which indicated on its face the number of shares in the various funds in which the investor had chosen to invest, the shares of FOF to which investors had subscribed were evidenced by bearer share certificates or share certificates registered in the name of a custodian and were maintained in custody by a succession of custodians pursuant to the IOS Investment Program. The investor was entitled at any time to have a share certificate for his shares of FOF issued to him by giving notice to the custodian and paying a small fee. Very few of the FOF Fundholders did so.

The Global Spin-Off

FOF held natural resource interests through its wholly-owned subsidiary F.O.F. Prop. in a subaccount called the NRFA and held its real estate interests through a wholly-owned subsidiary, Investment Properties International Limited ("IPI"). As a result of a December 1969 revaluation of the NRFA assets, FOF began to face a liquidity crisis arising from the increasing value of the NRFA and the IPI holdings as a percentage of FOF's total assets. Not only did massive redemptions take place in the first half of 1970, but it also became apparent that the redemptions were not going to stop and, as a result, FOF would eventually have no cash and only illiquid assets. It would thereupon be unable to redeem its shares.

Serious consideration was given by the Board to various methods of removing the illiquid assets from FOF. The Board of FOF determined to create a closed-end natural resources corporation and to dividend the shares of such corporation to the FOF Fundholders. The non-liquid assets of FOF were "spun-off" into Global Natural Resources Limited ("Global"), a closed-end investment company. The assets were sold and transferred pursuant to agreements dated the 21st of October, 1970 and the 21st of May, 1971 in

exchange for 19,356,091 shares of Global which were allotted and issued to FOF credited as fully paid. The Global shares were then declared as a dividend to FOF Fundholders.

FOF was entered in the register of Global as the holder of the 19,356,086 shares issued by Global in exchange for the assets received from FOF.

In June of 1972, the Royal Bank ceased to act as Global's registrar and Overseas Development Bank S.A. ("ODB") was appointed to take its place. The changes were effected by letter dated June 26th, 1972 from the Royal Bank to ODB and by a letter dated July 24th, 1972 from Global to the Royal Bank. In both letters there is a reference to

"One share certificate for 15,059,514 representing the holding of the IOS Investment Program".

That is a reference to a share warrant representing the balance of the shares originally issued by Global net of reductions resulting from delivery of warrants to persons who had (in accordance with their rights under the Program) claimed delivery of warrants for their share certificates. The share warrant representing the balance, as from time to time reduced, is hereinafter referred to as the "Balance Warrant".

As set out above, FOF declared a dividend in specie of the shares of Global to FOF Fundholders as at August 7, 1970 on a one-for-one basis, representing 19,356,086 Global shares. By August 1, 1973 when FOF was ordered to be wound-up, FOF Fundholders had not as yet collected approximately 14,000,000 of those Global shares. The unclaimed shares were presented by the Balance Warrant held by Global's registrar and transfer agent in England. The FOF Liquidator received legal advice that, between the date of declaration and the date of payment of a dividend, a debtor/creditor relationship existed between FOF and its Fundholders and the Liquidator was therefore obliged to take reasonable steps to deliver the Global shares to the FOF Fundholders.

With the authorization of the Ontario court, the Liquidator instituted proceedings in England to gain possession and control of the Balance Warrant. By Order of The Honourable Mr. Justice Houlden dated July 5, 1977, E.R.E. Carter, Q.C.,

was appointed Trustee of the Balance Warrant on an interim basis. The appointment was made permanent by Order dated January 30, 1978. By the time of Carter's appointment, the Balance Warrant had been reduced to 9,450,928 Global shares which was approximately 45% of the issued capital. During Carter's term of office as Trustee, the Balance Warrant was reduced to 1,633,869 Global shares. All Active and Inactive Fundholders entitled to Global Shares received payment of their entitlement in respect of their Global Shares (subject, perhaps, to any uncashed cheques).

Carter was appointed a Trustee under the Trustee Act of Ontario. The Ontario legislation did not expressly authorize a Trustee to convert trust property into cash. Carter therefore made application for a special Act of the Ontario Legislature which would authorize a sale of the Balance Warrant pursuant to a Court Order. An Act was passed by the Ontario Legislature in that regard bearing the short title "Global Natural Resources Limited Trust Act, 1981". The Act received Royal assent on December 18, 1981. Carter passed away on April 16, 1982 and the FOF Liquidator was appointed successor Trustee.

Pursuant to the Order of the Honourable Mr. Justice Houlden dated June 30, 1982, the FOF Liquidator sold the remaining unclaimed Global shares. Thereafter, approved claimants received their rateable portion of the proceeds of sale of the Balance Warrant.

