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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

**IN THE MATTER OF B9 ORGANIC ENERGY LIMITED
(Registration No. NI034588)**

AND IN THE MATTER OF THE COMPANIES ACT 2006

**AND IN THE MATTER OF THE INSOLVENCY (NORTHERN IRELAND)
ORDER 1989**

ROBERT BRENNAN

Petitioner

and

**[1] ROBERT IAN HARVEY
[2] DAVID CHARLES SURPLUS
[3] DAVID JOSEPH McKEE
[4] JAMES McKAY
[5] B9 ORGANIC ENERGY LIMITED**

Respondents

**William Gowdy KC with Peter Hopkins KC (instructed by DWF(NI) LLP, Solicitors) for
the Petitioner**

**Alistair Fletcher (instructed by A&L Goodbody, Solicitors) for the first to fourth
Respondents**

SIMPSON J

Introduction

[1] On 15 February 2024 the petitioner issued his petition in this case seeking relief pursuant to section 996 of the Companies Act 2006 as a result of what he says is unfairly prejudicial conduct and, in the alternative, that the fifth respondent (the

Company”) be wound up under the provisions of the Insolvency (Northern Ireland) Order 1989.

[2] The matter comes before me as an application on behalf of the first to fourth respondents (although the summons is taken out only by the first respondent) to strike out that part of the petition which seeks the winding up of the Company. The application is brought pursuant to Order 18 Rule 19(1) of the Rules of the Court of Judicature in Northern Ireland; specifically, paras (b) (that the pleading is scandalous, frivolous or vexatious) and (d) (that the pleading is otherwise an abuse of the process of the court). The applicants also rely on the inherent jurisdiction of the court.

[3] Order 18 Rule 19(3) provides:

(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading.”

[4] Mr Fletcher s skeleton argument sets out at para 2 the basis for the application, thus:

“... the petitioner s petition for the just and equitable winding up of the Company is an abuse, as he has an alternative remedy, namely under s 994 of the Act, such that the court should not (and would not at trial) grant this as a form of relief. There is no realistic prospect of the court ordering a winding up of the Company, given that if the petitioner establishes a just and equitable basis to wind up the Company, he will also have established unfair prejudice, and the relief under the latter is more than an adequate alternative remedy.”

[5] The Company was incorporated on 7 August 1998. The Memorandum of Association states that the Company s objects are:

- (a) To undertake work involving waste management including effluent monitoring and control and collection, recycling or reprocessing of waste products, and energy from waste.
- (b) To acquire interests in land and to enter into any options to acquire interests in land.
- (c) To carry on business as a general commercial company.”

[6] Originally the petitioner held 10% of the Company's shares while the first respondent held 90%. Following a number of alterations of the shareholding, the precise details of which are in dispute, including additional shareholders and the subsequent relinquishing of shareholdings, the present position is that the petitioner holds 25% and the first respondent 75% of the shares.

[7] The petitioner's grounding affidavit is dated 8 January 2024 (Brennan 1"). The first respondent swore an affidavit on 22 April 2024 on his own behalf and on behalf of the second to fourth respondents (Harvey 1"). At paragraph 3 that affidavit was specifically stated to be in response to the petition ... and to the corresponding affidavit of [the petitioner] sworn on 8 January 2024" and in support of the ... application to strike out on the basis of abuse of process by the petitioner."

[8] The first respondent's summons to strike out the claim for winding up relief is dated 3 May 2024. There then follow two more affidavits; from the petitioner, dated 18 June 2024 (Brennan 2") and from the respondent, dated 21 August 2024 (Harvey 2"). It is unnecessary for the purposes of this application to rehearse in this judgment the detail of the four affidavits, but I have taken into consideration all that is said in them, and in the relevant exhibits. It is clear, however, that the two deponents, the remaining shareholders in the company, are entirely at arm's length in relation to virtually every fact and there is simply no agreement between them.

