equity of redemption and the answer that would be given by equity to that question. I do not, for my part, think it matters one jot whether the duty is expressed as a common law duty or as a duty in equity. The result is the same. The origin of the receiver's duty, like the mortgagee's duty, lies, however, in equity and we might as well continue to refer to it as a duty in equity.

In my judgment, in principle and on the authorities, the following propositions can be stated. (1) A receiver managing mortgaged property owes duties to the mortgagor and anyone else with an interest in the equity of redemption. (2) The duties include, but are not necessarily confined to, a duty of good faith. (3) The extent and scope of any duty additional to that of good faith will depend on the facts and circumstances of the particular case. (4) In exercising his powers of management the primary duty of the receiver is to try and bring about a situation in which interest on the secured debt can be paid and the debt itself repaid. (5) Subject to that primary duty, the receiver owes a duty to manage the property with due diligence. (6) Due diligence does not oblige the receiver to continue to carry on a business on the mortgaged premises previously carried on by the mortgagor. (7) If the receiver does carry on a business on the mortgaged premises, due diligence requires reasonable steps to be taken in order to try to do so profitably …

[His Lordship accordingly ruled that the trial judge had rightly held the receivers liable for breach of duty.]

SWINTON THOMAS and TUCKEY LJJ concurred.

➢ Questions

1. Does the duty described in *Downsview* **[16.05]** meet commercial needs and expectations? Does it contribute to a 'rescue culture'? See G Lightman, 'The Challenges Ahead: Address to the Insolvency Lawyers' Association' [1996] JBL 113 at 119–120; contrast H Rajak, 'Can a Receiver be Negligent?' in B Rider (ed), *The Corporate Dimension* (1998).

2. Does it matter whether the receiver's duty is an equitable duty or a common law duty?[35]

3. What difference does it make to say that the receiver owes a duty of good faith, rather than a duty of care, to the company and to subsequent encumbrancers or guarantors?[36]

4. What duty does the *chargee* owe in deciding *when* or *whether* to appoint a receiver? See *Shamji v Johnson Matthey Bankers Ltd* [1986] BCLC 278, Ch, affd [1991] BCLC 36, CA. If an offer is made to redeem the secured debt (thereby extinguishing the charge), must the debenture holder accept it?

(p. 787) 5. What duty does the *receiver* owe in deciding *whether* to exercise the power of sale or continue the business, and in deciding *when* to sell? See *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949, CA.

6. Is the duty owed by the receiver when exercising the power of sale or the power to carry on the business one of good faith, due diligence or reasonable care? See LS Sealy, 'Mortgagees and Receivers—A Duty of Care Resurrected and Extended' [2000] CLJ 31; S Frisby, 'Making a Silk Purse Out of a Pig's Ear—*Medforth v Blake*' (2000) 63 MLR 413.

➢ Notes

1. Also see *International Leisure Ltd v First National Trustee Co Ltd* [2012] EWHC 1971 (Ch), discussed in the context of 'reflective losses', at Note 4 following *Giles v Rhind* **[13.23]**, pp 681.

2. In *Glatt v Sinclair* [2011] EWCA Civ 1317, applying the general principles governing the receiver's duties to the principal, the Court of Appeal ruled that there was at least an arguable case that a receiver appointed by the court pursuant to the Criminal Justice Act 1988 had committed a breach of duty in failing properly to

market the property in question, given that the same property was re-advertised and re-sold by the purchaser with an uplift of nearly 38%.

Distribution of assets subject to the receivership

If there is more than one charge over the secured assets, then priority as between chargees depends upon rules discussed earlier (see 'Registration, priority and constructive notice of registered charges', pp 603ff). IA 1986 s 43 provides for sale of the secured assets by a receiver other than one appointed by the chargee with first claim on the proceeds.

If the charge over the secured assets is floating, then various claims rank ahead of the secured creditor's claim to have the secured debt repaid. This is one of the disadvantages of floating charges. The order of payment out of the realisations is as follows:

