



**Prodefin Trading Limited v Midland Resources Holding  
Limited & Others**  
Royal Court  
14<sup>th</sup> February 2017

**JUDGMENT  
7/2017**

Compulsory Liquidation

**IN THE ROYAL COURT OF GUERNSEY**  
**ORDINARY DIVISION**  
**IN THE MATTER OF MIDLAND RESOURCES  
HOLDING LIMITED (a Guernsey registered company)**  
**AND**  
**IN THE MATTER OF PARTS XIX AND XXII OF  
THE COMPANIES (GUERNSEY) LAW, 2008**

**Between: PRODEFIN TRADING LIMITED (“the Applicant”)**

**-v-**

- (1) MIDLAND RESOURCES HOLDING LIMITED (“the Respondents”)**  
**(A Company registered in Guernsey)**
- (2) MIDLAND RESOURCES HOLDING LIMITED**  
**(A Company registered in BVI)**
- (3) LEXINTER INTERNATIONAL INC.**  
**(A Company registered in BVI)**

**Judgment handed down: 14<sup>th</sup> February 2017**

**Before: Sir Richard Collas, Bailiff**

**Advocate for the Applicant: Advocate J J Barclay**

**Advocate for the Second & Third Respondents: Advocate M C Newman**

**Cases, texts and laws referred to:**

Companies (Guernsey) Law, 2008  
Arnold v Britton [2015] AC 1619

O'Brien v Marett [2008] JCA 178

UK Companies Act 2006, section 994

Apex Global Management Limited v Fi Call Limited [2015] EWHC 3269 (Ch)

Re: Coroin Limited (No2) [2012] EWHC 2343 (Ch), [2013] EWCA Civ 781

O'Neill v Phillips [1999] 1BCLC 1

Ebrahimi v Westbourne Galleries Limited [1973] AC 360

Grace v Biagioli [2006] 2BCLC 70

1. The applications before me concern a company registered in Guernsey, Midland Resources Holding Limited (to which I refer both as the “Company” and as “Midland Guernsey”), which is ultimately owned equally by two businessmen who have been referred to in the proceedings as the Russian businessman and the Canadian businessman. The Company was at one time the holding company of a large group of companies with interests in Eastern Europe and elsewhere. The two businessmen have largely unwound their mutual interests, although there remain a small number of assets, or contingent assets, of the Company which may or may not have very substantial value. The two businessmen are in total disagreement as to how to deal with one of those contingent assets.
2. The Company has two directors. One of them, Robert Edward Lee, is a resident of Canada and a trusted associate of the Canadian businessman. The sister of the Russian businessman, Inna Sergiyenko, is the only other director of the Company unless I determine that she was validly removed as a director and replaced by another associate of the Canadian businessman, Daniel Tilis, by a purported resolution of the board of the Company, executed by Mr Lee, dated 18<sup>th</sup> November 2016. (I refer to the three of them as “Mr Lee”, “Ms Sergiyenko” and “Mr Tilis”). Mr Lee and Ms Sergiyenko both claim to have acted at all times in the best interests of the Company but each faces allegations that they have been pursuing the interests of the businessman at whose behest he or she was appointed in priority to the interests of the Company. Each of Mr Lee and Ms Sergiyenko has lost all trust and confidence in the other and there is also clear evidence that each of the two businessmen has lost trust and confidence in the other businessman. Consequently, the board of directors of the Company is deadlocked (unless Mr Tilis’s appointment as a director is valid). Each side has brought applications with a view to seeking to resolve the deadlock so that the actions that remain to be taken in order to complete the realisation of the Company’s assets may be pursued.
3. The Applicant, Prodefin Trading Limited, owns 50% of the Company’s shares and is ultimately owned by family trusts connected to the Russian businessman. The other 50% of the Company’s share capital is held by the Second and Third Respondents, both of which are ultimately controlled by the Canadian businessman. The Company is the First Respondent.

## **The Applications**

4. By an application dated 28<sup>th</sup> September 2016 (“the Application”), the Applicant applied for: an Order that the Company “be wound up pursuant to Sections 350 and/or 406(i) and 412” of the Companies (Guernsey) Law, 2008 as amended (“CGL”); an Order that Timothy Le Cornu of Krys Global (Guernsey) Limited and John Skelton of Krys Global (UK) Limited be appointed as the joint liquidators of the Company; some consequential Orders relating to the powers of the joint liquidators; and costs. The Application was amended on 2<sup>nd</sup> December 2016 (the “Amended Application”) by including an application for declarations both that the purported removal of Ms Sergiyenko as a director of the Company on 18<sup>th</sup> November 2016 was unlawful and also that the appointment of Mr Tilis is invalid and hence he is not a director of the Company.

5. In response, the Second and Third Respondents filed an Application (“the Alternative Relief Application”) dated 17<sup>th</sup> November 2016 seeking: an Order pursuant to Section 350(2)(b) of CGL that the Company be required to continue the arbitration proceedings referred to as the “Gorlane Proceedings”; an Order, pursuant to Section 350(2)(d) of CGL, that the Applicant’s shares in the Company be purchased by the Canadian businessman or a company nominated by him on terms set out at paragraph 39 of Mr Lee’s first affidavit; and costs.