[9] Mr Fletcher says that the petition contains no relevant pleading in relation to substratum. Further, he says, when one examines the Memorandum of Association (see para [5] above) it is clear from paras 3(b) and (c) that the objects of the company are very broad, and there can be no basis for asserting that the substratum is gone. While there may be a freeze on the company's activities, the company still owns a landfill site and land. It is paying off a loan, so it is still trading. He also warns against the court relying on the quasi partnership nature of the company.

[10] He submits that an examination of the petitioner's affidavits reveals no explanation of why the petitioner says the unfair prejudice jurisdiction does not provide him with all the necessary remedies. He says the petitioner is not genuine when he includes the prayer for winding up relief.

[11] In brief, Mr Gowdy KC submits that the petitioner complains of (1) the diminution of his shareholding; (2) that he has been excluded from management; (3) that the relationship of trust and confidence has broken down; (4) he alleges a breach of fiduciary duty; (5) that the sole venture has come to an end and the proceeds have been distributed without reference to the petitioner; (5) that the company is now doing nothing. All of those matters feed into the plea for just and equitable winding up.

Relevant statutory provisions

[12] Sections 994 and 996 of the Companies Act 2006 provide:

994 Petition by company member

- (1) A member of a company may apply to the court by petition for an order under this Part on the ground –
- (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
 - (b) ...

996 Powers of the court under this Part

- (1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.
- (2) Without prejudice to the generality of subsection (1), the court's order may –
- (a) regulate the conduct of the company's affairs in the future;
 - (b) require the company –
 - (i) to refrain from doing or continuing an act complained of, or
 - (ii) to do an act that the petitioner has complained it has omitted to do;
 - (c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;
 - (d) require the company not to make any, or any specified, alterations in its articles without the leave of the court;
 - (e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly."

[13] Where material to this application, the provisions in relation to winding up of a company are to be found in the Insolvency (Northern Ireland) Order 1989:

Circumstances in which company may be wound up by the High Court

102 A company may be wound up by the High Court if –

...

(g) the Court is of the opinion that it is just and equitable that the company should be wound up.

Powers of High Court on hearing of petition

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

(2) If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the High Court, if it is of the opinion –

(a) that the petitioners are entitled to relief either by winding up the company or by some other means, and

(b) that in the absence of any other remedy it would be just and equitable that the company should be wound up,

shall make a winding-up order; but this does not apply if the Court is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy."

Legal principles

[14] In relation to applications to strike out pleadings, in *McIlroy-Rose v McKeating* [2021] NICh 17 Humphreys J said:

[25] Under the inherent jurisdiction and grounds (b)-(d), evidence by affidavit or otherwise is admissible and the Court can explore the facts fully, but should do so with caution. In *Mulgrew v O'Brien* [1953] NI 10 Black LJ made clear that on such an application, the Court will strike out:

'...if it is manifest that the plaintiff's case cannot possibly succeed or if it is clear that the action is an abuse of the process of the court. In exercising this inherent jurisdiction, the court is not confined to what appears on the face of the pleadings. Extrinsic evidence is admissible of the facts which it is contended should induce the court to act.

[26] In *Three Rivers District Council v Bank of England No 3* [2001] UKHL 16 (which involved an application to strike out allegations of fraud or dishonesty), the court approved the following principles:

- (i) Strike out is only appropriate for plain and obvious cases.
- (ii) Judges should not rush to make findings of fact on contested evidence at a summary stage.
- (iii) If an application to strike out involves a prolonged and serious argument, the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, is also satisfied that striking out will remove the necessity for a trial or will substantially reduce the burden of preparing for, or the burden of the trial itself.
- (iv) Judges hearing strike out applications should not conduct mini trials involving protracted examination of the documents and facts (although sometimes a detailed analysis is appropriate).

- (v) A judge may refuse to hear a strike out application if the application:
 - (a) is unlikely to succeed; or
 - (b) will not be decisive or appreciably simplify the eventual trial.”

