Judgment 28/2012

In the matter of Synergy Capital Limited and In the matter of Part XXII of The Companies (Guernsey) Law 2008
Civil Action File No 1685
Royal Court
20th July 2012

Application to dismiss compulsory winding up petition on grounds of standing.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 20th day of July 2012 before Richard James McMahon, Esquire Deputy Bailiff sitting alone

Between:

IN THE MATTER OF
SYNERGY CAPITAL LIMITED

-AND-

IN THE MATTER OF PART XXIII OF
THE COMPANIES (GUERNSEY) LAW 2008

WHEREAS on the 12th and 13th June 2012 the Deputy Bailiff considered applications to dismiss winding up petition on ground of standing and heard thereon Advocates P Richardson, S H Davies, S Dingle and counsel for Synergy Ltd, Mr M Marcovic and USB-AG and Mr M Hulme respectively the Deputy Bailiff this day handed down judgment in the terms attached hereto and ORDERED:

1. That the application for the compulsory winding up of Synergy Capital should be allowed to proceed to a substantive hearing.

2. That in accordance with Rule 37 (1)(a) of the Royal Court Civil Rules, 2007, UBS shall cease to be a party to the winding up application.

S M D ROSS
Her Majesty's Deputy Greffier

Approved Text
20.07.2012

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

(CIVIL DIVISION)

IN THE MATTER OF
SYNERGY CAPITAL LIMITED

-AND-

IN THE MATTER OF PART XXIII OF
THE COMPANIES (GUERNSEY) LAW 2008

Applications to dismiss winding up petition on ground of standing

Hearing date: 12th June & 13th June (PM only) 2012

Judgment handed down: 20th July 2012

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for Synergy: **Advocate P Richardson**

Counsel for Mr Hulme: **Advocate S Dingle**

Counsel for Mr Markovic and UBS: **Advocate S H Davies**

Cases, Texts & legislation referred to:

The Companies (Guernsey) Law, 2008
The Royal Court Civil Rules, 2007
Re Cancol Ltd [1996] 1 All ER 37
Mann v Goldstein [1968] 1 WLR 1091
Re Bayoil SA; Seawind Tankers Corp v Bayoil SA [1999] 1 All ER 374
Sykes & Son Ltd v Teamforce Labour Ltd [2012] All ER (D) 89 (Apr)
Baker Hughes Ltd v CCG Contracting International Ltd [2005] SC 65
Marcus Ward Ltd v Anglo Irish Bank Corporation Ltd [2011] NICh 7
Flightlease Holdings (Guernsey) Limited v Flightlease (Ireland) Limited 2009-10 GLR 38
Black's Law Dictionary, 8th ed
In the matter of Belgravia Financial Services Group Limited [2008] JRC 161
Guernsey Financial Services Commission v Claridges Trustees Limited and others 2007-08 GLR N19
Hannoun v R Limited and Banque Syz Company Limited 2009 CILR 124
Practice Guide of The United Nations Commission on International Trade Law
Loi relative aux Sociétés Anonymes ou à Responsabilité Limitée (1908)
A-G v Prince Ernest Augustus of Hannover [1957] AC 436, 461
The Partnership (Guernsey) Law, 1995

Introduction

1. Milan Markovic and UBS AG (hereafter referred to as "the Applicants") have jointly made an application dated 5 April 2012 pursuant to sections 406, 408 and 412 of the Companies (Guernsey) Law, 2008 (hereafter referred to as "the 2008 Law") for the compulsory winding up of Synergy Capital Limited (hereafter referred to as "Synergy Capital"). That application was supported by an Affidavit sworn on 5 April 2012 by James Shaerf, an associate at Quinn Emanuel Urquhart & Sullivan UK LLP, and a Skeleton Argument prepared by Advocate Morris dated 16 April 2012. Paragraphs 46 onwards of that Skeleton Argument assert that, for the purposes of section 408(1) of the 2008 Law, Mr Markovic has standing to make the application as a creditor and/or as an "interested party" and that UBS has standing to make the application as an "interested party".

2. Notification of the winding up application was given to Matthew Hulme and to another group of persons who appear to have an interest in Synergy Capital and who have become known collectively as "the eSure investors". This winding up application follows an earlier application by Synergy Capital for interpleader relief pursuant to Part V of the Royal Court Civil Rules, 2007, in which Mr Markovic, UBS, the eSure investors and Mr Hulme have all appeared. Those proceedings stand adjourned pending further steps towards resolution of the winding up application being completed.

3. The winding up application was first listed in the Ordinary Court on 17 April 2012. It quickly became clear to me that the application was not ready to proceed before the Court constituted with Jurats so I adjourned the matter to an appointment before the Interlocutory Court to follow the closure of that morning's Ordinary Court. On behalf of Synergy Capital, Advocate Lund indicated that her client may wish to challenge the standing of both Mr Markovic and UBS to make the application, although she did not have instructions. On behalf of Mr Hulme, Advocate Dingle similarly did not have instructions, but indicated that his position may well be the same. On behalf of the eSure investors, Advocate Fullman indicated a neutral position, which he has since maintained. In those circumstances, where a successful challenge to the Applicants' standing would conclude the winding up application, I adjourned the matter until 20 April 2012 to see what steps, if any, those parties might wish to take.

4. On 18 April 2012, Synergy Capital applied pursuant to section 412 of the 2008 Law and rule 50(2)(e) of the 2007 Rules for the dismissal of the Applicants' winding up application on the grounds that the Applicants have no locus to bring it. On 19 April 2012, Mr Hulme made an application in terms that are substantively the same. For ease of identification, I will refer to both applications as "the dismissal applications". At the adjourned hearing on 20 April 2012, I took the view that it would indeed make sense to take the question of the Applicants' standing distinctly as a preliminary issue because it could be determinative of the application without the need to sit with Jurats. I fixed a timetable for the lodging of materials prior to a hearing on 12 June 2012 and set a review date of 25 May 2012 to take stock.

5. At the review hearing on 25 May 2012, Advocate Richardson, appearing on behalf of Synergy Capital, queried whether there would be factual issues needing to be determined before the dismissal applications could be decided, thereby raising the question of whether Jurats were needed at the hearing fixed for 12 June 2012. Although affidavit evidence had been lodged on behalf of Synergy Capital, but not on behalf of Mr Hulme, I decided that the issues raised by the dismissal applications were primarily questions of law. Insofar as it was necessary to do so, having ascertained the wishes of Counsel, I gave a direction in accordance with section 13(1)(b) of the Royal Court (Reform) (Guernsey) Law, 2008 that I would sit to hear the dismissal applications unaccompanied by Jurats. On behalf of the Applicants, Advocate Morris made it clear that they were not electing that Jurats sit, the effect of which election meant that my direction would not be reversed in accordance with section 13(3)(a).

6. At the hearing on 12 June 2012, Synergy Capital was represented by Advocate Richardson, Mr Hulme by Advocate Dingle and the Applicants by Advocate Davies. I am grateful to Counsel for both their written and oral submissions. The hearing did not conclude within the day allocated for it, but was completed the following afternoon, at which point I reserved my judgment.

The facts

7. The evidence lodged has largely been provided by Jacqueline Eley, a director of Synergy Capital. Her First Affidavit was sworn on 24 February 2012 in support of Synergy Capital's application for interpleader relief. That Affidavit was then exhibited to James Shaerf's Affidavit of 5 April 2012, along with a considerable number of other documents that had been generated in correspondence between the parties' Advocates and other material that had been disclosed as a result of the Applicants' ongoing enquiries, the broad terms of which I will turn to shortly. James Shaerf deposes to the concerns that the Applicants have about Synergy Capital and the wider structure in which it is placed. Jacqueline Eley has sworn two further Affidavits on 8 May and 25 May 2012, the first of which responded to the content of James Shaerf's Affidavit relevant to Synergy Capital's dismissal application, and also exhibited further documentation, and the second of which responded to certain matters alluded to in the Applicants' Supplemental Skeleton Argument.

8. Whilst I accept that it is a matter for the parties to the dismissal applications to lodge such evidence as they see fit, I am slightly surprised that the Applicants themselves, particularly Mr Markovic, and Mr Hulme have not chosen to provide the Court with their own evidence of how Synergy Capital and the structure in which it is placed came to be created and thereafter operated. Given that Mr Markovic has suggested that he was unaware of what was happening at the end of 2008 and into 2009, when payments totalling around £8½ million were made from his and his wife's account with UBS, which James Shaerf states "*were made without [Mr Markovic's] authority*", into a structure that he claims "*has been used as a vehicle for fraud*", the absence of any details or supporting material to support those assertions has made my task harder than it might have been. I have, however, pieced together the following chronology of events from the material that has been lodged.