### **The Witnesses**

6. On behalf of the Applicant, evidence was given by Ms Sergiyenko and by Michael Timothy Fenn (“Mr Fenn”), a partner in Pinsent Masons, a London firm of solicitors instructed by Ms Sergiyenko. Ms Sergiyenko produced one affidavit dated 30<sup>th</sup> December 2016 and there were three affidavits by Mr Fenn, dated 28<sup>th</sup> September and 24<sup>th</sup> November 2016 and 9<sup>th</sup> January 2017. Mr Lee gave evidence on behalf of the Second and Third Respondents; he had sworn four affidavits dated 17<sup>th</sup> November and 12<sup>th</sup> December 2016 and 13<sup>th</sup> January and 18<sup>th</sup> January 2017. The affidavits stood as the evidence in chief of the three witnesses, each of whom was cross-examined. There was also in evidence a letter from the Russian businessman to the Canadian businessman dated 12<sup>th</sup> January 2017 and a letter from the Canadian businessman to the Russian businessman dated 18<sup>th</sup> January 2017.
7. Advocate Jonathan Barclay appeared for the Applicant and Advocate Mathew Newman appeared for the Second and Third Respondents. Skeleton arguments were produced by them on behalf of the Applicant and the Second and Third Respondents, both dated 16<sup>th</sup> January 2017. The skeleton arguments stood as the opening speeches of counsel. The First Respondent played no part in the proceedings.

### **The Facts**

8. To a large extent the facts were agreed, or at least not disputed. The disputed evidence was more concerned with disagreements as to who was responsible for events that had occurred or for actions that should have, but had not, been taken; and the underlying motives and intentions of those concerned.
9. I will begin by setting out the key facts which are either agreed or not disputed.
  - (1) 20.02.1998 - the Company was incorporated in Guernsey.
  - (2) 12.06.2007 - Ms Sergiyenko was appointed as a director of the Company.
  - (3) 2009 - The two businessmen agreed to go their separate ways and to begin to liquidate and separate their interests.
  - (4) 19.05.2010 - the Company entered into a sale and purchase agreement (“SPA”) with five parties known collectively as the “Gorlane Purchasers” for a substantial steel business located in the Ukraine. The total consideration was \$850,000,000 US dollars of which \$50,000,000 (“the Holdback Amount”), was to be paid into an account known as the “Blocked Account” for a period of 18 months following “Completion” during what was effectively a warranty period, following which adjustments were to be made to the purchase price to take account of provisions detailed in the SPA relating to the “Net Debt Adjustment Amount”. Post Completion, the Company was to transfer to the Gorlane Purchasers a number of assets defined as the “Future Interests”. The present position is that the Blocked Account has not been opened, the Holdback Amount has not been paid, the Net Debt Adjustment Amount has not

been calculated and the Future Interests have not all been transferred. Where the responsibility falls for such failures is a matter of dispute between the parties and something to which I turn later in this judgment.

- (5) 23.05.2010 - "Completion" of the transaction took place.
- (6) 19.08.2010 - The Gorlane Purchasers wrote regarding the failure to transfer the Future Interests.
- (7) 05.10.2010 - The date of the first of three "Unwind Agreements" made between the Russian businessman and the Canadian businessman, agreeing how to unwind their shared business interests.
- (8) 02.2011 - Further letter from Gorlane Purchasers re the failure to transfer the Future Interests.
- (9) 29.03.2011 - Mr Lee was appointed as a director of the Company.
- (10) 28.04.2011 - Allen and Overy ("A&O"), instructed by the Company, wrote to the Gorlane Purchasers.
- (11) 12.05.2011 - The date of the second Unwind Agreement made by the Canadian Businessman and the Russian Businessman.
- (12) 05.10.2011 - the Gorlane Purchasers wrote again regarding the failure to transfer the Future Interests.
- (13) 23.11.2011 - being 18 months after Completion of the transaction was the date by which the Holdback Amount should have been paid to the Blocked Account by the Gorlane Purchasers.
- (14) 28.11.2011 - A&O wrote demanding payment of the Holdback Amount. No response has been received from the Gorlane Purchasers
- (15) 10.07.2012 - the Russian businessman and the Canadian businessman entered into the third Unwind Agreement.
- (16) 17.07.2013 - A&O produced a memorandum of advice to the effect that pursuit of the Holdback Amount from the Gorlane Purchasers was relatively straightforward and there was no meritorious defence to the claim.
- (17) 28.03.2014 - letter to the Gorlane Purchasers seeking payment.
- (18) 24.04.2014 - three of the Gorlane Purchasers wrote to the Company regarding the failure to transfer the Future Interests.
- (19) 17.06.2015 - a meeting took place with representatives of the Gorlane Purchasers at their offices, attended by Ms Sergiyenko and Alexander Zyuba ("Mr Zyuba"), a Russian lawyer, appointed by the Canadian businessman.
- (20) 29.06.2015 - A list of the Gorlane Purchasers' counter-claims was sent to the son of the Russian businessman, "Igor", along with claims relating to the Net Debt Adjustment Amount and the failure to transfer the Future Interests.
- (21) 04.12.2015 - the Canadian businessman commenced arbitration proceedings against the Russian businessman in the London Court of International Arbitration ("LCIA") alleging that he had suffered a fraud perpetrated by the Russian businessman in the region of several million US dollars ("the Fraud Claim").
- (22) April/May 2016 - correspondence was exchanged between Mr Lee and Ms Sergiyenko in which Mr Lee was seeking agreement that the Company commence proceedings for payment of the Holdback Amount, to which Ms Sergiyenko objected for reasons that include the risk of a counter-claim by the Gorlane Purchasers and doubts as to the enforceability of any judgment, which I describe in more detail later in this judgment.