(i) The *expenses of winding up* (including the remuneration of the liquidator),[37] *if* the company goes into liquidation at any time while the administrative receiver has in his possession undistributed realisations from the charged assets—see CA 2006 s 1282, inserting a new provision in the IA 1986 s 176ZA,[38] providing that property subject to a floating charge may, where necessary, be used to fund the general expenses of winding up in priority to the floating charge holder and to any preferential creditors entitled to be paid out of the property, but not providing for payment of these expenses out of the statutory share of assets for the unsecured creditors (see point (iii)). IA 1986 s 176ZA also provides for the power to make rules requiring the authorisation or approval of the floating charge holder, or the preferential creditors, or the court, to the expenditures in certain circumstances.
(p. 788) **(ii)** The *expenses of receivership*: these are payable in priority to the other preferred claims, on the basis that the person who has produced a fund for distribution should have the costs of doing so paid in priority. But the receiver has a duty not to incur expenses if this would lessen the amount available for the preferred creditors (see point (iv)): *Woods v Winskill* [1913] 2 Ch 303.
(iii) The *statutory share of assets (the 'prescribed part') for unsecured creditors*: a prescribed percentage of floating charge asset realisations must be set aside to pay the company's unsecured creditors—see IA 1986 s 176A, and Insolvency Act 1986 (Prescribed Part) Order 2003 (SI 2003/2097) art 3.[39] The prescribed percentage is: (a) 50% of the first £10,000; and (b) 20% or the remainder, up to a maximum grand total of £600,000.[40] The rule does not apply if the company's net assets are worth less than £10,000 (s 176A(3)(a)), or if the costs of distribution to unsecured creditors would be disproportionate to the benefits (s 176A(5)).
(iv) The '*preferential debts*'[41] (now primarily owed to employees, since EA 2002 abolished Crown priority), being debts that Parliament has decided should be paid in priority to all other debts, other than the expenses of winding up—see IA 1986 ss 40 and 175(2)(b). Any payment of preferential debts may be recouped out of the assets of the company available for the payment of unsecured creditors (if there are any such assets remaining in the company's insolvency) (IA 1986 s 40(3)).
(v) Finally, the *debt owed to the charge holder*.

By contrast, if the charge over the secured assets is fixed, rather than floating, then the property cannot be used to pay off the debts in points (i), (iii) and (iv). This is so even if the charge secures the same debt to the same charge holder as a floating charge in the creditor's favour expressed to be over all the company's assets and undertaking. This distinction between treatment of fixed and floating charge realisations is one reason why creditors expend such efforts in drafting charges that are classified as fixed rather than floating (see 'Distinguishing between fixed and floating charges', pp 622ff). It also explains why creditors adopt the practice of taking a fixed charge over as many assets as possible and an equally ranking floating charge over whatever assets remain. The same receiver can then be appointed over both classes of assets, but the distributions will follow quite different rules.

Liquidation or winding up

Both solvent and insolvent companies may be wound up. In the *winding up* or *liquidation* (the terms are

synonymous), the company gives up its business, sells off its assets, pays its debts (or, if it is insolvent, does so to the extent that its funds allow) and distributes whatever surplus remains amongst its members or otherwise as its constitution may provide. The event must be notified in the *Gazette* (see 'Publication in the *Gazette*', p 716).

(p. 789) The conduct of the winding up is placed by law in the hands of a *liquidator*; and on his appointment the directors' power to manage the business of the company ceases.[42]

The company continues in being throughout the process of winding up: there is still a corporate personality and all corporate acts in the course of the liquidation, such as the transfer of property and the institution of legal proceedings, are done in its name rather than by the liquidator in his own name. The company ceases to exist only by the formal act of *dissolution* (IA 1986 ss 201ff) after the winding-up procedure has been completed (see 'Dissolution of the company', p 823).

A company may be wound up *compulsorily*, that is, by court order, or *voluntarily*, as a consequence of an extraordinary resolution passed by the members.

Voluntary winding up

In a voluntary winding up, following a special resolution passed by the members (IA 1986 s 84, also indicating limited exceptions), the liquidator is appointed by the members if the directors are able to declare that the company will be able to meet its debts in full (a '*members' voluntary winding up*') (IA 1986 ss 89 and 91 setting out the detailed requirements); if not, the company's creditors have the power of appointment and exercise general control over the conduct of the liquidation (a '*creditors' voluntary winding up*') (IA 1986 ss 90 and 96).

The court need not be involved in a voluntary winding up, although court confirmation gives a creditors' winding up recognition throughout the EU, which is important if the company has assets in other EU states (IR 1986 r 7.62).