Creation of the Synergy structure

9. In or around September 2008, Mr Hulme, who at that time was an employee of UBS, made a presentation to Mr Markovic and to a Mr Chris Raeder about an investment opportunity under the heading "Synergy Capital". It is not clear to me whether this was done by Mr Hulme as an employee of UBS or was a separate venture of his, although the former appears more likely. The structure at that stage contemplated a special purpose vehicle to be jointly owned by Mr Markovic and Mr Raeder plus further investment from as yet unidentified investors, all flowing into Synergy Capital, with Synergy Capital being advised through the vehicle of another new entity by IMI LLP.

10. Concept Group Limited, of which Jacqueline Eley is a director, assisted in the setting up of the resulting corporate structure. Instructions were received by Roger Berry, also a director of Concept Group Limited, from Mr Hulme, using a UBS e-mail account and signing himself as "Executive Director" on 27 October 2008. Mr Hulme indicated that he was able to "*provide all of the Due Diligence required as necessary*". Mr Berry relayed these instructions to Advocate Ashton, indicating that what was contemplated was a "*seed fund structure*" where the "*initial investors are 4 in number and all known*". Mr Raeder was still being mentioned at that stage, as was IMI LLP, the partnership through which Andrew Fearon subsequently provided his investment advisory services to the structure.

11. On 6 November 2008, Mr Berry and Advocate Ashton gave a presentation of the proposed structure to officers at the Guernsey Financial Services Commission with a view to exploring whether or not it fell within the regulatory framework. The structure envisaged would involve investors, possibly through limited companies, owning shares in a company called "Synergy

Capital Advisors" and "*they would collectively make recommendations regarding investments*". A company called "Synergy Capital" would then be the investment vehicle. The conclusion reached appears to have been that it was on the border of regulation but just outside. However, if the number of investors in the structure were to increase it would then fall within the regulatory framework.

12. As late as 1 and 2 December 2008, Trevor Pinchemain, another director of Concept Group Limited, was corresponding with Mr Hulme about the proposed Synergy structure with reference to Synergy Capital Advisors Limited. Mr Raeder's name was mentioned as an investor, along with Mr Markovic. However, because both of those gentlemen were travelling, Mr Hulme suggested "*that all of the companies are registered to me, with a transfer at a later stage*". By 3 December 2008, however, an adjusted Synergy Capital schematic had been produced, attached to an e-mail sent by Mr Hulme, still using a UBS e-mail account, to Advocate Ashton and Mr Pinchemain. This included, apparently for the first time, reference to a partnership "*which should carry the allocation of participation rather than the investor vehicle*". Mr Hulme further explained that Mr Markovic would commit £5 million, IMI £200,000 and Mr Raeder probably £500,000 and set out how fees would be paid to the participants. Mr Hulme wished to have a copy of the partnership agreement before the weekend because he had a meeting with Mr Markovic the following week.

13. On 5 December 2008, four Guernsey companies were incorporated. The single issued share in Ccay Limited is held by CB Nominees Limited, a corporate shareholder provided by Concept Group Limited. By virtue of a Deed of Trust dated 5 December 2008, that share was declared as being held as nominee and trustee for Mr Hulme. The single issued share in Crasygy Limited is also held by CB Nominees Limited with a similar Deed of Trust. The single issued share in Milmasy Limited (hereafter referred to as "Milmasy") is also held by CB Nominees Limited. It was originally held for Mr Hulme's benefit but a Deed of Trust declaring it to be held in favour of Mr Markovic was made on 22 December 2008. The single issued share in Synergy Capital is also held by CB Nominees Limited. By virtue of a Deed of Trust dated 5 December 2008, that share was declared as being held for "*Ccay Limited, Crasygy Limited and Milmasy Limited under a partnership yet to be established between yourselves and to be known as the 'Synergy Partnership'*". The directors of all four companies have been provided from amongst the directors of Concept Group Limited, with CB Directors Limited being the corporate director.

14. On 11 December 2008, Ccay Limited, Crasygy Limited and Milmasy entered into a partnership agreement. The agreement was executed by Kevin Le Moigne, another director of Concept Group Limited, on behalf of Ccay Limited and Mr Pinchemain on behalf of Crasygy Limited and Milmasy. As set out in clause 2.2 of that agreement:

> "*The purpose of the Partnership is to carry on the business of an investor and in particular, to negotiate, invest in and realise securities directly or indirectly and to carry on the business of an investor and, in particular, to invest in private equity investment opportunities of all descriptions but in the first instance in convertible debt via a conduit company Synergy Capital Limited. The Partnership may negotiate, execute, deliver and perform all contracts and other undertakings and engage in all activities and transactions as may in the opinion of the Partners be necessary or advisable in order to carry out the Purpose.*"

15. On or about 17 December 2008, IMI LLP was appointed as the investment adviser to Synergy Capital. I do not know the terms of that appointment, but I have seen a document, apparently signed by Mr Fearon, whose signature was witnessed by Mr Hulme, but not completed by Synergy Capital, confirming that IMI LLP "*has acted as a consultant to the Company since (17th December, 2008)*" and payments have been made to IMI LLP consistent with such an arrangement.

16. On 17 December 2008, Mr Hulme, still using a UBS e-mail account, was corresponding with Mr Pinchemain about how to transfer ownership of Milmasy into Mr Markovic's ownership, initially through an existing company but changed the following day to be in Mr Markovic's own name. Mr Hulme promised to "*send DD for your files*" in respect of Mr Markovic. What was then forwarded as a certified and true copy, apparently bearing the signature of Mr Hulme, was a copy of a gas bill showing Mr Markovic's home address. The date on it appears to be November 2008, although there is some smudging. However, a copy of a bill in the same amount was exhibited to James Shaerf's Affidavit and bears a different signature beneath the stamp "certified & true copy" with the date 8 June 2006. That document is clearly dated 28 November 2005. When comparing the two, they appear to an untrained eye to be the same document, especially as the date by which a direct debit for the amount due is to be taken looks unchanged, although it is partially obscured by the certification stamp and signature on the document provided to Concept Group Limited. Either way, it appears that Mr Markovic himself was not asked, whether by Mr Hulme or anyone else, to provide due diligence documentation for the benefit of Concept Group Limited at the end of 2008.

17. Concept Group Limited's involvement apparently extends to providing corporate administration services to the Synergy Partnership pursuant to Agreements dated 12 October 2008 (at which time the Partnership may well not have existed or even been contemplated) and 23 October 2009, where the other parties to the Agreement are the three companies which are partners of the Synergy Partnership. However, I have not been shown a copy of either agreement.

18. I have set out the steps taken to establish the Synergy structure in some detail because the timing of certain actions has some significance for what is now in dispute. I am left with the impression that in 2008 Mr Hulme was acting in his capacity as an employee of UBS. Mr Markovic was a client of UBS. Although Mr Raeder was originally mentioned, he then drops out of the picture in December 2008 and does not appear to have played any part in the Synergy structure thereafter. IMI LLP, and so indirectly Mr Fearon, does not appear to have had any ownership role in the Synergy structure but, through the investment adviser role, has been involved in the structure's activities and has received fees. At the time the Synergy Partnership agreement was executed, the three partners were all beneficially owned by Mr Hulme. Mr Markovic's involvement in Milmasy was brought about on instruction from Mr Hulme. I have seen no evidence of Mr Markovic's active participation in agreeing to the Synergy structure. Equally, Mr Markovic has been silent about the events at this time. Come what may, by the time that Mr Markovic took the benefit of the Deed of Trust in respect of the shareholding in Milmasy, that company had entered into the Synergy Partnership agreement and Synergy had engaged IMI LLP as an investment consultant.

Payments to structure: "standard" payments

19. The Synergy structure has been funded by payments from Mr Markovic. Minutes of meetings of the directors of Milmasy, of the partners of the Synergy Partnership and the directors of Synergy Capital were exhibited to Jacqueline Eley's Second Affidavit.