[15] The same broad approach applies in the present type of case, and it is common case that the strike out application can only be granted if it is plain and obvious that the petition [here, the winding up prayer in the petition] will not succeed” (*Re a Company No. 003096 of 1987* [1987] 4 BCC 80, 81) or if it is perfectly clear that the claim will not succeed” (*Re Abbey Leisure Ltd.* [1990] BCLC 342, 347).

[16] Section 122(1) of the Insolvency Act 1986 is in identical terms to article 102 of the Insolvency (Northern Ireland) Order 1989, and section 125 of the Act is in identical terms to article 105 of the Order. There is a very useful summary of the relevant principles in *Dosanjh v Balendran and Webb Estate Developments Ltd.* [2025] EWHC 507 (Ch), some of which I repeat:

10. Section 122(1) of the Insolvency Act 1986 provides:

A company may be wound up by the court if –

...

(g) the court is of the opinion that it is just and equitable that the company should be wound up.

11. Section 125(1) of the 1986 Act confers a wide discretion on the court as to the orders that it may make on the hearing of a petition:

On hearing a winding-up petition the court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make an interim order, or any other order that it thinks fit...’

In the case of a petition presented on the just and equitable ground, section 125(5) constrains the court as follows:

If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the court, if it is of opinion –

- (a) that the petitioners are entitled to relief either by winding up the company or by some other means, and
- (b) that in the absence of any other remedy it would be just and equitable that the company should be wound up,

shall make a winding-up order; but this does not apply if the court is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.'

12. A petitioner is required to show that a tangible benefit will be derived from the winding up, usually that there is a surplus of assets over liabilities so that there will be a distribution to members (*Taylor v Whitehall Partnership Ltd* [2023] EWHC 596 (Ch), per His Honour Judge Mithani KC (hon. causa), sitting as a judge of the High Court, at paragraph 36).

13. Winding up has been described as a remedy of last resort and an exceptional remedy to grant in the context of disputes between shareholders (*Fulham Football Club (1987) Ltd v Richards* [2012] Ch 333, per Patten LJ at paragraph 56). In *Chu v Lau* [2020] UKPC 24 Lord Briggs JSC, giving the opinion of the board, considered the very similar provisions as to just and equitable winding up applicable under the Insolvency Act 2003 in the British Virgin Islands. He described the circumstances in which such a winding up may be ordered as follows:

14. A just and equitable winding up may be ordered where the company's members have fallen out in two related but distinct situations, which may or may not overlap. First, a winding up may be ordered to resolve what may conveniently be labelled a functional deadlock. This is where an inability of members to cooperate in the management of the company's affairs leads to an inability of the company to function at board or shareholder level. ...

15. Secondly, where the company is a corporate quasi-partnership, an irretrievable breakdown in trust and confidence between the participating members may justify a just and equitable winding up, essentially on the same grounds as would justify the dissolution of a true partnership. This jurisprudence was developed as an aspect of the law of partnership in England in the mid-19th Century, and is exemplified in the following passage from the judgment of Sir John Romilly MR in *Harrison v Tennant* (1856) 21 Beav 482, at 496-497:

I do not base my decision upon any particular reported case, but upon the principle that the circumstances under which the parties entered into the partnership have, by matters over which they have no control, materially altered, that these altered circumstances have, combined with the conduct of the parties themselves, produced a mistrust which the Court cannot say is unreasonable; and that, taking all these things together, it is impossible that the partnership can be conducted upon the footing on which it was originally contemplated, without injury to all these persons concerned, and that taking all these matters together, it makes this a case in which, in my opinion, it is the duty of the Court to pronounce a decree for the dissolution of the partnership.

It is clear, for example from *Pease v Hewitt* (1862) 31 Beav 22 and *Atwood v Maude* (1868) LR 3 Ch App 369, at p 373, that a dissolution of a partnership might be ordered even where both parties were to blame for the breakdown in mutual trust and confidence.