Compulsory winding up generally

In a compulsory (or court-ordered) winding up the Official Receiver[43] automatically becomes the liquidator and is in law regarded as an officer of the court acting under its direction and control. Various people are entitled to petition the court for the compulsory liquidation of a company (IA 1986 s 124, and note the conditions specified), including company creditors (who bring almost all petitions), the company itself and the company's directors. The Secretary of State may petition for winding up, in the public interest, generally in cases of notoriety, most often following an investigation of the company's affairs under CA 1985 Pt XIV or the Financial Services and Markets Act 2000 (see 'Public investigation of companies, pp 730ff) (IA 1986 ss 124(4) and 124A). By way of additional protection, these people may also petition for the appointment of a *provisional liquidator*, as an interim measure designed to maintain the status quo and prevent prejudice to any party pending the court's decision on the petition itself (IA 1986 s 135).

A company may be wound up by the court only if it is shown that one of the circumstances listed in IA 1986 s 122(1) exists. In practice, companies are usually wound up because the company is unable to pay its debts (s 122(1)(f)), or because the court is of the opinion that it is 'just and equitable' to do so (s 122(1)(g)).[44] IA 1986 s 123 describes circumstances that a court will take as sufficient evidence of a company's inability to pay its debts.

(p. 790) Permitted petitioners for a compulsory winding up

Every contributory has a statutory right[45] to petition for a winding up, which cannot be excluded or limited by any provision in the articles.

[16.07] Re Peveril Gold Mines Ltd [1898] 1 Ch 122 (Court of Appeal)

The company's articles provided that no member should petition for the winding up of the company unless (i) two directors had consented in writing, or (ii) a general meeting had so resolved, or (iii) the petitioner held at least 20% of the issued capital. A member presented a petition without satisfying any of these conditions. It was held that the articles were ineffective to prevent him from doing so.

LINDLEY MR: Anyone who is familiar with the Companies Act knows perfectly well that these registered limited companies are incorporated on certain conditions; they continue to exist on certain conditions; and they are liable to be dissolved on certain conditions. The important sections of the Act of 1862, with regard to dissolution, are ss 79 and 82 [IA 1986 ss 122 and 124]. Section 79 states the circumstances under which such a company may be dissolved by the court, and s 82 states the persons who may petition for a dissolution. Any article contrary to these sections—any article which says that the company is formed on the condition that its life shall not be terminated when any of the circumstances mentioned in s 79 exist, or which limits the right of a contributory under s 82 to petition for a winding up, would be an attempt to enforce on all the shareholders that which is at variance with the statutory conditions, and is invalid. It is no answer to say that the right to petition may be waived by any contributory personally. I do not intend to decide whether a valid contract may or may not be made between the company and an individual shareholder that he shall not petition for the winding up of the company. That point does not arise now. But to say that a company is formed on the condition that its existence shall not be terminated under the circumstances, or on the application of the persons, mentioned in the Act is to say that it is formed contrary to the provisions of the Act, and upon conditions which the court is bound to ignore. The view taken by Byrne J was right, and the appeal must be dismissed.

CHITTY LJ delivered a concurring judgment.

VAUGHAN WILLIAMS LJ concurred.

➤ Questions

1. Lindley MR left open the question whether a contract outside the articles between the company and a member that he would not petition for a winding-up order was enforceable. Is it? (An analogy might be drawn with *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855, [2012] Ch 333, CA, at [82], where the court upheld an agreement to refer unfair prejudice allegations to arbitration, ie a statutory right was compromised by private agreement.)

2. Would a contractual promise by a company that it would not petition for its own winding up be binding? Consider *Russell v Northern Development Corpn Ltd* **[4.34]**.

3. Would an agreement between a shareholder and an outsider, or between several or all of the shareholders *inter se*, containing a promise that none of the parties would petition for a winding-up order, be upheld?

(p. 791) ***A member cannot petition for a winding up unless there are assets available for distribution to members.***

[16.08] Re Rica Gold Washing Co (1879) 11 Ch D 36 (Court of Appeal)

The facts appear from the judgment.

JESSEL MR: This is an appeal from the decision of Vice-Chancellor Hall dismissing a petition to wind up the company, on the ground that it was not a bona fide petition, and that the petitioner, as I read the judgment, had not sufficient interest to support it …

Now I will say a word or two on the law as regards the position of a petitioner holding fully paid-up shares. He is not liable to contribute anything towards the assets of the company, and if he has any interest at all, it must be that after full payment of all the debts and liabilities of the company there will remain a surplus divisible among the shareholders of sufficient value to authorise him to present a petition. That being his position, and the rule being that the petitioner must succeed upon allegations which are proved, of course the petitioner must show the court by sufficient allegation that he has a sufficient interest to entitle him to ask for the winding up of the company. I say 'a sufficient interest', for the mere allegation of a surplus or of a

probable surplus will not be sufficient. He must show what I may call a tangible interest. I am not going to lay down any rule as to what that must be, but if he showed only that there was such a surplus as, on being fairly divided, irrespective of the costs of the winding up, would give him £5, I should say that would not be sufficient to induce the court to interfere in his behalf …