20. The first tranche of money was £2 million. A meeting of Mr Le Moigne and Mr Pinchemain as directors of Milmasy took place on 22 December 2008. The Minutes record that the money "*had been received from the Company's shareholder as an interest free, unsecured and repayable in [sic] demand loan*." This was the day on which CB Nominees Limited, the shareholder, executed a Deed of Trust in favour of Mr Markovic. The reference to "*the Company's shareholder*" appears to be a reference to Mr Markovic rather than CB Nominees Limited as there has been no evidence that CB Nominees Limited has ever had these (or other funds paid into the structure) at its disposal. The directors resolved to accept the loan. Because "*the loan was for investment purposes*", they further resolved "*to make a capital contribution of £2,000,000.00 to The Synergy Partnership under the terms of the Partnership Agreement dated 11th December 2008, the Company being a Partner of the said Partnership*".

21. On the same day, 22 December 2008, a meeting of the Partners of the Synergy Partnership took place. It was attended by Mr Pinchemain and Mr Le Moigne in their capacities as directors of Ccay Limited, Milmasy and Crasygy Limited, Partners. The meeting resolved "*to accept a Capital Contribution of £2,000,000.00 to the Partnership from Milmasy Limited, a Partner of the Partnership, under the terms of the Partnership Agreement dated 11th December 2008*". Because "*the purpose of the Capital Contribution was for investment purposes*", the meeting further resolved "*to make a loan of £2,000,000.00 to Synergy Capital Limited which was wholly owned by the Partnership and that the terms of the loan be unsecured, interest free and repayable on demand*".

22. On the same day, 22 December 2008, a meeting of Mr Le Moigne and Mr Pinchemain as directors of Synergy Capital took place. The meeting resolved "*to accept the loan of £2,000,000.00 from the Company's shareholder and that the terms of the loan be unsecured, interest free and repayable on demand*". Again, there is no suggestion that it was Synergy Capital's shareholder, CB Nominees Limited, that made the loan. Indeed, the position described is inconsistent with the minute of the meeting of the Partners, where they clearly intended to loan £2 million directly to Synergy Capital. The loan was made by the three companies forming the Synergy Partnership.

23. The second tranche of money was £1.25 million. Apart from the amount involved and the personnel, there are three Minutes of meetings in the same terms as for the initial tranche of money. They are all dated 11 February 2009.

24. The third tranche of money was £250,000. Again, apart from the fact that the personnel present reverted to being Mr Le Moigne and Mr Pinchemain and the amount involved, the forms of the three Minutes of the meetings are in the same terms. They are all dated 11 March 2009.

25. The fourth tranche of money was £750,000. On this occasion, the meetings took place on 29 April 2009 and were attended by the persons present on 11 February 2009. Each of the three Minutes is in the same terms as the previous Minutes.

26. I will turn to the fifth payment in due course, but a sixth tranche of money, this time involving £1 million, was paid on 14 July 2009. Again, the three Minutes are in the same terms, save for the amount involved, as the Minutes of 22 December 2008.

27. The final tranche of money was £2 million, being made up of amounts of £1,127,000 and £873,000. The Minutes of the meeting of the directors of Milmasy, Mr Le Moigne and Mr Pinchemain, apart from noting the two amounts aggregating to £2 million, are in the same terms as the other Minutes of Milmasy to which I have just referred. The meeting took place on 24 September 2009. The Minutes of the meeting of the Partners is also in what has might be termed "standard" form and are dated 24 September 2009. The Minutes of the meeting of Synergy Capital, despite involving the same two gentlemen and being in the same terms as other Minutes of that company relating to these loans "*from the Company's shareholder*", are dated 25 September 2009.

28. The bank statements for Synergy Capital were exhibited to James Shaerf's Affidavit. On 23 December 2008, the statement records a receipt of £2 million "*From NFC12 Milmasy LI*". On 11 February 2009, the statement records a receipt of £1.25 million "*From Milmasy Limited*". On 11 March 2009, the statement records a receipt of £250,000 also "*From Milmasy Limited*". Similarly, on 1 May and 14 July 2009, the statements record receipts of £750,000 and £1 million respectively "*From Milmasy Limited*". Finally, on 25 September 2009, the statement records a receipt of £2,000,031.53 "*From Milmasy Limited*". It is unclear why this amount is not a round figure, like the others, but I do not believe anything turns on that difference.

29. The Cash Book for Synergy Capital is also exhibited to James Shaerf's Affidavit. It records as "*Loan from Synergy Partnership Milmasy*" credits of £2 million, £1.25 million, £250,000, £750,000, £1 million and £2 million on 23 December 2008, 11 February 2009, 18 March 2009, 1 May 2009, 14 July 2009 and 25 September 2009 respectively. Although clause 2.4 of the Synergy Partnership agreement provides that:

> "*The Partners' [sic] shall open and operate such bank and custody accounts for the Partnership in its capacity as is necessary for the proper operation of the Partnership*"

with the insertion in handwriting of Barclays as being the intended bank for the first bank account, I rather gather that no Partnership bank account was, or has been, opened, hence the direct receipt of funds by Synergy Capital from Milmasy.

Payments to structure: Halliwells money

30. The odd one out in the series of transactions funding Synergy Capital occurred on or about 25 June 2009.

31. There is no Minute of Milmasy from that time. The Minutes of a meeting of the Partners of the Synergy Partnership, held on 25 June 2009, attended by Mr Pinchemain and Jacqueline Eley in their capacities as directors of Ccay Limited, Milmasy and Crasygy Limited, Partners, resolved "*to accept a Capital Contribution of £1,250,000.00 to the Partnership from Milmasy Limited, a Partner of the Partnership, under the terms of the Partnership Agreement dated 11th December 2008*". Because "*the purpose of the Capital Contribution was for investment purposes*", the meeting further resolved "*to make a loan of £1,250,000.00 to Synergy Capital Limited which was wholly owned by the Partnership and that the terms of the loan be unsecured, interest free and repayable on demand*". The Minutes of a meeting of the directors of Synergy Capital also took place on 25 June 2009, attended by Jacqueline Eley and Mr Pinchemain. The meeting resolved "*to accept the loan of £1,250,000.00 from the Company's shareholder and that the terms of the loan be unsecured, interest free and repayable on demand*". The Minutes of the Partnership and Synergy Capital were, therefore, in the same terms as for the other amounts received.

32. The bank statement of Synergy Capital records a receipt of £250,000 on 29 June 2009 "*From Halliwells Llp*". The cash Book records a credit of £250,000 on 29 June 2009 as "*Halliwells – Transfer*". On 25 June 2009, as "JOURNAL" entries, the Cash Book records "*Loan from Synergy Partnership*" and "*Westminster Group – Halliwells*" with the balance remaining unchanged. There was no express reference to "*Milmasy*" here.

33. By a letter dated 22 November 2011 sent to the directors of Synergy Capital, UBS raised with them "*an audit query regarding a payment made from the account of a client of UBS AG to the account of Halliwells LLP*", explaining their understanding that the payment "*was made in connection with the acquisition of Loan Notes in Westminster Group PLC on behalf of Synergy Capital Limited*". The letter also records that "*Halliwells LLP (via their successor firm, Gateleys LLP) have confirmed that they acted for Synergy Capital Limited in relation to this Transaction*" and that the payment out was made on 26 June 2009 in the amount of £1,250,030 to Halliwells LLP Client Account.

34. On 28 November 2011, a fiduciary administrator at Concept Group Limited contacted the partner at Halliwells who had sought confirmation on 29 June 2009 from Mr Pinchemain, copied to Andrew Fearon, that Synergy Capital was authorising the disbursement of £1.25 million held by the firm in the manner set out. Mr Hulme was copied into that message and replied within 20 minutes indicating that he had been talking to Mr Markovic's counsel about this and "*the answer is that it came from Milan [Markovic] directly, so not through Milmasy, although of course it is held in Synergy*". No further explanation was offered then, or since, as to why this transaction proceeded in this fashion.

35. On 19 December 2011, as a continuation of that e-mail thread, Mr Le Moigne contacted Mr Hulme in relation to completing draft accounts for Milmasy, asking "*can you clarify if the £1,250,000 should be shown as coming through Milmasy by way of a loan from MM and then a capital contribution into the Synergy Partnership or whether it should be shown as a loan directly to Synergy Capital Limited by MM.*" Mr Hulme replied within minutes with just two words: "*The former.*" By this time, all those involved in the Synergy structure had become aware that questions were being asked about what had gone on within the Synergy structure (see, eg, the details sought on 8 December 2011 set out below). Subsequently, by letter dated 22 February 2012, Quinn Emanuel Urquhart & Sullivan UK LLP queried what authority Mr Hulme had "*to give instructions on behalf of Milmasy as to how payments by Milmasy were to be treated*". Again, no real clarification has been provided.