By Order of The Honourable Mr. Justice Houlden dated December 29, 1989, the Global Trust was terminated as at the close of business on December 31, 1989. The Liquidator of FOF was removed as Trustee of the trust property and the trust property and all books and records relating thereto were delivered to the FOF Liquidator to be administered as the Global Account within the FOF liquidation. As at July 31, 2003, the Global Account represented 23,635 accounts and 464,754 claimant units. Each claimant unit is represented by cash held by the Liquidator in the amount of U.S.\$16.00 per unit.

Collapse of the IOS Group and the Liquidation of FOF

In 1972 the entire IOS complex began to collapse and the Program administration was severely disrupted and finally came to a halt.

As a result of a number of fraudulent transactions undertaken by Vesco and his associates, various regulatory authorities led by the SEC and including the OSC,

QSC and Luxembourg Banking Commission, agreed that various entities within the IOS Group should be wound-up under judicial control. FOF was ordered to be wound-up by Order of the Honourable Mr. Justice Houlden of the High Court of Justice on August 1, 1973. Mr. John A. Orr, a partner of what is now known as Deloitte & Touche, was appointed Permanent Liquidator. Upon Mr. Orr's retirement in 1986, the office of the Permanent Liquidator was assumed by Deloitte & Touche Inc. ("D&T") which has continued to serve as Permanent Liquidator to date.

There are 77,145 Fundholders of FOF who reside in over 100 countries. By Order dated July 31, 1975 (which Order was subsequently amended from time to time as a result of late developments), Mr. Justice Houlden authorized procedures for processing claims of Fundholders. By the summer of 1976, the Liquidator had determined that because of numerous lawsuits in which FOF was involved and numerous claims which had been filed by FOF against other entities, the asset realization process would take many more years to complete. Many Fundholders had, however, already come forward, identified themselves, and proved their entitlement as Fundholders in accordance with the procedures authorized by the Court.

A decision was therefore made that rather than wait until the entire realization process was completed, the Liquidator would make interim distributions of the net proceeds of realization from time to time as sufficient assets were realized. Such distributions of assets are sometimes referred to as "dividends". Such distributions were not, however, dividends of the type declared and paid by corporations out of profits, but rather a partial return to investors of the capital itself, together with interest that had accrued on the proceeds of realization while in the Liquidator's possession.

By July of 1977, the Liquidator had either settled or provided for all creditor claims and had realized sufficient assets and determined the identity and entitlement of sufficient Fundholders to commence distribution of those assets to Fundholders. Accordingly, by Order dated July 12, 1977, the Liquidator was authorized to pay a first distribution "to fundholders whose accounts are approved for payment in accordance with the procedures authorized by this Court, calculated on the basis of U.S.\$1.50 per unit". By the terms of the Order, the Liquidator was authorized to make further distributions on account of the first distribution from time to time as numbers of accounts were approved for payment sufficient to make such distributions, in the Liquidator's opinion,

economically justified.

The first FOF distribution, calculated on the basis of U.S.\$1.50 for each of the 10,326,138 units outstanding, amounted to U.S.\$15,489,207. The Liquidator has now paid nine distributions to FOF Fundholders totalling U.S.\$159,538,833 or U.S.\$15.45 per unit. As noted above, there are a total of 77,145 Fundholder accounts which represent the 10,326,138 outstanding units.

Upon the declaration of a distribution, the Liquidator set aside as a reserve an amount calculated by multiplying the total number of outstanding units by the amount of the distribution just declared. Initially, bank drafts drawn on TD Bank, and later cheques drawn on the Liquidator's account at TD Bank, in payment of the distribution were then sent to all account holders who had proved their claims in accordance with the procedures set by the Court and with whom the Liquidator remained in contact (hereafter the "Active Fundholders").

At the time of each subsequent distribution, the list of Fundholders to whom drafts or cheques were sent differed from the list compiled for the previous distribution in two ways: some additional Fundholders had made contact in the interim and had proved their claims; and the Liquidator had lost contact with some Fundholders who received the previous dividend. As at July 31, 2003, 14,267 accounts (out of the total of 77,145) had never come forward for identification and payment. These accounts represent 303,760 shares and U.S.\$4,693,092 of the reserve funds (hereafter the "Non-Responding Fundholders"). Approximately, a further 19,000 FOF Fundholders were initially contacted by the Liquidator but with whom the Liquidator has now lost contact (hereafter the "Inactive Fundholders").

At the direction of the Court, the FOF Liquidator adopted an active search and identification program for the FOF Fundholders scattered throughout most of the world. It was the view of the Court and the Liquidator that unless such active program was adopted, a great number of Fundholders would never be found. Initially, the Liquidator worked in conjunction with the Liquidators of the other Dollar Funds at the former operational headquarters of IOS in Ferney-Voltaire, France until May of 1978. The search and identification function was then transferred to Toronto and has been continued by the Liquidator through Auxiliare de Liquidation (Canada) Limited ("ADL"). Similarly, on the instructions of the Court, the Global Trustee adopted an active search and

identification program for Global claimants.