I cannot believe that a shareholder who has 75 £1 paid-up shares can imagine that he has sufficient interest to make it worth his while to present a winding-up petition … I have no doubt that, as the Vice-Chancellor says, this is not a bona fide petition, but a petition presented with a very different object than that of obtaining for the petitioner, the £75, or any part of it. In my opinion it is either presented for the purpose of obtaining costs, or for the purpose of annoyance to some other person or persons; and I entirely agree with the Vice-Chancellor that it is not a bona fide petition. Therefore I think we must dismiss this appeal.

BRETT LJ delivered a concurring judgment.

BRAMWELL LJ concurred.

➢ Questions

1. What is the *ratio decidendi* of this case?

2. If a petition for winding up is presented by a holder of a small parcel of fully paid shares on facts similar to *Re German Date Coffee Co* (1882) 20 Ch 169, CA, or *Re Thomas Edward Brinsmead & Sons* **[16.10]** should the court apply the *Rica Gold* rule?

3. The Jenkins Committee (Cmnd 1749, 1962, para 503(h)) recommended the reversal of this rule by statute. In *Re Chesterfield Catering Co Ltd* [1977] Ch 373, the decision was affirmed as being still good law, notwithstanding an argument by counsel that in the light of *Ebrahimi v Westbourne Galleries Ltd* **[16.13]** the principle of*Rica Gold* should be regarded not as a strict rule, but merely as one of the considerations for the court to take into account in assessing whether it was just and equitable to order a winding up. Is this logic persuasive?

4. Given the imposition of filing fees to lodge a winding-up petition, plus legal fees (a hefty sum for a contested case), plus the chance that a petition which is not well founded may be dismissed with an order that the petitioner pay the company's costs, or may be struck out as vexatious (see *Charles Forte Investments Ltd v Amanda*at 'The courts' discretion to order a compulsory winding up', p 804), does the law need the rule in *Rica Gold* ?

(p. 792) ➢ Notes

1. Note the other restrictions on the circumstances in which a contributory can bring a petition: IA 1986 s 124(2)–(4A).

2. The petitioner is not required to prove a tangible interest if the petition is based on, or alleges, company defaults that themselves make it impossible to determine whether there is a surplus for contributories: *Re Wessex Computer Stationers Ltd* [1992] BCLC 366.

3. By contrast, and subject to the wishes of the class of creditors, an unpaid creditor of an insolvent company will not be refused an order on the ground that there are no assets, unless it is shown that making the order would be pointless: *Re Crigglestone Coal Co Ltd* [1906] 2 Ch 327, [1906] 2 Ch 327 at 336; IA 1986 ss 195 and 125(1).

> ➢ Question
>
> In *Bell Group Finance (Pty) Ltd v Bell Group (UK) Holdings Ltd* [1996] 1 BCLC 304, Chadwick J granted a winding-up order to a petitioning creditor where the company had no assets, so that the liquidator could investigate whether there had been impropriety in the conduct of the company's affairs. Is there any reason in principle for having one rule for a creditor (see earlier) and an opposite rule for a member **[16.08]** ?

Grounds for compulsory winding up

1. Compulsory winding up because the company is unable to pay its debts

A winding-up order will not be made on the basis of a debt which is bona fide disputed.

[16.09] Stonegate Securities Ltd v Gregory [1980] Ch 576 (Court of Appeal)

Prior to the presentation of a petition to wind up the plaintiff company, the defendant, in accordance with the Companies Act 1948 (CA 1948) s 223(a) [IA 1986 s 123], served a notice on the company demanding the payment of a debt within 21 days. The company, while accepting that there was a contingent or prospective liability to the defendant, denied that the debt was presently due. It issued a writ and sought interlocutory relief restraining the defendant from presenting a petition. The trial judge found that there was a bona fide dispute whether the defendant was a creditor for a sum presently due and granted an injunction restraining the defendant from presenting a petition in respect of the alleged debt provided that, within three weeks, the directors of the plaintiff company made a declaration of solvency of the company. The company successfully appealed.