36. Also on 19 December 2011, Mr Le Moigne and Jacqueline Eley attended a meeting of the directors of Milmasy. The Minutes record "*that on 25th June 2009 an amount of £1,250,000.00 had been received from the Company's shareholder as an addition to the interest free, unsecured and repayable on demand loan*". The meeting resolved "*to ratify the acceptance of the loan*" and also resolved "*to ratify the capital contribution of £1,250,000.00 to The Synergy Partnership under the terms of the Partnership Agreement dated 11th December 2008, the Company being a Partner of the said Partnership*". On the copy of the Minutes exhibited to Jacqueline Eley's Second Affidavit is a handwritten note reading "*Payment made directly to Halliwells from S/H*".

37. The Board of Directors of Synergy Capital also met on 19 December 2011, with Jacqueline Eley and Mr Le Moigne present. The Minutes record that:

> "*The Chairman advised the meeting that funds totalling £1,250,000.00 received on 25th June 2009 had been minuted in error on 25th June 2009 as having been a loan from the Company's shareholder. The funds of £1,250,000.00 were received as a capital contribution from Milmasy Limited under the terms of the Partnership Agreement dated 11th December 2008.*
> *After consideration,* ***IT WAS RESOLVED*** *to ratify the acceptance on 25th June 2009 of £1,250,000.00 as a capital contribution from Milmasy Limited under the terms of the Partnership Agreement dated 11th December 2008.*"

These are Minutes more in the style of those previously prepared for the Synergy Partnership than for Synergy Capital. In relation to the other tranches of money, the Partnership received capital contributions and then made loans to Synergy Capital. This implies some muddled thinking at Concept Group Limited on 19 December 2011, which is not assisted by the explanation provided in the Third Affidavit of Jacqueline Eley. In particular, I am not persuaded that it was reasonable for the directors of Milmasy to have sought confirmation from Mr Hulme about how to categorise the Halliwells payment, even if he was regarded as "*the investment advisor to the Synergy structure*", given the correspondence previously received from UBS. The original Minutes of 25 June 2009 were consistent with the approach adopted in respect of earlier and later tranches of money going into the structure. Whether there is any substantive significance to the different way of recording this receipt, and the interposition of Halliwells LLP, arguably as agent of Synergy Capital, for which that firm was acting, are questions to which I will return when considering if Mr Markovic is a creditor of Synergy Capital.

Later events

38. On 22 July 2011, Mr Hulme e-mailed Jon Marquis, who had become a director of Synergy Capital in 2010 but was leaving Concept Group Limited shortly thereafter, leading to his resignation as a director of Synergy Capital, in which Mr Hulme stated that "*I am the majority beneficiary of Synergy now*". Mr Hulme was then asked for a breakdown of the amounts he put in and Mr Markovic put in. His response referred to all the tranches of money except the

£1.25 million via Halliwells. Mr Hulme claimed to have put in £2 million on 22 December 2008, £250,000 on 18 March 2009, £750,000 on 29 April 2009 and £1 million on 14 July 2009. He indicated that Mr Markovic had put in £1.25 million on 11 February 2009, but it was "*written off so no value retained*", and, in respect of the two amounts put in on 24 September 2009 by Mr Markovic, £1,127,000 was also "*written off so no value retained*", leaving just the other £873,000. Although the position has not, as far as I am aware, been clarified in other documents, Mr Markovic clearly claims to have paid in the full amount of £8.5 million and the other parties have not questioned that claim, especially as the documentation shows the money passing through, or being treated as having passed through, Milmasy, in which Mr Hulme no longer appears to assert any interest.

39. As an aside, the e-mail account being used by Mr Hulme in this exchange displayed as "synergy capital" and "@synergycapitalllp.com". Clause 2.1 of the Synergy Partnership agreement, dealing with the status of the Partnership expressly provided that it "*will not be registered pursuant to the Limited Partnerships (Guernsey) Laws [sic] 1995 on signing of this Agreement as it shall be governed by The Partnerships (Guernsey) Law, 1995.*" It has not been explained to me whether Mr Hulme had any personal formal role in the operation of the Synergy structure or why he was using an e-mail address purporting to be from a Synergy Capital limited liability partnership. I regard this as an example of the levels of confusion that appear to surround the Synergy structure and also of Mr Hulme wishing to give the impression to Concept Group Limited it could rely on his instructions because Mr Markovic had no ongoing role in the structure.

40. On 1 August 2011, Mr Hulme informed Mr Le Moigne that "*essentially I am now the beneficial owner of the whole structure*" and, when asked for clarification, explained that Mr Markovic had no interest in the structure because Mr Hulme "*effectively took whole interest late September last year*". On 2 August 2011, Mr Hulme informed Mr Le Moigne "*on Milmasy, I assumed all the assets and liabilities so technically bought the company*". He promised to "*dig out the SPA / documentation and get it sent over*" when he could. When a copy of the share purchase agreement was requested by Jacqueline Eley on 8 December 2011, Mr Hulme backtracked, explaining "*The SPA was not exactly that – it was an undertaking to assume liabilities first and foremost, so while the economic downside is made, the BO has not yet changed as there was the need to ensure tax efficacy.*"

41. On 10 and 24 January 2012, a fiduciary administrator at Concept Group Limited made an enquiry of Hub Capital Partners Limited in relation to £250,000 remitted to that company's clients' account on 14 January 2011. The response received was not encouraging. A partner at Hub Capital indicated that the message had been passed to Mr Hulme "*as we don't know who you are or what your involvement is in these transactions*", to which Jacqueline Eley replied by pointing out that the source of funds was Synergy Capital's bank account (which is duly recorded on the bank statement). She further explained: "*Matthew Hulme although he acts as an agent for Synergy Capital Limited has no authority to give instructions for those funds to be used without the prior authorization of the Company's Directors.*" On 26 January 2012, Mr Hulme clarified that he "*thought the best idea was to treat the £250k as an advance to me so that I bear the risk*". Accordingly, the following day Jacqueline Eley requested Mr Hulme to repay £250,000 to Synergy Capital.

42. There was a similar exchange in January 2012 about C$150,000 sent on 10 February 2011 to Stikeman Elliot LLP's client account. Again, following enquires, on 27 January 2012, Jacqueline Eley wrote "*As the funds have been used personally by you can you please arrange to return the amount of C$150,000 to Synergy Capital Limited.*"

43. On 26 January 2012, Mr Le Moigne, as Operations Director of Concept Group Limited, wrote to Mr Markovic enclosing invoices for £500, being the cost of the annual validation for Milmasy, and £166.66, being one-third of the cost of the annual validation for Synergy Capital, indicating that they would be asking Mr Hulme to cover the other two thirds of that

cost. The annual validations needed to be submitted by 31 January and, because the bank accounts for the two entities had been blocked by the bank, Concept Group Limited sought funds directly from Mr Markovic.

44. On 10 February 2012, Quinn Emanuel Urquhart & Sullivan UK LLP wrote to AFR Advocates, as lawyers for Milmasy and Synergy Capital, making a demand for immediate repayment by Milmasy of the £8,500,000 due to Mr Markovic. That demand was rejected by letter dated 16 February 2012, in which AFR confirmed on behalf of their clients that "*Mr Markovic's alleged monies were received into Milmasy and recorded as repayable on demand. Should Milmasy be in such funds then payments back to Mr Markovic's nominated bank account would be made forthwith.*"

45. On 3 April 2012, Quinn Emanuel Urquhart & Sullivan UK LLP again wrote to AFR Advocates, in their capacity as advocates for Synergy Capital, making a demand for immediate repayment by Synergy "*of the £8.5 million of Mr Markovic's money which Synergy Capital has received.*"

Summary of findings

46. As I have already indicated, it is perhaps unfortunate that the facts I have set out have had to be extracted from documents exhibited and the evidence submitted by Jacqueline Eley and James Shaerf without the benefit of the more direct explanation that might have come from Mr Markovic and Mr Hulme. I must not, of course, jump to conclusions about the role played by Mr Hulme, especially when he has not taken the opportunity to explain his role. The investment analysis carried out in respect of Synergy Capital, including the summary of fees paid, due and outstanding, appears to show that IMI LLP and Mr Hulme's own partnership vehicle, Laurus Maximus LLP, have been paid in excess of £3 million, at roughly £1 million per annum for the years 2009, 2010 and 2011. That represents a significant proportion of the £8.5 million invested into the structure, which has been provided by Mr Markovic. I understand that steps are being taken to sort out exactly what should have been paid to IMI LLP and to Laurus Maximus LLP, but the inference from the material I have seen is that Mr Markovic's interests have been poorly protected by the others involved.