By the late 1980's the Court indicated that the Liquidator could take a more passive approach to the search and identification program. However, after the fall of the Iron Curtain in the early 1990s, the Liquidator initiated another round of mailing and advertising to FOF and Global unit-holders which did stimulate a considerable number of further responses.

It has become apparent that the search and identification function is becoming progressively less effective with the passage of time. The percentage of FOF Fundholders with whom the Liquidator is in contact (the "Active Fundholders") has declined from approximately 81% in 1985 to approximately 57% in 2003.

Current Situation

The Liquidator has made nine distributions to FOF Fundholders to date for an aggregate amount of approximately U.S.\$160 million. The last distribution was made in March, 2002.

As indicated above, FOF Fundholders representing 14,267 accounts have never come forward for identification and payment and 23,635 Global unit holders have never been identified and paid. Many of the unidentified accounts in the two groups are the same persons.

The Liquidator holds reserve funds of approximately U.S.\$19.6 million, of which U.S.\$12.1 million relate to FOF and U.S.\$7.5 million relate to the Global Account, plus free funds of U.S.\$1.7 million. There are also a number of uncashed bank drafts and uncashed cheques in circulation totalling in excess of U.S.\$5.5 million.

The operating costs of the liquidation amount to approximately U.S.\$600,000 per annum. With existing interest rates of 1% to 1.2% per annum, the Liquidator will run a deficit of approximately U.S.\$375,000 per annum. Unless interest rates improve, the free funds of U.S.\$1.7 million will cover the costs of operations for about 5 years.

Vesco remains alive in Cuba. FOF has a sizeable judgment against Vesco which

is enforceable only in the United States. Transglobal by assignment from IOS has an internationally-enforceable judgment against Vesco for more than U.S.\$50 million, in which FOF has a right to share in recoveries in excess of U.S.\$5 million. FOF also has a non-dischargeable judgment against John M. King, an associate of Vesco, who has recently been located in Texas. U.S. counsel have been consulted as whether the judgment is still enforceable. There is thus a possibility, albeit remote, that further recoveries may be made in the liquidation.

The Motion

3 In order to bring some finality to the liquidation after a period of more than 30 years, the Liquidator has brought a motion for directions before this court. Direction is sought with respect to the following issues:

1. What disposition should be made of the FOF property which the Liquidator is unable to distribute because a fundholder's whereabouts is unknown ("FOF Reserve")?
2. What disposition should be made of the property in the Global Account which the Liquidator is unable to distribute because a claimant's whereabouts is unknown ("Global Reserve")?
3. If the Court determines that any or all of the Non-Responding Fundholders, Inactive Fundholders, or claimants to the Global Reserve have an entitlement to the FOF Reserve or Global Reserve or any amounts held by or on behalf of the Liquidator in respect of uncashed cheques, should notice in writing, by advertisement, or by any other manner be given to any one or more of the Non-Responding Fundholders, Inactive Fundholders or claimants to the Global Reserve that in the event of their failure to identify themselves and establish their entitlement within a time to be set by the Court, their claims to the FOF Reserve or the Global Reserve or any amounts held by or on behalf of the Liquidator in respect of uncashed cheques will be barred?
4. With respect to paragraph 1 above, is there a difference between property referable to FOF Fundholders who have never identified themselves and established their entitlement in accordance with the procedures set by the Court ("Non-Responding Fundholders") and property referable to FOF Fundholders who did at one time identify themselves, established their entitlement and received one or more distributions but with whom contact was subsequently lost ("Inactive Fundholders")?
5. Should some or all of the FOF Reserve held by the Liquidator for Non-Responding and/or Inactive Fundholders be paid as a further distribution to FOF fundholders who have identified themselves and established their entitlement and with whom the Liquidator remains in contact ("Active Fundholders")?

6. Should some or all of the Global Reserve be paid to the Active Fundholders?
7. Should some or all of the amounts held by or on behalf of the Liquidator in respect of uncashed cheques be paid to the Active Fundholders and, if so, on what terms?
8. Should some or all of the FOF Reserve be paid to the Office of the Public Guardian and Trustee and, if so, on what terms?
9. Should some or all of the Global Reserve be paid to the Office of the Public Guardian and Trustee and, if so, on what terms?
10. Should some or all of the amounts held by or on behalf of the Liquidator in respect of uncashed cheques be paid to the Office of the Public Guardian and Trustee and, if so, on what terms?
11. Should the Court now set a target date for closing the liquidation and, if so, on what terms?