14. Lord Briggs recognised that winding up is a remedy of last resort. It is not, however, only available if there is no other remedy. He said:

20. ... The member retains a significant element of choice in the remedy to be sought,

even though the court has the last word. As is clearly enshrined in section 167(3) of the 2003 Act, the court carries out a three stage analysis, asking:

- (a) Is the applicant entitled to some relief?
- (b) If so, would a winding up be just and equitable if there were no other remedy available?
- (c) If so, has the applicant unreasonably failed to pursue some other available remedy instead of seeking winding-up?

21. The legal burden of proof is on the applicant at stages (a) and (b). But it shifts to the respondent at stage (c)...

It seems to me that those principles are equally applicable to section 125(5) of the 1986 Act, which is in the same terms as section 167(3) of the BVI statute.

15. As to the conduct of a petitioner, Lord Cross noted in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at 387:

A petitioner who relies on the just and equitable clause must come to court with clean hands, and if the breakdown in confidence between him and the other parties to the dispute appears to have been due to his misconduct he cannot insist on the company being wound up if they wish it to continue.

In *Harding v Edwards* [2014] EWHC 247 (Ch), Rose J, as she then was, observed:

21. Lord Cross made that statement when considering an earlier case where the petitioner had been found by the court to have been stealing the company's money. I do not consider that the obligation to come with clean hands means that a petitioner must be able to show that he or she is entirely blameless for the problems that have overtaken the company. Petitions for winding up on just and equitable

grounds usually represent the culmination of a long period of argument and disruption from which it is rare for any one party to emerge as having behaved with exemplary politeness and reasonableness throughout. To set such a high standard would, in my judgment, ignore the very realities of human relationships which Lord Wilberforce regarded as the foundation of the jurisdiction.

Thus, the conduct of a petitioner that may justifiably attract criticism when examined some years later in court is not necessarily a bar to obtaining relief under the just and equitable ground."

[17] From the above it is clear that the burden of proving that the petitioner is acting unreasonably falls on Mr Fletcher.

[18] Mr Fletcher, at para [9] of his skeleton argument relies for the proposition that the winding up jurisdiction is not wider than the unfair prejudice jurisdiction" on the first instance judgment of Jonathan Parker J in *Re Guidezone* [2001] BCC 692. However, in *Re Neath Rugby Ltd* [2010] BCC 597 the Court of Appeal said:

Lewison J. in the present case at [230] and Warren J. at [48] of his judgment in *Re Southern Counties Fresh Foods Ltd* [2008] EWHC 2810 (Ch) expressed doubt as to the correctness of the conclusion of Jonathan Parker J. For the reasons I have endeavoured to give above, in my judgment, those doubts were justified: the judgment of Jonathan Parker J. on this point should no longer be followed." (Para 107)

[19] At paras 104 and 105 of the Court of Appeal s judgment, having quoted from the speech of Lord Hoffman in *O'Neill v Phillips* [1999] 1 WLR 1092, the court stated:

104 It is to be noted that Lord Hoffman did not say that the facts giving rise to the jurisdiction to wind up under the just and equitable jurisdiction were the same as those giving rise to the exercise of the jurisdiction under section 994: he used the word parallel. To the contrary, he expressly approved the statement of Mummery J in *Re a company (No 00314 of 1989)* that the grant of one remedy will not necessarily require proof of conduct which would justify a different remedy. In many, if not most, cases the conduct of the respondent may give rise both to the jurisdiction under section 994 and to that under [article

102(g)]; but there may be cases which satisfy the requirements of one jurisdiction but not the other. In addition, it should be borne in mind that a winding up may be ordered on the just and equitable ground where no unfair conduct is alleged, as in the cases in which the so called substratum has gone, as in *Re German Date Coffee Co* (1882) 20 Ch D 169 and *Re Baku Consolidated Oilfields Ltd* [1944] 1 All ER 24.