> BUCKLEY LJ:… The relevant statutory provisions are contained in sections 222, 223 and 224 of the Companies Act 1948 [IA 1986 ss 122, 123 and 124]. Section 222, as is very familiar, provides that a company may be wound up by the court if '(e) the company is unable to pay its debts.' Section 223 provides that a company shall be deemed to be unable to pay its debts if, among other things, a creditor to whom the company is indebted in a sum exceeding £50 [now £750] then due—and I emphasise those last two words—has served a statutory demand upon the company and the company has failed for three weeks to comply with it. That provision has no application to a case in which the creditor is a creditor in respect of a sum which is not presently due …
>
> … in my opinion, the expression 'contingent creditor' means a creditor in respect of a debt which will only become due in an event which may or may not occur; and a 'prospective creditor' is a creditor in respect of a debt which will certainly become due in the future, either on some date which has been already determined or on some date determinable by reference to future events.
>
> **(p. 793)** Where a creditor petitions for the winding up of a company, the proceedings will take one of two courses, depending upon whether the petitioner is a creditor whose debt is presently due, or one whose debt is contingent or prospective … If the creditor petitions in respect of a debt which he claims to be presently due, and that claim is undisputed, the petition proceeds to hearing and adjudication in the normal way; but if the company in good faith and on substantial grounds disputes any liability in respect of the alleged debt, the petition will be dismissed or, if the matter is brought before a court before the petition is issued, its presentation will in normal circumstances be restrained. That is because a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed.
>
> Ungoed-Thomas J. put the matter thus in *Mann v Goldstein* [1968] 1 WLR 1091, 1098–1099:
>
>> 'For my part, I would prefer to rest the jurisdiction directly on the comparatively simple propositions that a creditor's petition can only be presented by a creditor, that the winding up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial

grounds), since, until a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the Companies Court; and that, therefore, to invoke the winding up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is an abuse of the process of the court.'

I gratefully adopt the whole of that statement, although I think it could equally well have ended at the reference to want of locus standi. In my opinion a petition founded on a debt which is disputed in good faith and on substantial grounds is demurrable for the reason that the petitioner is not a creditor of the company within the meaning of section 224(1) at all, and the question whether he is or is not a creditor of the company is not appropriate for adjudication in winding up proceedings.

The circumstances may, however, be such that the company adopts an intermediate position, denying that the debt is presently due but not denying that it will or may become due in the future—in other words, accepting it as a contingent or prospective debt. The present case is of the last-mentioned kind and the present appeal involves consideration of what is proper in such a case.

… The company now admits that the defendant is a contingent creditor at any rate in a sum of £33,000, but not that any part of that sum is immediately due … and the defendant now accepts that there is a bona fide dispute as to whether any part of the £33,000 is now due, and he further admits that in so far as the debt is contingent, the relevant contingency may never happen. So the situation is such that the defendant cannot petition to wind the company up on the basis that he is a debtor for a sum which is presently due [ie via the statutory demand that had been issued], because that position is disputed in good faith and on substantial grounds; but he is competent to petition as a contingent creditor …

If the only established footing upon which the defendant can petition to wind up the company is as a contingent or prospective creditor, the burden rests on him to show prima facie that there is a case for winding up the company … If the ground for seeking a winding up order is that the company is unable to pay its debts—and no other ground is suggested here—it would be incumbent on the defendant to establish a prima facie case that this was so. The condition [imposed in the trial judge's injunction, requiring the directors to make a declaration of solvency] seems to me to reverse this burden of proof, for if the condition is not complied with it would be open to the defendant as a petitioner to rely upon that fact as some evidence of the company's inability to pay its debts; and moreover, having regard to the nature of the declaration of solvency … the condition imposes upon the company, through its directors, a heavier burden of proof than the burden of establishing merely that the company is not commercially solvent; it imposes the burden of proof of establishing that the company will ultimately be solvent on the basis of a prospective liquidation within 12 months. It seems to me that such a condition cannot be supported in principle …

The whole of the doctrine of this part of the law is based upon the view that winding up proceedings are not suitable proceedings in which to determine a genuine dispute about whether the company does or does not owe the sum in question; and equally I think it must be true that winding **(p. 794)** up proceedings are not suitable proceedings in which to determine whether that liability is an immediate liability or only a prospective or contingent liability …

GOFF LJ and SIR DAVID CAIRNS delivered concurring judgments.

➤ Notes

1. Exceptional circumstances may, however, justify the making of a winding-up order even if the debt is bona fide disputed. See the judgment of Warren J in *Lacontha Foundation v GBI Investments Ltd* [2010] EWHC 37 (Ch), where this exception is summarised:

84 The law today, which I regard as clear, is that there is no absolute jurisdictional bar to a petition being allowed to proceed, or indeed the making of winding-up order, where the debt on which the petition is founded is *bona fide* disputed on substantial grounds.