Statutory Provisions

4 The statutory provisions relevant to the issues before this court are section 235 of the Ontario Business Corporations Act, R.S.O. 1990, Ch. B.16 as amended ("OBCA") which provides as follows:

Where the Liquidator is unable to distribute rateably the property of the corporation among the shareholders because a shareholder is unknown or a shareholder's whereabouts is unknown, the share of the property of the corporation of such shareholder may, by agreement with the Public Trustee, be delivered or conveyed by the Liquidator to the Public Trustee to be held in trust for the shareholder, and thereupon subsection 238(5) and (6) apply thereto.

A delivery or conveyance under subsection (1) shall be deemed to be a distribution to that shareholder of his, her or its rateable share for the purposes of the winding up.

Subsections 238(5) and (6) of the OBCA which provide as follows:

- (5) If the share of the property so delivered or conveyed to the Public Trustee under subsection (4) is in a form other than cash, the Public Trustee may at any time, and within ten years after such delivery or conveyance shall, convert it into cash.
- (6) If the amount paid under subsection (3) or the share of the property delivered or conveyed under subsection (4) or its equivalent in cash, as the case may be, is claimed by the person beneficially entitled thereto within

ten years after it was so delivered, conveyed or paid, it shall be delivered, conveyed or paid to the person, but, if not so claimed, it vests in the Public Trustee for the use of Ontario, and, if the person beneficially entitled thereto at any time thereafter establishes the person's right thereto to the satisfaction of the Lieutenant Governor in Council, an amount equal to the amount so vested in the Public Trustee shall be paid to the person.

Section 228 of the OBCA which provides as follows:

For the purpose of proving claims, sections 23, 24 and 25 of the Assignments and Preferences Act apply with necessary modifications, except that where the word "judge" is used therein, the word "court" as used in this Act shall be substituted.

Sections 23, 24 and 25 of the Assignments and Preferences Act, R.S.O. 1990, ch. A-33 (the "APA") which provide as follows:

Voting at meeting

23. At any meeting of creditors, the creditors may vote in person or by proxy authorized in writing, but no creditor whose vote is disputed is entitled to vote until after filing with the assignee an affidavit in proof of the claim, stating the amount and nature thereof. R.S.O. 1990, c. A.33, s. 23.

Scale of votes

24.(1) Subject to section 10, all questions at meetings of creditors shall be decided by the majority of votes, and for such purpose the votes of creditors shall be calculated as follows:

1. For every claim of or over \$100 and not exceeding \$200, one vote.
2. For every claim over \$200 and not exceeding \$500, two votes.
3. For every claim over \$500 and not exceeding \$1,000, three votes.
4. For every additional \$1,000 or fraction thereof, one vote. R.S.O. 1990, c. A.33, s. 24(1).

Upon claims acquired after assignment

- (2) No person is entitled to vote on a claim acquired after the assignment unless the entire claim is acquired, but this does not apply to persons acquiring notes, bills or other securities upon which they are liable. R.S.O. 1990, c. A.33, s. 24(2).

Casting vote

- (3) In the case of a tie, the assignee or, if there are two assignees, the assignee nominated for that purpose by the creditors or by the judge, if none has been nominated by the creditors, has a casting vote. R.S.O. 1990, c. A.33, s. 24(3).

Valuing securities

- (4) Every creditor in the proof of claim shall state whether the creditor holds any security for the claim or any part thereof, and if such security is on the estate of the assignor or on the estate of a third person for whom the assignor is only secondarily liable, the creditor shall put a specified value thereon and the assignee, under the authority of the creditors, may either consent to the creditor ranking for the claim after deducting such valuation or may require from the creditor an assignment of the security at an advance of 10 per cent upon the specified value to be paid out of the estate as soon as the assignee has realized the security, and in such case the difference between the value at which the security is retained and the amount of the gross claim of the creditor is the amount for which the creditor shall rank and vote in respect of the estate. R.S.O. 1990, c. A.33, s. 24(4).

Right to revalue in certain cases

- (5) If a creditor's claim is based upon a negotiable instrument upon which the assignor is only indirectly or secondarily liable and that is not mature or exigible, the creditor shall be considered to hold security within the meaning of this section and shall put a value on the liability of the person primarily liable thereon as being the security for the payment thereof, but after the maturity of such liability and its non-payment the creditor is entitled to amend the claim and revalue the security. R.S.O. 1990, c. A.33, s. 24(5).

Where creditor holding security fails to value it

- (6) Where a person claiming to be entitled to rank on the estate holds security for the claim, or any part thereof, of such a nature that the person is required by this Act to value the security and fails to value it, the judge, upon summary application by the assignee or by any other person interested in the estate, of which application at least three days notice shall be given to the claimant, may order that, unless a specified value be placed on the security and the assignee is notified in writing within a time to be limited by the order, the claimant is, in respect of the claim, or the part thereof for which the security is held in case the security is held for part only of the claim, wholly barred of any right to share in the proceeds of the estate. R.S.O. 1990, c. A.33, s. 24(6).