105 This conclusion is consistent with the judgment of Arden LJ (with whom the other members of the Court of Appeal agreed) in *Jones v Jones and others; re Incasep* [2002] EWCA Civ 961 at paragraph 44, and with the earlier judgment of Nourse J in *Re R A Noble & Sons (Clothing) Ltd* [1983] BCLC 273 (which was cited to the Appellate Committee in *O Neill v Phillips* but was not commented upon). It is consistent with the differences in the statutory wording: Parliament would not have used such different wording in section 994 of the Companies Act 2006 and in [article 102(g) of the Insolvency [(Northern Ireland) Order 1989] if the jurisdictions were intended to be coterminous."

[20] It is clear from the above that the unfair prejudice jurisdiction and the just and equitable jurisdiction run parallel to each other but are not coterminous.

Discussion

[21] I am satisfied that this is not a functional deadlock case. The first respondent has a 75% shareholding; the petitioner 25%. Accordingly, any necessary resolutions can be passed to allow the business of the company to be carried out. Accordingly, it is necessary to examine the other bases on which a company may be wound up under the just and equitable principle, and which are relied upon by Mr Gowdy KC, namely the quasi-partnership basis and the substratum basis.

[22] As to the first, in *Ebrahimi v Westbourne Galleries Ltd.* [1973] AC 360 the petitioner was one of three shareholders. The petitioner and one of the respondents had originally been in equal partnership with each other in the business. On the formation of the company each owned 50% of the shares but shortly thereafter another individual was made managing director and some shares were transferred to him. At the time of the presentation of the petition the petitioner owned 40% of the shares and the two respondents respectively owned 40% and 20%. The majority shareholders removed the petitioner from the office of director, which led to the petition. The petitioner sought an order (under the then companies legislation) that the majority shareholders purchase his shares, on the basis of oppressive conduct and, in the alternative, a winding up of the company. The judge refused the oppressive conduct relief, but ordered that the company be wound up. The Court of Appeal reversed that

order and the matter went on appeal to the House of Lords. The House allowed the appeal and restored the judge's order.

[23] In the course of his submissions in *Ebrahimi*, counsel for the respondents suggested that too great a use of the partnership analogy in respect of company winding up had been made in earlier authorities and invited the House to restate the principles. The leading speech was that of Lord Wilberforce.

[24] Lord Wilberforce considered a line of authorities, including the following, beginning at 375H:

The real starting point is the Scottish decision in *Symington v Symington s Quarries Ltd.* (1905) 8 F. 121. There had been a partnership business carried on by two brothers who decided to transfer it to a private limited company. Each brother was to hold half the shares except for a small holding for a third brother to hold balance for voting. A resolution was passed in general meeting by the votes of one brother together with other members having nominal interests that he should be sole director. The other two brothers petitioned for a winding up under the just and equitable provision and the court so ordered. The reasons for so doing, given by some of their Lordships of the First Division, are expressed in terms of lost substratum or deadlock—words clearly used in a general rather than a technical sense. The judgment of Lord McLaren, which has proved to be the most influential as regards later cases, puts the ground more generally. He points out, at p. 130, that the company was not formed by appeal to the public: it was a domestic company, the only real partners being the three brothers:

In such a case it is quite obvious that all the reasons that apply to the dissolution of private companies, on the grounds of incompatibility between the views or methods of the partners, would be applicable in terms to the division amongst the shareholders of this company, ...'

In England, the leading authority is the Court of Appeal's decision in *In re Yenidje Tobacco Co. Ltd.* [1916] 2 Ch. 426. This was a case of two equal director shareholders, with an arbitration provision in the articles, between whom a state of deadlock came into existence. It has often been argued, and was so in this House, that its authority is limited to true deadlock cases. I could, in any case, not be persuaded

that the words just and equitable need or can be confined to such situations. But Lord Cozens-Hardy M.R. clearly puts his judgment on wider grounds. Whether there is deadlock or not, he says, at p. 432, the circumstances:

are such that we ought to apply, if necessary, the analogy of the partnership law and to say that this company is now in a state which could not have been contemplated by the parties when the company was formed ...”