47. As Jacqueline Eley deposed in her Second Affidavit, "*The way in which funds were transferred between the entities was at the direction of Mr Hulme who we reasonably believed was acting for Mr Markovic.*" Quite how much reliance was placed on the previous association with Mr Hulme when he worked in Guernsey as a colleague of Jacqueline Eley remains to be seen. The impression I get is that Mr Hulme was indeed the principal person active in providing direction to the Synergy structure. Although it is not entirely clear what role Andrew Fearon played, it looks as though he and Mr Hulme did not consult with Mr Markovic about what was happening to the investments made into the Synergy structure. As a result, Mr Hulme may well have given an indication to personnel at Concept Group Limited that Mr Markovic did not wish to take any direct involvement. Because the evidence of Jacqueline Eley has not been directly challenged, I am unable to find that her stated belief was unreasonable.

48. At the outset, in the autumn of 2008, the structure was being developed by Mr Hulme with assistance from Concept Group Limited for the benefit of four investors. It was claimed that those four investors were "*all known*". I doubt that was an accurate description about Mr Markovic because some of the documentation I have seen asks at a later date about the sources of his wealth. I do accept, however, that Mr Markovic was given a presentation by Mr Hulme about the investment opportunities presented by the proposed structure involving Synergy Capital and that, when it was established towards the end of 2008, his participation as an investor was broadly consistent with the proposals previously explained to him. I cannot ascertain whether he was aware that a fellow potential investor, Chris Raeder, had dropped out of the picture and how, if at all, that affected any decisions taken by Mr Markovic. In any event, little to no contact appears to have been had with Mr Markovic from

the time of the Deed of Trust dated 22 December 2008 in respect of the issued share in Milmasy and the latter part of 2011, when questions about the money paid into the structure were first raised. No explanation has been offered as to why these enquiries only arose in 2011, given that the last of the monies paid into the structure had been paid in September 2009.

49. Apart from the payment of monies into the client account of Halliwells LLP, the consequences of which I will cover in due course, the other payments all follow the same pattern, namely monies paid into Milmasy and then on to Synergy Capital. Taken at face value, the monies provided to the structure have emanated from Mr Markovic in a manner that is consistent with the investment opportunity described. Because I have not been provided with any evidence pointing to a different conclusion, I struggle with the assertion in James Shaerf's Affidavit that the "*payments were made without [Mr Markovic's] authority*" (see para. 7) and his further explanation (at para. 17) that:

> "*Mr Markovic's position is that the Payments were procured dishonestly by Mr Hulme. In particular, it is Mr Markovic's position that Mr Hulme deceived Mr Markovic into making the Payments by representing that he was acting on behalf of UBS and giving advice to Mr Markovic as part of the wealth management services which UBS was contracted to provide when, in fact, Mr Hulme was acting for his own private purposes.*"

I have not been informed that any complaint has been made to the police about this alleged dishonesty. I am also not aware of any proceedings to seek the recovery of the amounts paid involving any of the parties. In those circumstances, I can only conclude, for the purposes of assessing his standing to make the winding up application, that Mr Markovic made the payments out of the account he and his wife had with UBS over the period December 2008 to September 2009 as investments into the Synergy structure.

50. The events I have described seem to me to encapsulate the core of what Mr Markovic and UBS complain about. There are considerably more documents exhibited to the Affidavits and explanations given of events by James Shaerf and Jacqueline Eley, but for the purposes of considering the standing of the Applicants to bring the winding up application, that summary suffices.

Preliminary matters

51. At the outset, Advocate Richardson submitted that, although Synergy Capital and Mr Hulme were making applications to dismiss the winding up petition, the legal burden to establish that the Applicants have standing to make such an application under section 408 of the 2008 Law rests with the Applicants. I agree. Similarly, I also agree with his submission that each of the bases on which one of the Applicants asserts standing must be viewed separately from each other. Accordingly, I propose to consider first whether Mr Markovic is a creditor of Synergy Capital for the purpose of bringing the winding up application and then to consider UBS and Mr Markovic separately on the question of whether either or both is an interested party.

Is Mr Markovic a creditor of Synergy Capital?

52. There is no definition of "creditor" in Part XXIII (compulsory winding up) or Part XXIV (provisions of general application in winding up) of the 2008 Law. Similarly, the word does not feature in section 532, the general interpretation section. The definition of "creditors" to which Advocate Dingle referred in his Skeleton Argument on behalf of Mr Hulme is taken from section 467, the interpretation section for Part XXVII (protected cell companies), and so is inapplicable. However, it clarifies that the word "*includes present, future and contingent creditors*" (see also section 373 to similar effect in relation to Part XX (striking off)), which may itself may not be a controversial proposition in relation to applications to wind up a company.

53. In the absence of any applicable definition in the 2008 Law, the word can be given its ordinary meaning as being a person to whom a debt is payable. This potentially, although not necessarily, encompasses future and contingent pecuniary claims. This is consistent with the content of the 2008 Law, which contains many references to a company's debts. For example, in Part XXIV of the Law, section 419(1)(b) refers to "*any agreement between the company and any creditor thereof as to the subordination of the debts due to that creditor to the debts due to the company's other creditors*". I am satisfied, therefore, that the first thing I need to consider is whether Mr Markovic is a person to whom a debt is payable by Synergy Capital.

54. Counsel referred me to Re Cancol Ltd [1996] 1 All ER 37 as offering further guidance on how to construe the word "creditor". Advocate Dingle sought support in the narrow interpretation advanced in argument, namely "*a person entitled to the benefit of a liability presently due, whether or not quantified by judgment, where there is a liability to pay damages.*" However, Knox J rejected the narrow argument that only those with presently enforceable claims were creditors, preferring the definition set out in rule 1.17(1) of the Insolvency Rules 1986, which included "*those entitled to a right to a future payment under an existing valid instrument such as a lease*". I do not think that I can derive any real assistance from the analysis in this case.

55. In the Skeleton Argument accompanying the application to wind up Synergy Capital, an attempt was made to disregard the Synergy Partnership agreement completely as providing a layer between Mr Markovic and Synergy Capital on the basis that it "*was entered into without his knowledge or consent*". This submission overlooks the chronology. The Synergy Partnership agreement was executed on 11 December 2008. The Deed of Trust conferring beneficial ownership of Milmasy on Mr Markovic is dated 22 December 2008. It was also on 22 December 2008 that the first payment was made by Mr Markovic into the Synergy structure. Mr Markovic's position in these proceedings is predicated on him being the beneficial owner of Milmasy. In these circumstances, I am not prepared to ignore the Synergy Partnership agreement, which forms part of the Synergy structure to which Mr Markovic came on 22 December 2008.

56. The sets of Minutes for Milmasy, the Synergy Partnership and Synergy Capital, which I have already set out in detail, demonstrate that payments were generally made directly to Milmasy, the exception being the £1.25 million paid to the client account of Halliwells LLP. The monies were loaned by Mr Markovic to Milmasy. As one of the partners of the Synergy Partnership, Milmasy then made a capital contribution to the Synergy Partnership out of its funds. The partners, represented by directors, then resolved to loan funds paid into the partnership as capital contributions to Synergy Capital. As regards the £7.25 million paid by Mr Markovic to Milmasy and subsequently dealt with in this manner, in my judgment, Mr Markovic is a creditor of Milmasy rather than of Synergy Capital. Synergy Capital may be susceptible to a demand for repayment by Milmasy, in its capacity as one of the partners to whom the amount shown is owed, as Advocate Richardson acknowledged. However, for the purpose of standing as a creditor, I need to respect the choice to incorporate Milmasy as an entity separate from Mr Markovic.

57. In particular, I reject the contention that a debtor-creditor relationship exists because Synergy Capital was the eventual recipient of the monies provided to the structure by Mr Markovic because to do so would completely ignore the structure that was expressly created, quite possibly to distance the investors from direct participation in the opportunities being made available to them. In his submissions, Advocate Davies floated a variety of potential causes of action to show that Mr Markovic could pursue his claim for the return of his money directly against Synergy Capital. These included a possible tracing claim or dishonest or knowing receipt of money based on a breach of fiduciary duty by Mr Hulme. In my view, these are speculative matters at this stage and do not assist Mr Markovic to establish that, at the time of making his application to wind up Synergy Capital he is a creditor of that

company. Similarly, the letter of 3 April 2012 sent on behalf of Mr Markovic demanding repayment from Synergy Capital does not of itself constitute Mr Markovic as a creditor of Synergy Capital.