Consequences of neglect of order

- (7) If a specified value is not placed on the security or the assignee is not notified in writing according to the exigency of the order or within such further time as the judge by subsequent order allows, the claim, or the part, as the case may be, is wholly barred as against the estate, but without prejudice to the liability of the assignor therefor. R.S.O. 1990, c. A.33, s. 24(7).
25. All persons claiming to be entitled to rank on the estate shall furnish to the assignee particulars of their claim proved by affidavit and such vouchers as the nature of the case admits.

Sections 217 and 218 of the OBCA which provide as follows:

217. Where the realization and distribution of the property of a corporation being wound up under an order of the court has proceeded so far that in the opinion of the court it is expedient that the Liquidator should be discharged and that the property of the corporation remaining in the Liquidator's hands can be better realized and distributed by the court, the court may make an order discharging the Liquidator and for payment, delivery and transfer into court, or to such person as the court directs, of such property, and it shall be realized and distributed by or under the direction of the court among the persons entitled thereto in the same way as nearly as may be as if the distribution were being made by the Liquidator. R.S.O. 1990, c. B.16, s. 217(2).

In such case, the court may make an order directing how the documents and records of the corporation and of the Liquidator are to be disposed of, and may order that they be deposited in court or otherwise dealt with as the court thinks fit. R.S.O. 1990, c. B.16, s. 217(2).

218. The court at any time after the business and affairs of the corporation have been fully wound up may, upon the application of the Liquidator or any other person interested, make an order dissolving it, and it is dissolved on the date fixed in the order. R.S.O. 1990, c. B.16, s. 218(1).

The person on whose application the order was made shall within ten days after it was made filed with the Director a certified copy of the order and shall forthwith publish notice of the order in The Ontario Gazette. R.S.O. 1990, c. B.16, s. 218(2).

Section 244 of the OBCA which provides as follows:

Any property of a corporation that has not been disposed of at the date of its dissolution is immediately upon such dissolution forfeit to and vests in the Crown.

Despite subsection (1), if a judgment is given or an order or decision is made or land is sold in an action, suite or proceeding commenced in accordance with section 242 and the judgment, order, decision or sale affects property belonging to the corporation before the dissolution, unless the plaintiff, applicant or mortgagee has not complied with subsection 242(3) or (4),

- (a) the property shall be available to satisfy the judgment, order or other decision; and
- (b) title to the land shall be transferred to a purchaser free of the Crown's interest, in the case of a power of sale proceeding.

A forfeit of land under subsection (1) or a predecessor of subsection (1) is not effective against a purchaser for value of the land if the forfeiture occurred more

than 20 years before the deed or transfer of the purchaser is registered in the proper land registry office.

Despite subsection (2), if a person commences a power of sale proceeding relating to land before the dissolution of a corporation but the sale of the land is not completed until after the dissolution, the person is not required to serve the notice mentioned in subsection 242(4) and title to the land may be transferred to a purchaser free of the Crown's interest.

Analysis

5 It is evident from the statutory provisions referred to above that a termination of the liquidation could be accomplished by proceeding under any one of sections 217, 218 or 235 of the OBCA. With respect to section 217, I am unable to conclude, in view of the size and complexity of the FOF liquidation, that it is expedient that the Liquidator be discharged and that the property of the corporation remaining in the Liquidator's hands can be better realized and distributed by the court.

6 With respect to section 218 of the OBCA, although I am satisfied that the business and affairs of FOF have been fully wound-up in the sense of the business and affairs of FOF being the sale of units of closed-end and opened-end mutual funds and the management of such funds, the result of proceeding under section 218 would be that FOF would be immediately dissolved upon the issuance of an order under section 218 and, pursuant to section 244 of the OBCA, the property of FOF would immediately vest in the Crown raising a number of issues of concern to the Crown as outlined in the factum of the Public Guardian and Trustee (the "PGT") referred to below. Accordingly, in my view, the only appropriate way to bring some finality to the FOF liquidation is to proceed pursuant to section 235 of the OBCA by way of an agreement entered into between the Liquidator and the PGT and approved by order of this court.