[25] At 378 E, in a consideration of authorities from other common law jurisdictions, he said:

In re Wondoflex Textiles Pty. Ltd. [1951] V.L.R. 458 was a case where again the company was held to resemble a partnership. The petitioner, owner of a quarter share, was removed from office as director by the governing director exercising powers under the articles. Thus, the issue, and the argument, closely resembled those in the present case. The judgment of Smith J. contains the following passage, at p. 467:

It is also true, I think, that, generally speaking, a petition for winding up, based upon the partnership analogy, cannot succeed if what is complained of is merely a valid exercise of powers conferred in terms by the articles: ... To hold otherwise would enable a member to be relieved from the consequences of a bargain knowingly entered into by him: ... But this, I think, is subject to an important qualification. Acts which, in law, are a valid exercise of powers conferred by the articles may nevertheless be entirely outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company; and in such cases the fact that what has been done is not in excess of power will not necessarily be an answer to a claim for winding up. Indeed, it may be said that one purpose of [the just and equitable provision] is to enable the court to relieve a party from his bargain in such cases.

The whole judgment is of value.”

[26] Having reviewed those, and other authorities, Lord Wilberforce said this (379 B-D), of the just and equitable jurisdiction:

My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words just and equitable and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The just and equitable provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."

[27] As to the substratum point, in *Re Perfectair Holdings Ltd.* [1990] BCLC 423 Scott J identified a third species of case where winding up may be ordered. Noting that the petition included the plea that the purposes for which the company was formed no longer pertain and there is no purpose for the company's continued existence", he said:

That would appear to invoke the line of authority represented by what are sometimes called the substratum cases. All trading companies are formed for certain trading purposes. The memoranda of association are usually cast in fairly wide and comprehensive form, including a variety of possible commercial activities as well as a variety of ancillary acts or functions designed to serve the principal objects therein contained. But if it can be shown to the satisfaction of the court that the principal objects contained

in a memorandum, once they have been identified, can no longer be achieved, then grounds are shown for a winding-up order to be made at the instance of a contributory.

The reason underlying this is not hard to find. Shareholders in trading companies put their money into the company of their choice on the basis of the commercial activities authorised by its memorandum. There may be one main commercial activity - the running of a restaurant, let it be supposed - and also other commercial activities designed to be covered by paragraphs in the memorandum in case it should be desired to change the business of the company from restaurant-owning to some other form of commercial activity. But if it be clear that none of the commercial activities authorised by the memorandum can be achieved, then to require the incorporators to leave their moneys in the company would be to require them to leave their moneys in a vehicle for which they never intended it. And so it is that if the real commercial enterprise authorised by the memorandum properly construed cannot be achieved, it is accepted that it is just and equitable for the company to be wound up.

Mr Bannister referred me to *Re Kitson & Co. Ltd* [1946] 1 All E.R. 435 and *Re Taldua Rubber Co. Ltd.* [1946] 2 All E.R. 763, as authority for the proposition that a company would not be wound up under the just and equitable ground simply on the basis that a particular prominent purpose, even the most important and most prominent purpose, identified for the company in its memorandum was no longer capable of being achieved, if it were the case that other commercial purposes authorised by the memorandum remained capable of being achieved.

It is not clear that either of the companies involved in the two cases was, so to speak, a partnership company such as the company in the present case undoubtedly was. But, nevertheless, I accept the general principle set out in those cases. The memorandum of any company to which the loss of substratum argument as a ground for winding up is to be applied must be construed. If when construed there are still commercial activities that the company is capable of discharging consistently with its memorandum and if some members of the company want that commercial activity to be pursued by the company, prima facie at least,

if there is no more to the case than that, the just and equitable ground will not have been made out.”