85 However, before the Companies Court will make a winding-up order or even allow a petition to proceed where the debt is *bona fide* disputed on substantial grounds, there have to be exceptional circumstances. The Privy Council in *Parmalat* declined to give any guidance on the limits of the discretion. But some guidance can be obtained from two other authorities.

86 The first is *Claybridge*,[46] where a departure from the usual rule was said to be justified where the company was a foreign company and the petitioner would otherwise be without a remedy or otherwise injustice would result or for some other sufficient reason the petition should proceed.

…

88 The second authority is *Alipour v Ary*.[47] In that case, the company was a foreign company. The petitioner originally claimed to be the registered holder of 10 shares in a foreign company and subsequently wished to claim instead to be the original allottee of the shares having accepted that his claim to be a registered shareholder could not be maintained. The court summarised the position in this way:

> 'The position as we see it, in the light of the authorities as affected by the current procedures of the Companies Court, is this. (1) A creditor's petition based on a disputed debt will normally be dismissed. (2) It will not be dismissed if the petitioning creditor has a good arguable case that he is a creditor and the effect of dismissal would be to deprive the petitioner of a remedy or otherwise injustice would result or for some other sufficient reason the petition should proceed. (3) On a contributory's petition where the *locus standi* of the petitioner is disputed, the court will consider all the circumstances, including the likelihood of damage to the company if the petition is not dismissed, in determining whether to require the petitioner to seek the determination of the dispute outside the petition.'

2. Deciding when a company is unable to pay its debts can be difficult. There are deeming provisions in s 123(1)(a)–(d), a 'cash-flow' test (used to examine the short-term future of the company) in s 123(1)(e), and a 'balance-sheet' test (used to examine the long term prospects of the company) in s 123(2). On s 123(2), the Supreme Court in*BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc* [2013] UKSC 28, at [48], has insisted that the words of the section (requiring the petitioner to satisfy the court, on the balance of probabilities, that the company has insufficient assets to be able to meet all its liabilities, including prospective and contingent liabilities) should not be paraphrased as a '"point of no return" (test reached by a company) because of an incurable deficiency in its assets'.[48]

(p. 795) 2. Compulsory winding up on the 'just and equitable' ground

Members are entitled, as 'contributories', to petition for the compulsory winding up of the company (IA 1986 s 124). They are not restricted to using the 'just and equitable' ground[49] (and nor is this ground restricted to members), but this is the one most commonly used by members who find themselves unable to proceed on the basis of a special resolution for the voluntary winding up of the company (IA 1986 s 84(1)(b)).

A company formed for a fraudulent purpose may be wound up on the 'just and equitable' ground.

[16.10] Re Thomas Edward Brinsmead & Sons [1897] 1 Ch 406 (Court of Appeal)

Three men named Brinsmead, former employees of John Brinsmead & Sons, the well-known piano makers, formed the present company to make pianos which were to be passed off as the product of the older established firm. An

injunction had been obtained, restraining the company from this action; but meantime shares in the company worth many thousands of pounds had been subscribed for by the public in a promotion fraud instigated by the Consolidated Contract Corporation. On this evidence, it was held to be just and equitable to grant a winding-up order.

> The judgment of the court (LINDLEY, AL SMITH and RIGBY LJJ) was read by AL SMITH LJ: In our judgment it has been proved that this company—ie Thomas Edward Brinsmead & Sons Limited—was initiated to carry out a fraud, and that, until restrained by injunction, it continued therein; and that a strong prima facie case has been made out that the Consolidated Contract Corporation are at the present moment dishonestly keeping the shareholders' money to which the shareholders, and not they, are entitled, and are resisting the petition to wind up in order to continue to do so. If the sums which they have improperly obtained from the company can be recovered from them, there will probably be something to distribute among the shareholders and, although the petitioner is a fully paid-up shareholder, he cannot be said to have no locus standi. The company is hopelessly embarrassed by the actions already brought against it, and there will, no doubt, be many more of the same sort if this petition is dismissed; and if it is not wound up the £35,000 obtained from it by its promoters will remain in their hands.
>
> Although the words 'just and equitable' have had a narrow construction put upon them,[50] they have never been construed so narrowly as to exclude such a case as this. If ever there was a case in which it was just and equitable that a company should be wound up by the court, we cannot doubt that the case is this case. For the reasons above, we dismiss this appeal with costs.