7 It was submitted by counsel for the Non-Responding Fundholders and by counsel for the PGT that an order could be made directing the Liquidator to establish a trust, with a trustee having perpetual succession, and transferring the property held by the Liquidator for the Inactive Fundholders of FOF, the Non-Responding Fundholders of FOF and the Inactive or Non-Responding Claimants to the funds held by the Liquidator representing the dividend originally payable in Global shares. It was further submitted that such trustee would continue to administer such assets with provision that the trustee would recognize the claim of any persons who subsequently come forward to entitlement to their pro-rata share of such property. The PGT has submitted that it would consider accepting an appointment as trustee of such a trust and counsel for the Non-Responding Fundholders and for PGT have submitted that the trust should be a trust with charitable objects including in particular education with respect to corporate ethics. This issue was not thoroughly canvassed in the submissions made to this court on the hearing of this motion but I am not satisfied as to the authority of a liquidator to transfer to a third party property belonging to shareholders of a

corporation who cannot be located, particularly when the applicable statute under which the liquidation is proceeding makes provision only for the transfer of such property to the PGT or for such property to forfeit to and vest in the Crown. I am, accordingly, not prepared to order that the funds held by the Liquidator for Inactive or Non-Responding Fundholders or Claimants be transferred to a trust.

8 An issue was raised on the hearing of this motion by counsel for the Active Fundholders as to whether the FOF Fundholders are, in fact, shareholders of FOF or whether they are creditors of FOF. Counsel for the Active Fundholders appears to rely to some extent on the fact that the vast majority of the FOF Fundholders did not receive a share certificate for their shares of FOF. With respect to the lack of share certificates, I think it is settled law that a share certificate is simply evidence of the ownership of the shares and that it is possible for a person to be a shareholder of a corporation without having a share certificate issued to him or her evidencing his or her ownership of the shares of the corporation. Counsel for the Active Fundholders also relied on certain old authorities which, in my view, were inapplicable in that in none of the cases cited by counsel for the Active Fundholders had there been a subscription for or an allotment and issuance of shares to the persons alleged to be shareholders. In the case at bar, aside from the fact that the Order of Houlden J. dated October 15, 1975 appears to conclusively determine that the FOF Fundholders are shareholders of FOF and that the issue is therefore *res judicata*, the evidence is undisputed that the FOF Fundholders paid their money to acquire shares in FOF, that shares were allotted and issued in the numbers subscribed for by the investor and a share certificate for such shares, (which may have been one certificate representing a number of shares subscribed for by various investors) was issued and delivered to a custodian to be held by it pursuant to the IOS Investment Program on behalf of the investors. There was no evidence that the monies invested by the investors were intended to be advanced by the investors to FOF by way of loan or were treated by FOF as an advance. Accordingly, I must conclude that the FOF Fundholders are shareholders of FOF.

9 A submission was made by counsel for the Non-Responding Fundholders that no claims bar order could be made pursuant to the APA with respect to the unclaimed dividends declared on the shares of FOF and originally payable in shares of Global in that by virtue of the declaration of a dividend payable in shares of Global, the shareholders of FOF became shareholders of Global. Counsel for the Non-Responding Fundholders submits that there is no authority for a claims bar order extinguishing the rights of shareholders to participate in the distribution of the property of the corporation. With respect to the status of the FOF Fundholders as being shareholders of Global as a result of the declaration of the dividend payable in shares of Global, in my view, one must distinguish between the interest of the FOF Fundholders as recipients of a dividend declared on their shares of FOF as opposed to the interest of the FOF Fundholders as shareholders of Global once shares of Global are issued to them pursuant to the declaration of the dividend. It is settled law that the declaration of a dividend creates a debtor/creditor relationship between the corporation and its shareholders from the time that the dividend is declared until it is paid and it is indisputable that the claim of an FOF Fundholder who has not received the Global shares, or the cash substituted for such Global shares by virtue of the Order of Houlden J. dated June 30, 1982, is a creditor's claim

and accordingly, may be made subject to a claims bar order pursuant to the provisions of section 228 of the OBCA and section 25 of the APA. In the case of Fundholders of FOF who did receive their shares of Global pursuant to the declaration of the dividend payable in Global shares and accordingly have become shareholders of Global, they will not have their interests as shareholders of Global and their claims as shareholders in the estate of Global affected in any way by the order sought on this motion to establish a claims bar with respect to the unclaimed funds held by the Liquidator being the proceeds of the sale of the dividend Global shares sold by the Liquidator.

10 Accordingly, in view of the substantial period of time which has elapsed since the declaration of the dividend in Global shares in 1970 and in view of the concerted effort which has been made by the Liquidator to contact the FOF Fundholders entitled to such shares, in my view, a claims bar order should issue pursuant to section 25 of the APA establishing appropriate notices and time periods for a procedure to bar claims to the unclaimed funds held by the Liquidator representing the proceeds of the Global shares sold by the Liquidator pursuant to the June 30, 1982 Order of Justice Houlden. The amount involved is \$7,436,754 in respect of 23,635 FOF Fundholders entitled to receive 464,754 Global shares. The order to issue with respect to a claims bar date for claims to the Global dividend should also include a provision that any surplus funds remaining in the Global Account after the claims bar date and the disposition of all claims made could be applied toward a further distribution to all FOF Fundholders. Counsel are directed to bring a further motion before this court for a claims bar order pursuant to section 25 of the APA with respect to the funds representing unclaimed dividends on the FOF shares.