58. I have given particularly careful consideration to what happened when £1.25 million was paid across directly to Halliwells LLP. It was submitted on behalf of Mr Markovic that receipt by Halliwells LLP was as agent for Synergy Capital. The evidence shows that Halliwells LLP were retained by Synergy Capital and sought authorisation from a director of that company in relation to disbursing the £1.25 million. However, there is nothing to suggest that Synergy Capital sought a direct loan from Mr Markovic on 25 or 26 June 2009. Indeed, the contemporaneous Minutes of the Synergy Partnership and Synergy Capital support the contention that this payment was, in substance, no different from the other payments.

59. It is troubling that there was no contemporaneous Minute of Milmasy. The Minutes of the meetings held on 19 December 2011 do not completely resolve the ambiguity surrounding exactly what went on in June 2009. However, without the benefit of clarification from Mr Markovic and/or Mr Hulme, what I am left with is a payment made differently from the other payments but consistently with the overall scheme of it being a payment to the credit of Milmasy for use by that company. As Advocate Richardson pointed out, there is no requirement in law for monies to pass through the hands of a person for them to take the benefit of liabilities associated with them and, in support, he gave the example of borrowing money to purchase realty where the purchaser/borrower does not generally take physical possession of those funds.

60. The draft Director's Report and Unaudited Financial Statements for the year ended 31 December 2011 in respect of Synergy Capital, exhibited to Jacqueline Eley's Second Affidavit, lists as one of the company's creditors "*Shareholder's loan – Synergy Partnership*", which is "*unsecured, interest free and has no specific date for repayment*". The amounts payable at the end of 2010 and 2011 are both shown as a little under £8.5 million. In my view, that is an accurate representation of where the benefit of the debt owed by Synergy Capital rests. It does not rest, even in part, with Mr Markovic. Therefore, Mr Markovic does not have standing as a creditor to make the winding up application.

Disputed nature of debt

61. If I am wrong about that conclusion, whether generally or in relation just to the £1.25 million paid directly to Halliwells LLP, Synergy Capital and Mr Hulme have further submitted that the dispute surrounding what is due to Mr Markovic means that he cannot pursue a winding up application as a creditor. These submissions are based on decisions reached in the jurisdictions of the United Kingdom.

62. The leading authority in England is Mann v Goldstein [1968] 1 WLR 1091, in which Ungoed-Thomas J summarised the position as follows (at page 1094B):

> "*The presentation of a petition is governed by statutory provision. Section 224 of the Companies Act, 1948, provides that an application to wind up a company shall be by petition presented, so far as material for present purposes "... by any creditor or creditors. ..." The section seems to me plainly, on the face of it, exhaustive, so that a person not within its ambit cannot petition. This conclusion is in accordance with the note in Buckley on the Companies Act (13th ed. (1957), p. 462), based on the observations of Wynn-Parry J in In re H. L. Bolton Engineering Co. Ltd. Of course, a person not named in section 224 as a person entitled to present a winding-up petition, does not become so named because the company is insolvent. Therefore, so far as material to our case, if the defendants are not creditors they are not entitled to present or advertise their petitions or apply for a winding-up order; they have no locus standi, and their petitions are bound to fail even though the company be insolvent. So if a creditor's petition is not restrained by such an application as is*

> *now before me and comes before the Companies Court, that court will, in limine, before proceeding further, consider the petitioner's claim to be a creditor. As stated in Buckley on the Companies Act, 13th ed. (1957) p. 451, in a passage quoted with approval by Lord Greene M.R., in In re Welsh Brick Industries:*
>
> > *"Some years ago petitions founded on disputed debt were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed."*
>
> *And then it goes on:*
>
> > *"The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the court may decide it on the petition and make the order."*
>
> *What the Companies Court will not do is to proceed any further at all on a petition founded on a debt which is not thus shown in limine to exist, for in such a case there is not, of course, the necessary creditor required by section 224 to apply for a winding-up order."*

A similar decision was reached in Re Bayoil SA; Seawind Tankers Corp v Bayoil SA [1999] 1 All ER 374 and recently confirmed in Sykes & Son Ltd v Teamforce Labour Ltd [2012] All ER (D) 89 (Apr), to which I was referred on behalf of Mr Hulme and Synergy Capital respectively.

63. In the Scottish case of Baker Hughes Ltd v CCG Contracting International Ltd [2005] SC 65, Lady Smith held (at para. [10]):

> "*... if the debt claimed is disputed in good faith and on real and substantial grounds, then the petitioners cannot satisfy the statutory requirement that they are a creditor so as to have title to sue in a petition for winding up, whatever their lack of alternative remedy.*"

This is a helpful clarification of the approach to be taken and encapsulates the test I propose to adopt as a matter of Guernsey law. Mann v Goldstein was agreed to be the approach to be applied in Northern Ireland in Marcus Ward Ltd v Anglo Irish Bank Corporation Ltd [2011] NICh 7. Because the three jurisdictions of the United Kingdom, in comparable situations, dismiss a petition to wind up a company brought by someone claiming to be a creditor but in circumstances where the debt claimed is disputed in good faith and on real and substantial grounds, in my judgment, it is appropriate for this Court to adopt a similar approach when an application for the compulsory winding up of a Guernsey company is made under the 2008 Law.

64. Assuming for a moment that Mr Markovic has established that he, as opposed to Milmasy, is in principle a creditor of Synergy Capital, I am satisfied that Synergy Capital is disputing that debt in good faith. I am also satisfied that the grounds for disputing the debt are real and substantial. This is because the Synergy structure appears to have been designed as a means for investors to make investments without being direct beneficiaries or directly exposed to any liabilities. Alternatively, as alleged by the Applicants, it may have been used as a vehicle for fraud or for some other as yet unascertained purpose. Either way, in my view, following the approach in the United Kingdom, an application to wind up the company is not the proper way in which to attempt to resolve these matters relating to whether or not the claimed debt can be established.

65. For these reasons, I find that Mr Markovic does not have standing to make the application to wind up Synergy Capital as a creditor of that company.

"any other interested party"

66. The inclusion of these words in provisions relating to winding up companies appears to be unique to Guernsey. In particular, they do not appear in section 124 of the Insolvency Act

1986, meaning that I am unable to obtain any assistance from the jurisdiction to which most regard is had in company law matters (see, eg, Flightlease Holdings (Guernsey) Limited v Flightlease (Ireland) Limited 2009-10 GLR 38, at para. [91]).

67. The Applicants have argued in favour of a broad interpretation. In his original Skeleton Argument, Advocate Morris referred to the definition of "*interested party*" in Black's Law Dictionary, 8th ed.: "*a party who has a recognizable stake (and therefore standing) in a matter*". He submits that both Applicants have recognisable interests in the business venture represented by the Synergy structure. The difficulty is that the Synergy structure comprises more than a single company. Because of the structure created, it is not immediately apparent that the Applicants have any recognizable stake in Synergy Capital. He further suggested that the Applicants have a common interest in ensuring that the investments made with their money are secured and realised in an orderly way, which is why they are interested parties. In his Supplemental Skeleton Argument, he submitted that "*the proper approach is simple and straightforward: the words ... ought to be given their natural and ordinary meaning*" and elaborated on how that applied to both Applicants.

68. Advocate Davies further submitted that, because the Applicants were relying on the "*just and equitable*" ground in their application to wind up Synergy Capital, by reference to para. [20] of the judgment of the Royal Court of Jersey in In the matter of Belgravia Financial Services Group Limited [2008] JRC 161, this was a case akin to "*one of the categories which has developed in English jurisprudence ... where an investigation into the company's affairs is required*". When taken with the nature of the dispute over the debts, this reinforced the argument that the Applicants are interested parties. I fear, however, that this submission confuses merits with standing. If the Applicants establish that they have standing, this is an argument in favour of regarding the "*just and equitable*" ground as being satisfied. Unless and until the Applicants have standing, the principle remains that the application to wind up cannot proceed to consider whether such an investigation is required.