➤ Note

The entire scheme for the company must be fraudulent in order to justify liquidation under this principle. Usually if the company itself has been defrauded, or if subscribers for shares have been misled or defrauded, these parties must simply apply for a remedy against the wrongdoer; the company will not be wound up.

(p. 796) ***It is just and equitable to wind up a company when its 'substratum' or principal object has failed.***

[16.11] Re Kitson & Co Ltd [1946] 1 All ER 435 (Court of Appeal)

The company was incorporated in 1899. The first two sub-clauses of the objects clause in its memorandum read as follows:

> **(i)** To acquire and take over as a going concern the business now carried on at Airedale Foundry, Hunslet, in the city of Leeds, under the style or firm of 'Kitson & Co', and all or any of the assets and liabilities …
> **(ii)** To carry on the business of locomotive engine manufacturers, iron-founders, mechanical engineers and manufacturers of agricultural implements and other machinery, tool makers, brass founders, metal workers, boiler makers …

In July 1945, the company agreed to sell the goodwill and assets of the engineering business which was carried on at the Airedale foundry, and acquire the assets of a subsidiary ('Balmforth') and to continue an engineering business. It was held that the substratum had not gone.

> LORD GREENE MR: [The] form of the memorandum is the common form where a business is being acquired. It sets out in the usual way the acquisition of the business as the first step which the company is going to undertake. We are not considering now whether failure in 1899 to acquire the business of Kitson & Co would have destroyed the substratum of the company. It might possibly have been thought that unless it got this business it was not really starting its career in the way in which the shareholders bargained it should be started; but the question we have to decide is whether, that business having been acquired, forty-six years ago, the disposal of it last year amounted to a destruction of the substratum. In my opinion, the

main and paramount object of this company was to carry on an engineering business of a general kind. It was such a business that was carried on by Kitson & Co, and I cannot bring myself to construe this memorandum as limiting the paramount object and restricting the contemplated adventure of the shareholders to the carrying on of what could be called the business of Kitson & Co. The impossibility of applying such a construction seems to me to be manifest when one remembers that a business is a thing which changes. It grows or it contracts. It changes; it disposes of the whole of its plant; it moves its factory; it entirely changes its range of products, and so forth. It is more like an organic thing. Counsel for the respondents quoted to us a number of very well-known authorities on which it has been held that on particular facts the substratum of particular companies had gone. I do not propose to examine those authorities because they do not assist me in construing this particular memorandum. It must be remembered in these substratum cases that there is every difference between a company which on the true construction of its memorandum is formed for the paramount purpose of dealing with some specific subject-matter and a company which is formed with wider and more comprehensive objects. I will explain what I mean. With regard to a company which is formed to acquire and exploit a mine, when you come to construe its memorandum of association you must construe the language used in reference to the subject-matter, namely, a mine, and, accordingly, if the mine cannot be acquired or if the mine turns out to be no mine at all, the object of the company is frustrated, because the subject-matter which the company was formed to exploit has ceased to exist. It is exactly the same way with a patent, as in the well-known *German Date Coffee* case.[51] A patent is a defined subject-matter, and, if the main object of a company is to acquire and work a patent and it fails to acquire that patent, to compel the shareholders to remain bound together in order to work some other patent or make some unpatented article is to force them into a different adventure **(p. 797)** to that which they contracted to engage in together; but, when you come to subject-matter of a totally different kind like the carrying on of a type of business, then, so long as the company can carry on that type of business, it seems to me that prima facie at any rate it is impossible to say that its substratum has gone. So far as this stage of the argument is concerned, it is to my mind quite impossible upon the true construction of this memorandum of association to limit the paramount object of this company to the specific business of Kitson & Co, so as to lead to the result that as soon as Kitson & Co's business was sold the substratum of the company had gone …

MORTON and TUCKER LJJ delivered concurring judgments.

➢ Note

In *Re Tivoli Freeholds Ltd* [1972] VR 445 (SC Vic) a winding-up petition was granted on the just and equitable ground. The main objects of the company had been to own and build theatres and to carry on theatrical and similar entertainment businesses. An outside group acquired control of the company and, having realised nearly all of its assets, used the funds so raised to mount corporate raids on other firms. (These activities were quite profitable and dividends were regularly paid on the strength of the profits, so an alternative petition based on alleged oppression of the minority members (see 'Unfairly prejudicial conduct of the company's affairs', pp 681ff) was rejected by the judge.) Although it was not contended that the company could not, if it chose, have continued to pursue its original objects, the court accepted that the evidence showed that the business for which the company was formed had been conclusively abandoned, and granted relief on a basis analogous to a failure of substratum.