11 Counsel appear to agree that the limitation period in respect of the creditor claims created by the declaration of the Global dividend in 1970 had not expired at the date of the FOF Winding-Up Order on August 1, 1973 and that the effect of such Winding Up Order is that the Statute of Limitations ceases to run in respect of the creditor claims against FOF so that the claims to the dividend remain viable at this date and could only be terminated by a claims bar order.

12 There are a number of outstanding cheques and bank drafts representing distributions of assets of FOF to the FOF Fundholders. Many of such cheques have become stale-dated as a result of the effluxion of time. The expiry of a cheque as a result of the effluxion of time or the failure of a payee to present a cheque for payment does not discharge the drawer of the cheque in respect of the underlining obligation with respect to which the cheque was issued and, accordingly, the Liquidator remains liable to the payees of such cheques for the amounts represented thereby and such amounts should be treated in the same manner as all other unpaid distributions of assets of FOF as set out below.

13 Submissions were made to the court that an order should issue abridging the ten-year period specified in section 235 of the OBCA. There is clearly no authority in the OBCA for an order to issue abridging such time period. It also appears to me that, as section 235 creates a substantive right in favour of shareholders who bring their claims within the 10-year period, the court should not exercise any inherent jurisdiction it may have to abridge such time period.

14 In his factum and in his submissions at the hearing of this motion counsel for the PGT raised certain concerns with respect to entering into an agreement pursuant to section 238 of the OBCA. The PGT is concerned that if it took over the role of the Liquidator, it would not have the staff or resources to continue with the activities undertaken by the Liquidator and by ADL, the corporation retained by the Liquidator to process and verify claims of persons alleging to be FOF Fundholders or assignees or heirs of FOF Fundholders. In particular the PGT would not be prepared to continue with any active searching for missing Fundholders.

15 Counsel for the PGT also raised concerns as to appropriate provisions for the payment of fees to the PGT for dealing with the property, as to the application of the Ontario Government's Procurement Rules and Regulations if the PGT was required to retain private sector corporations or individuals in connection with the administration of the property and as to any irrelevant or unnecessary documents and records being destroyed prior to property being turned over to the PGT.

16 Counsel for the PGT also raised concerns as to the application of the Freedom of Information and Protection of Privacy Act, R.S.O. 1990 c. F-31 (the "FIPPA"). Section 10 of the FIPPA provides as follows:

10.(1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

- (a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or
- (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious. 1996, c.1, Sched. K, s.1.

(2) If an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22 and the head of the institution is not of the opinion that the request is frivolous or vexatious, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions. 1996, c.1, Sched. K, s.1.

17 It appears to me that the OBCA contains no restrictions on the provisions that may be included in an agreement entered into with the PGT pursuant to section 235 of the OBCA. In particular, section 235 would appear to contemplate that it is the property of the corporation which is distributable among shareholders that will be transferred to the PGT. In the case at bar, the property to be transferred to the PGT would be the funds held by the Liquidator and, accordingly, the various books and records of the Liquidator need not be transferred to the PGT other than possibly a list of the FOF Fundholders and a record of the distributions paid to the FOF Fundholders. If the agreement entered into under section 235 of the OBCA provided that the books and records remain

with the Liquidator or its agent, that the Liquidator or its agent continue to maintain the books and records and deal with claims made during the ten-year period and that any payments of funds to claimants be dealt with by the Liquidator reviewing the claim and requisitioning a cheque in payment of the claim from the PGT, this would avoid a number of the problems which might arise under FIPPA if the books and records were in the custody and control of the PGT and would also, in my view, avoid any problems with the Procurement Rules and Regulations of the Ontario Government.

18 Section 235 of the OBCA would also appear to contemplate that property of the corporation may be transferred to the PGT from time to time and accordingly the agreement between the Liquidator and the PGT could provide that the funds held by the Liquidator representing the unclaimed Global dividends be held by the Liquidator until the claims bar date and the payment of a further distribution to FOF Fundholders and the balance thereafter transferred to the PGT. Such agreement could also provide that the judgments against Vesco and King would also continue to be held by the Liquidator for a period of time until some determination can be made as to the possibility of any collection on such judgments and the judgments then transferred to the PGT.