69. Both Advocate Richardson and Advocate Dingle suggested that "interested party" should be construed narrowly. In part, this is because an application to wind up a company can be regarded as "*a draconian remedy to be used only as a last resort*" (Guernsey Financial Services Commission v Claridges Trustees Limited and others 2007-08 GLR N19). However, whether a person has standing or not is a distinct question of law that, in my view, is unaffected by the nature of the remedy to be sought. It is a pre-condition to proceeding to consider the merits of the application where the nature of the remedy becomes relevant. In this context, each of the Applicants is either an interested party or is not an interested party and deciding that issue depends on how I construe section 408 of the 2008 Law rather than the consequences of the remedy they seek.

70. They also submitted that the approach elsewhere has been against judicial extension of the categories of person who can petition to wind up companies. In the Cayman Islands case, Hannoun v R Limited and Banque Syz Company Limited 2009 CILR 124, the petitioner was not a shareholder of the fund in respect of which a petition to wind up was made, but rather the beneficiary of a bare trust of which the second respondent was trustee, ie, the legal owner of shares in the fund. Under s. 96 of the Companies Law (2007 Revision), a contributory had locus standi to petition. The petitioner argued that exceptional circumstances existed in which a beneficiary would be allowed to bring a derivative action against a third party for the benefit of the trustee. Henderson J in the Grand Court rejected that argument, limiting standing in this type of situation to those who are registered as a contributory on the books of the company. He indicated that (at para. [8]):

> "*If the beneficiary of a bare trust whose existence and identity have not been disclosed to the corporate directors is permitted to step out of the shadows and seek the dissolution of a company in which he has an indirect interest, the law would be expanded undesirably.*"

The identity of Mr Markovic is, of course, known to the directors of Synergy Capital, so this guidance could not be directly relied upon anyway. Moreover, the wording of the Cayman provision, like section 124 of the UK's 1986 Act, contains a closed list of categories of person who have standing to petition.

71. Although I also mentioned at the hearing the slightly different list of persons with standing set out in section 241 of the New Zealand Companies Act 1993, I do not find any further assistance in such comparative analyses. In other jurisdictions, and the passage I have quoted from Mann v Goldstein makes the point as clearly as any, if the person seeking to wind up a company is not named by reference to his capacity in the provision setting out those with standing, the petition, or application, cannot proceed. That principle must, in my judgment, be correct and applicable to section 408 of the 2008 Law. However, unlike elsewhere, the States of Deliberation have included the words "*or any other interested party*", which potentially broaden the category of persons with standing quite considerably.

72. In his Skeleton Argument on behalf of Synergy Capital, Advocate Richardson submitted that "*other interested party*" in section 408 "*may for example contemplate a shadow director as defined by section 132(1) of the [2008] Law*". He also referred to the provisions of the Practice Guide of The United Nations Commission on International Trade Law (UNCITRAL) because it offers the guidance that in respect of harmonising the law on cross-border insolvency (which, of course, is inapplicable to the present case), "*interested persons*" can extend to the debtor and its employees. A reference to "*the debtor*" does not take matters further, because this is the company, which is already afforded standing to make an application to wind itself up by section 408 of the Law. However, I understand that the purpose of referring to these potential categories of person who might be regarded as interested parties is to demonstrate that Mr Markovic and UBS, in any event, do not fall into these categories.

73. In the Skeleton Argument prepared by Advocate James Tee on behalf of Mr Hulme, he submitted that the intention of the drafters in including the term "*interested parties*" as a class "*was to enable public authorities to bring a winding up petition*". He referred to section 410 of the 2008 Law, which provides that an application to wind up a company on the ground that "*it is desirable that the company should be wound up for the protection of the public or of the reputation of the Bailiwick ... may be made to the Court only by the [Commerce and Employment] Department or by the [Guernsey Financial Services] Commission.*" I agree with his submission to the extent that the Department and the Commission must be afforded standing to bring an application to wind up by virtue of the words "*or any other interested party*" in section 408. However, I disagree that those public authorities are the only persons who come within that phrase. If that had been the legislative intent, section 408 would have referred expressly to the Department and the Commission in the same way that section 410 does. Accordingly, the phrase in section 408 must, in my judgment, be of wider application.

74. Advocate Dingle, developing Advocate Tee's Supplemental Skeleton Argument, referred me to the legislative history of what is now section 408 of the 2008 Law. Article LXXIII of the Loi relative aux Sociétés Anonymes ou à Responsabilité Limitée registered on 21 March 1908 provided:

> "*Toute application pour la dissolution d'une Société sera faite par le moyen d'une requête addressee à la Cour Ordinaire. La requête pourra être présentée par la Société elle-même, par un ou plusieurs des actionnaires ou créanciers de la Société ou autres personnes intéressées, et tout acte passé par la Cour sur la dite requête opérera en faveur de tous les créanciers de la dite Société de meme manière que si la dite requête avait été présentée par tous les créanciers de la Société.*"

The Petition submitted with the Projet de Loi, which subsequently became the 1908 Law (see pages 178 and 179 of Ordres en Conseil, Vol. IV), indicates that this new Law was intended to replace the 1883 Law, which "*was founded upon and analogous in many respects to the Act of Parliament known as 'the Companies Act 1862'*". In 1905, the States had adopted a Projet de Loi and authorized the Bailiff to present a humble petition for Royal Sanction. However, the Committee of Council for the Affairs of Guernsey and Jersey "*intimated that they could not recommend Your Majesty to give Your Royal sanction to the said 'Projet de Loi' in the form submitted and suggested certain modifications*". Revisions were made, in consultation between the Guernsey and UK authorities and the resulting Projet de Loi was regarded as acceptable and so was enacted.

75. Having regard to the 1905 Projet de Loi as set out in the Billet d'État for that year (from page 464), the bits missing from draft Article LXVII (which became Article LXXIII in the 1908 Law) are the references to "*par un ou plusieurs des actionnaires … ou autres personnes intéressées*". The comment made on behalf of the UK authorities had initially drawn attention to the fact that "*many additional provisions [were] taken from Acts of the Imperial Parliament – in particular the Companies Act of 1900*", the inference being that a degree of harmonization was desirable. The comment about draft Article LXVII was:

> "*Under the Imperial Acts a shareholder has a right to petition for the winding up of a company. By this Article the right of the shareholder is excluded.*"

As Advocate Davies pointed out, this concern was addressed by the inclusion of a reference to "*actionnaires*" (ie, shareholders) as well as to "*créanciers*" (ie, creditors). However, the States chose also to include reference to "*ou autres personnes intéressées*".

76. On behalf of Mr Hulme, it was submitted that the timing of Guernsey's 1908 Law was such that the provisions of the United Kingdom's Companies (Consolidation) Act, 1908 "*must have been in mind of both the UK and Guernsey authorities when considering and negotiating amendments to the proposed Guernsey companies law*". I question whether I can properly reach that conclusion. I note, for example, that Royal Assent was only given to the 1908 Act on 21 December 1908. I do not know when the Bill leading to its enactment was introduced into Parliament. However, I do know that Royal Sanction was given to Guernsey's 1908 Law on 29 February 1908 and that the Projet de Loi had been adopted by the States of Deliberation on 18 December 1907. Accordingly, it is at best speculative to assert that the respective authorities must have had what became section 137 of the 1908 Act in mind prior to submission of the Projet de Loi to the States in 1907.

77. In any event, relying on the inclusion in section 137 of the 1908 Act of the Official Receiver as one of the persons with standing to petition the court to wind up a company as demonstrating that including the words "*ou autres personnes intéressées*" in the 1908 Law means that only someone of the same type as the Official Receiver is covered is, in my view, misconceived. Had the States wished to limit the categories of persons in such a way that outcome could readily have been achieved by conferring standing on specified persons. Moreover, the wording of section 137(2) of the 1908 Act shows that "*the official receiver attached to the court*" was only given standing in very limited circumstances, rather than generally, as was apparently the case in the 1908 Law. Accordingly, I do not find that having regard to what happened just over a century ago assists me in construing the words of section 408 of the 2008 Law.

78. The words "*or by any other interested party*" appear immediately following a list of persons on whom standing to apply to wind up a company is given: "*the company, by any director, member or creditor thereof*". None of the Counsel sought to rely on any particular canon of construction, whether *noscitur a sociis* (ie, a word of uncertain meaning "*is recognised by its associates*") or the *ejusdem generis* rule. The latter may be of less assistance because the words could be construed as residuary or sweeping-up words (and so of wide application).