It is just and equitable to wind up a company when there is a complete deadlock in the management.

What is meant by 'deadlock' is not completely clear from the cases. Deadlock requires at least an impasse in the corporate decision-making process. But in most cases the courts will hold that there is no deadlock if a legal means exists to get decisions made, using some procedure under either the company's constitution or the general law. On the other hand, in quasi-partnerships, it may be unjust or inequitable to leave one faction to exercise its legal rights over the other (see the *Ebrahimi* case **[16.13]**).

It is just and equitable to wind up a company where there is such a justifiable (and, it seems, insoluble) lack of confidence in the management of the company's affairs that it is unjust and inequitable to require

the petitioner to remain a member.

[16.12] Loch v John Blackwood Ltd [1924] AC 783 (Privy Council)

The engineering business of John Blackwood had, after his death, been formed into a company and run by one of his trustees, McLaren, for the benefit of the three beneficiaries in his estate: McLaren's wife (who was to take one-half), Mrs Loch (one-quarter) and Rodger (since deceased, one-quarter). The business had been run very profitably by McLaren, but (as is described in the judgment) he had run it in a manner which was oppressive to the beneficiaries other than his wife. They accordingly petitioned for the winding up of the company on the ground that it was just and equitable to do so. The Chief Justice of Barbados made an order, which was reversed by the West Indian Court of Appeal but restored by the Privy Council. The remaining facts appear from the judgment.

> The opinion of the Privy Council was delivered by LORD SHAW OF DUNFERMLINE: The board of directors now consists of Mr McLaren, his wife Mrs McLaren, who was appointed in 1913, and **(p. 798)** Mr Yearwood. Under this directorate the business of the company appears to have been energetically managed and to have amassed considerable profits.
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> The arrangement of the capital was this: the total amount was 40,000 in £1 shares; 20,000 of these were allotted to Mrs McLaren; of the remaining 20,000, 10,000 should have gone to Mrs Loch and 10,000 to Mr Rodger. Mrs Loch, however, was allotted 9,999; Mr Rodger, 9,998; and the three shares left over were allotted one to Mr McLaren and one each to Mr Yearwood and Mr King (Mrs McLaren's nominees; the first being Mr McLaren's clerk and the second his solicitor). This was quite a natural and proper arrangement; but, of course, in the event of a division of opinion in the family between what may be called the McLaren interest on the one hand, and the interest of the nephew and niece on the other, the preponderance of voting power lay with the former. It is thus seen that although taking the form of a public company the concern was practically a domestic and family concern. This consideration is important,[52] as also is the preponderance of voting power just alluded to.
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> In the petition for winding up eight different reasons are assigned therefor. The first is: that the statutory conditions as to general meetings have not been observed; the second that balance-sheets, profit and loss accounts and reports have not been submitted in terms of the articles of the company; and the third is that the conditions under the statute and articles as to audit have not been complied with. All these allegations are true, and it seems naturally to follow from the preponderance already alluded to, that there is at least considerable force in the fifth reason that it is impossible for the petitioners to obtain any relief by calling a general meeting of the company. There are further submissions—namely, that the company and the managing director, Mr McLaren, have refused to submit the value of the shares to arbitration, and that without winding up it is impossible for the petitioners to realise the true value of their shares. But the principal ground of the petitioner is that in the circumstances to be laid before the court it is just and equitable that the company should be ordered to be wound up. This last ground was affirmed by the Court of Common Pleas.
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> With regard to the first three submissions made in the petition, it was strenuously argued on behalf of the company, which practically means the directorate or the McLaren interest, that however true it might be that owing to the informal way in which the books of the company had been kept it appeared as if both the statute and the articles of association had been violated in various particulars and that no general meetings of the company had been held, and no auditors properly appointed, and it was certain that no balance-sheets, profit and loss accounts and reports had been submitted for the critical years 1919 and 1920, still these were no grounds for winding up. Other applications, it was said, might competently be made to the court to compel the statute and articles to be properly complied with. It may be doubtful whether such a course of conduct lasting in several particulars since its inception until now, would be insufficient as a ground for winding the company up. But their Lordships think it unnecessary to give any separate decision upon such a point.
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> In their opinion, however, elements of that character in the history of the company, together with the fact that a calling of a meeting of shareholders would lead admittedly to failure and be unavailable as a remedy,