19 It would also appear to be possible to provide in an agreement under section 235 of the OBCA that the PGT would not be required to carry out any active search for FOF Fundholders or to undertake any review of claims by persons claiming to be FOF Fundholders or claiming through FOF Fundholders. Clearly, the agreement would also have to deal with the question of fees to the PGT for its services in dealing with the funds.

20 The Liquidator is to provide the PGT with access to all or any information or documents and access to facilities over which the Liquidator has control, as requested by the PGT from time to time, in order to facilitate and assist in the concluding of an agreement pursuant to section 235 of the OBCA. The PGT shall maintain confidentiality in respect of all information and documents received by it, in the course of this proceeding or in the course of the negotiation of an agreement pursuant to section 235 of the OBCA, from the Liquidator or from any third party in respect of the FOF liquidation.

21 With respect to the destruction of books and records, if a claims bar order is issued with respect to the claims to the dividend originally declared in shares of Global, the books and records relating to Global could be destroyed after a reasonable period following the claims bar date. The books and records relating to distributions to the FOF Fundholders and to claims made by persons claiming to be, or claiming through, FOF Fundholders should, in my view, remain with the Liquidator for the ten-year period during which the Liquidator would continue with the processing of claims.

22 Although it was not pursued on a hearing of this motion, submissions were made that the funds in the hands of the Liquidator be distributed only to the Active Fundholders. There is, in my view, no legal authority for such an order to be made. There is no basis in law for distinguishing

between the Active Fundholders and the Inactive and Non-Responding Fundholders. All of the Active Fundholders, the Inactive Fundholders and the Non-Responding Fundholders are members of the same class of shareholders and the law is clear that they must be treated equally in all respects.

The principle that all shareholders are to be treated equally in a winding-up is reiterated in subsection 221(1) of the OBCA which provides:

Upon a winding up,

- (a) the Liquidator shall apply the property of the corporation in the satisfaction of all its debts, obligations and liabilities and subject thereto shall distribute the property rateably among the shareholders according to their rights and interests in the corporation. (emphasis added)

In this case, the letters patent of FOF specifically provide:

In the event of the liquidation, dissolution or winding up of the Company, whether voluntary or involuntary, the holders of the Class A shares shall be entitled to receive, before any distribution of any part of the assets of the Company among the holders of the common shares, the amount paid up on the Class A shares; thereafter the holders of the common shares shall be entitled to receive the amount paid up on the common shares; and thereafter the holders of the Class "A" and common shares shall rank equally share for share in any of the remaining assets of the Company. (emphasis added)

23 An issue was raised on the hearing of this motion as to the duty and obligation of the PGT to enter into an agreement with the Liquidator pursuant to section 235 of the OBCA. The provisions of section 235 of the OBCA are, in my view, clearly permissive and not mandatory and this court cannot order that the PGT enter into an agreement with the Liquidator. I note, however, that section 5 of the Public Guardian and Trustee Act, R.S.O. 1990, ch. P.51 provides that the PGT shall discharge the duties imposed upon him or her by any act of the legislature and, in my view, the PGT does have an obligation and duty to negotiate in good faith with the Liquidator toward the settlement of an agreement dealing with the transfer of the funds of FOF in the hands of the Liquidator to the PGT and containing the types of provisions set out above.

24 Accordingly, the following orders will issue.

1. that a motion be brought by the Liquidator before this court on or before November 1, 2004 to establish a claims bar date with respect to the claims of FOF Fundholders to a share of the proceeds of the sale of the Global shares dividended to the FOF Fundholders and providing that any surplus

- funds thereafter remaining in the Global Account could be applied toward a further distribution to all FOF Fundholders;
2. that the Liquidator and the PGT enter into good faith negotiations to conclude an agreement pursuant to section 235 of the OBCA and containing, inter alia, the types of provisions referred to above and that, if such an agreement is not concluded and approved by this court prior to September 30, 2005, the Liquidator bring a further motion before this court, on or before October 31, 2005, for directions as to the termination of the liquidation of FOF; and
 3. that notice be provided by such reasonable and economic means as the Liquidator may determine, to all Active Fundholders, Inactive Fundholders and Non-Responding Fundholders of the motion to establish a claims bar date with respect to the Global dividend and of any motion to approve an agreement entered into between the Liquidator and the PGT pursuant to the section 235 of the OBCA.

The costs of the Liquidator and counsel for the Liquidator, the Active Fundholders, the Inactive Fundholders and the Non-Responding Fundholders in connection with this motion being otherwise dealt with by this court, the PGT is directed to make brief written submissions to me, prior to July 30, 2004, with respect to its costs.

GROUND J.

cp/e/nc/qw/qlgkw

IN THE MATTER OF THE WINDING-UP OF COVENTREE INC.

ONTARIO
SUPERIOR COURT OF JUSTICE-
COMMERCIAL LIST

Proceeding Commenced at Toronto

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