However, the guidance offered by Viscount Simonds in A-G v Prince Ernest Augustus of Hannover [1957] AC 436, 461 that "*words, and particularly general words, cannot be read in isolation; their colour and their content are derived from their context*" lends support to my belief that I must have regard to the preceding words in reaching a conclusion about those general words. In other words, the final words in section 408(1) should not be construed extremely broadly because that would run the risk of expanding undesirably widely the list of those capable of instigating the demise of a company.

79. A "*director, member or creditor*" of a company necessarily has a close connection with the company itself (which is also given standing). In my judgment, an "*interested party*" must be a person who is interested in the company in respect of which the application is being made and that interest must be treated as something broadly equivalent to, but distinct from, the interests of the persons actually specified. The public authorities to which reference has been made, (and I would potentially add the Law Officers of the Crown to the list), will generally have that level of interest because of their supervisory functions or on behalf of the government. As such, their interest relates to companies generally or particular types of companies. Other persons who are "*interested parties*" may be in some contractual relationship with the company, but I am not limiting the category of person who can bring themselves within the term to those who have, or have had, such a contractual relationship. I am merely offering that type of link as being of the nature that can potentially lead to the conclusion that the applicant is an "*interested party*".

80. In every case where the issue arises, I think it will be necessary to have regard to all the circumstances in which an applicant for a winding up order claims to have links to, and so an interest in, the company in question entitling it to bring the application. The basis of the person's interest in the company will need to be assessed against the touchstone of whether an appropriate degree of connection or association with the company exists so as to warrant the person taking steps to bring about its dissolution. I will apply those broad principles to the position of UBS and Mr Markovic separately.

Application to UBS

81. As far as I can ascertain, UBS does not have any direct interest in Synergy Capital. For example, UBS is not Synergy Capital's banker. Instead, UBS is Mr Markovic's banker. It was also Mr Hulme's employer at the time that the Synergy structure was established and payments were made into the structure. UBS is, therefore, at best one step removed from Synergy Capital.

82. The respective positions were described at para. 18 of James Shaerf's Affidavit:

> "*Mr Markovic's position is that UBS is liable to re-credit his bank accounts in respect of the Payments. UBS does not accept that it is liable to Mr Markovic. However, UBS and Mr Markovic have a common interest in ensuring that the investments which Synergy Capital holds are secured and realised in an orderly way and that the payments which have been improperly made out of the structure are returned.*"

Whatever the position as between UBS and Mr Markovic, any common interest of UBS is dependent on the interest of Mr Markovic in Synergy Capital. In any event, for the purposes of establishing standing, a common interest will not suffice. The position of UBS needs to be looked at independently of the position of Mr Markovic and what UBS will have to establish to be able to proceed is that it has its own degree of connection or association to be an "*interested party*".

83. The conclusion I have reached, following a thorough review of the evidence, is that the position of UBS is too remote from Synergy Capital for it to be an "*interested party*" and so

able to make a winding up application. A bank raising a query with a company on behalf of a customer about payments made out of an account held with it has no more than a very tangential connection with the company itself. In this case, the payments made out went to Milmasy and not to Synergy Capital and, in relation to the payment made to Halliwells LLP, I have already concluded that this cannot be treated differently. UBS is simply a correspondent with Synergy Capital and it would be casting the net too wide to afford such a person standing to make a winding up application.

Application to Mr Markovic

84. The position of Mr Markovic is quite different. Synergy Capital is part of a structure created with Mr Markovic, and others, in mind. As events have unfolded, the structure is ultimately for the benefit of Mr Markovic and Mr Hulme, and possibly also for the benefit of Mr Fearon. I have commenced this analysis by referring to the structure generally because it was submitted on behalf of Mr Markovic that whatever the layers within the structure, he and Mr Hulme are in substance the two shareholders of Synergy Capital.

85. Given the suggestion from Advocate Richardson that a shadow director under section 132 of the Law may be an "*interested party*", there was some discussion at the hearing as to whether a person who might be regarded as a shadow member or shadow creditor would also be an "*interested party*". I accept that the difference here is that a shadow director is expressly recognised for the purposes of the 2008 Law, albeit he is not treated as a director for the purposes of section 408, whereas the other statuses do not feature as part of the 2008 Law. However, in considering the degree of interest that a person has in a company, I can see merit in having regard to these sort of things. A person may not be a member or creditor in the strict sense of the word (and, if he were, there would be no need to consider if he is an interested party), but may be the closest one can get to being a member or creditor, thereby demonstrating more interest in the company than someone, like UBS, who is more remote. This will not, however, be a decisive factor.

86. I am conscious of the need to respect the integrity of the chosen Synergy structure. As I have already indicated, the interposition of the Synergy Partnership cannot be disregarded. However, in accordance with the provisions of the Partnership (Guernsey) Law, 1995, this creates a "*relationship … between persons carrying on business in common with a view to profit*" (section 1(1)) and the persons in question are Ccay Limited, Crasygy Limited and Milmasy rather than Mr Markovic and Mr Hulme. By virtue of section 5(1) of the 1995 Law, "*every partner is an agent of the firm and of his other partners for the purposes of the partnership business*" and binds the firm and his partners unless he has no authority to act for the firm and the person with whom he is dealing knows he has no authority or does not know or believe that he is a partner.

87. The Synergy Partnership has lent money to Synergy Capital. As one of the partners, Milmasy could make a demand for repayment. It is common ground that Mr Markovic could, if he chose, direct CB Nominees Limited to transfer the share it holds in Milmasy into Mr Markovic's name. If Milmasy were to appoint a liquidator, the Synergy Partnership would be bankrupt (as defined in section 44(1)) for the purposes of section 32 of the 1995 Law and it would be dissolved, unless the partners agreed otherwise, which seems unlikely. As the single share in Synergy Capital is held by CB Nominees Limited subject to the Deed of Trust in favour of the three companies forming the Synergy Partnership, if the Partnership were dissolved, Milmasy's position in respect of Synergy Capital would potentially become more direct. In all these circumstances, Mr Markovic could take steps to be in a position to direct that an application to wind up Synergy Capital be made. The issue for me, therefore, is whether Mr Markovic should be forced to go through those steps to bring himself within one of the other categories of person who has standing to make the application or whether his current position demonstrates that he is already sufficiently closely connected or associated with Synergy Capital as an "*interested party*".

88. Insofar as reaching a conclusion that Mr Markovic in person has standing involves any element of piercing the corporate veil, or veils, within the Synergy structure, I am satisfied that this is a proper case in which to do so. In so far as Milmasy is concerned, the directors are the same directors as for Synergy Capital and there are no other people outside of Mr Markovic who have an interest in Milmasy. That company is, of course, a legal entity separate and distinct from its member, which (I remind myself) is CB Nominees Limited and not Mr Markovic himself, but the evidence points to Milmasy effectively being the alter ego of Mr Markovic and the funding he provided to that company could have been provided directly to Synergy Capital. Further, in the special circumstances of this case, Synergy Capital appears to have carried on its business as a result of monies provided to it from a single source, namely Mr Markovic. Accordingly, I take the view that there is justification for looking through Milmasy and elevating Mr Markovic in person into a position where he is an "*interested party*" for the specific purpose of making an application to wind up Synergy Capital.

89. Having weighed up the arguments for and against finding that Mr Markovic is an "*interested party*", on balance, I have reached the conclusion that he is. The genesis of the Synergy structure was described as being "*a club of 4 people investing in the same thing*". It avoided the need to be regulated by the Guernsey Financial Services Commission because of the small number of persons involved and their alleged close connection. Although the Synergy structure actually set up was slightly different from the original proposal, the close connection of the actual participants to the central feature of the structure, namely Synergy Capital, has, in my judgment, been retained. Accordingly, although Mr Markovic is not a director, member or creditor of Synergy Capital, his interest in that company is as close as anyone else could get and, for the reasons I have set out, I have decided that his application for the compulsory winding up of Synergy Capital should be allowed to proceed to a substantive hearing.

Conclusion

90. The dismissal applications brought by Synergy Capital and Mr Hulme are, therefore, successful in part, but have failed in their quest to have the winding up application completely dismissed for want of standing of both Applicants. The application can proceed at the suit of Mr Markovic only because, although he is not a creditor for the purposes of section 408, I have found that he is an "*interested party*" for the purposes of making the application. UBS on the other hand has not persuaded me that it has standing to continue the application. Therefore, in accordance with rule 37 (1)(a) of the Royal Court Civil Rules, 2007, UBS shall cease to be a party to the winding up application.