[28] I take into account the above guidance, from which I have derived considerable assistance, in my consideration of the issues in this case as identified in their submissions by counsel.

[29] Dealing with the substratum point first, paras 40 to 42 of Harvey 1 discuss the trading position of the company. The deponent says that from 2014 onwards the company has had little trading activity. Between 2012 and 2104 it had a management contract with Gottex (the company s major funder) in respect of an anaerobic digestion project at Granville, Dungannon. That management contract was terminated in 2014 when Gottex entered into a similar contract with a company named B9 Solutions Ltd., a company in which the first, second and third respondents were directors and shareholders, but in which the petitioner had no interest. In para 42 of Harvey 1, the deponent says:

As the management contract was the primary commercial activity that the company was undertaking at the time, the novation of the management contract resulted in nearcessation of commercial activity for the company.”

[30] It seems to me that there is a potential valid argument available to the petitioner, in line with the authority of *Perfectair*, that in reality the principal objects of the company are no longer able to be achieved. In the circumstances, therefore, and taking into account that the court should only strike out the prayer for just and equitable relief if it is plain and obvious that the [prayer in the] petition will not succeed” (*Re a Company No. 003096 of 1987* [1987] 4 BCC 80, 81) or if it is perfectly clear that the claim will not succeed” (*Re Abbey Leisure Ltd.* [1990] BCLC 342, 347) I decline to strike out the prayer.

[31] As to the issue of quasi-partnership, one matter which is agreed between the deponents is that the petitioner was removed as a director in March 2016. It is asserted by the first respondent that this was done in the company s interests and due to a number of factors, including the petitioner s alleged failure to contribute positively to the company. In addition, it is alleged that the company s funder, Gottex, had made it clear that it would no longer work with the petitioner. The petitioner does not believe this.

[32] Having read the affidavits of the petitioner and first respondent and having listened to the submissions of the parties, I consider that it is clear beyond peradventure that there is a total breakdown in trust between the protagonists, the two shareholders. It is difficult to envisage any circumstances in which they could ever work productively together again. While I am conscious of the need to be wary of going too far with the partnership analogy, nevertheless I consider that the various

citations included in his speech by Lord Wilberforce in *Ebrahimi*, particularly that from the case of *Wondoflex*, are pertinent to my considerations in this case.

[33] In the circumstances I consider that there is a valid potential argument available to the petitioner that all trust and confidence between the two shareholders is destroyed and, accordingly, a valid potential argument for winding up.

[34] One of the matters which the petitioner may desire is the appointment of an independent liquidator which would remove the controlling party from power, ensuring that a neutral party realises the assets for the benefit of all shareholders. In my view he is entitled to retain that choice.

[35] Accordingly, and taking all of the above into account, I do not consider that it has been demonstrated that the petitioner is acting unreasonably in including a prayer for winding up in his petition.

[36] There remains the issue of delay which was raised by Mr Fletcher. The petitioner in *Brennan 1* explains the reasons for delay. They may be valid reasons or they may be spurious reasons. However, this is not the forum for any analysis of the validity or otherwise of the explanations.

[37] Further, it is clear that even if I struck out the prayer for just and equitable relief it would not remove the necessity for a trial nor would it substantially reduce the burden of preparing for, or the burden of the trial itself.

[38] Taking guidance from the White Book as to what amounts to a pleading that is scandalous, frivolous or vexatious, I do not consider that the prayer for just and equitable relief falls into any of those categories in this case. I do not consider that it is an abuse of the process of the court and I do not consider that, in all the circumstances of the case, the first respondent (or any of the respondents) can successfully invoke the inherent jurisdiction of the court.

Conclusion

[39] In all the circumstances as identified above, I refuse the first respondent's application to strike out the prayer in the petition which seeks a just and equitable winding up of the company.

[40] Having heard the parties on the issue of costs, I reserve costs to the trial judge.