- (23) 13.05.2016 - proceedings were commenced in the LCIA against the Gorlane Purchasers (“the Gorlane Arbitration”, also the “Gorlane Proceedings”) issued by Messrs DWF LLP (“DWF”) purporting to act on behalf of the Company but instructed solely by Mr Lee. Their authority to do so is challenged by Ms Sergiyenko and the Applicant who also has concerns that DWF have a conflict of interest in that the same firm is acting for the Canadian businessman in the Fraud Claim. The conduct of the Gorlane Arbitration is discussed further by me later in this judgment.
- (24) 28.09.2016 - the Applicant issues the Application.
- (25) 17.11.2016 - the Second and Third Respondents issue the Alternative Relief Application.
- (26) 18.11.2016 - Mr Lee acting as a sole director of the Company purports to remove Ms Sergiyenko and replace her as a director with Mr Tilis.

Subsequent events are described by me later in this judgment.

### **The Blocked Account**

10. The SPA was negotiated with the Gorlane Purchasers over a short period of time, a mere two days. Prior to then, negotiations that had been going on over a period of six months with another party for the purchase of the steel business had fallen through. Clause 3 of the SPA provided for the purchase price of \$850,000,000 to be paid in three tranches. On 19<sup>th</sup> May 2010, or such other day as the parties might agree, \$425,000,000 was to be paid to an escrow agent pending Completion. On Completion, a further \$375,000,000 was to be paid to the Company’s account and the balance of \$50,000,000 to the Blocked Account, this being the Holdback Amount. The first two tranches of the purchase price were duly paid but the final tranche has never been paid. Clause 5.2(b) specified that if the Blocked Account had not been opened by the Completion date, the Gorlane Purchasers were to retain the Holdback Amount until the Blocked Account had been opened and were to deposit it within two days following the opening of such account.
11. A proviso to clause 5.2 stated that the Company was not obliged to complete the sale of the “Shares” as defined in the SPA unless the entire completion payment was made, the Blocked Account was opened by the Completion date and the entire Holdback Amount was paid into the Blocked Account. Clause 6.5 specified that the Company was to procure that the Future Interests be transferred to the Gorlane Purchasers for nominal value, as soon as reasonably practical, but in any event no later than 10<sup>th</sup> June 2010, the longstop date. The Blocked Account was to be operated in accordance with the principles set out in schedule 10 of the SPA and in accordance with a Blocked Account Agreement which I understand has not been completed. Schedule 10 stated that payments would be made from the Blocked Account to settle any adjustments to the purchase price, including any relating to the Net Debt Adjustment Amount and pursuant to a completion statement which was to be prepared within ninety days of Completion.
12. Neither Ms Sergiyenko nor Mr Lee accepted any responsibility for the failure to open the Blocked Account. Mr Lee is by profession a chartered accountant who joined the Midland Group in 2002, not as an employee of the Company, but employed by a Canadian company that represented the Group’s interests in Canada. He has always been based in Toronto. He described his role in 2002 as being the preparation and collation of financial data from the Group’s activities around the world for presentation to auditors to enable the preparation of

financial statements for showing to banks and others who required them. Ms Sergiyenko alleged, in cross-examination, that Group bank accounts were dealt with by the Toronto office and she claimed that it was Mr Lee's responsibility to open the Blocked Account. She said that, as far as she was concerned, he was the finance director in the Group's structure, he was responsible for opening the account, he was *de facto* dealing with it so she left him to it as she had no reason to mistrust him.

13. Mr Lee said that he had initially proposed two banks that he considered were suitable to open and operate the Blocked Account. However, neither of them was acceptable to the Gorlane Purchasers who requested that the account be opened with the bank that had provided the finance to them for the purchase. Further discussions were needed and as it was the son of the Russian businessman ("Igor") and Ms Sergiyenko who had conducted the negotiations for the purchase and continued to deal with the Gorlane Purchasers after Completion, Mr Lee said that he left it to Igor to agree with them the setting up of the Blocked Account. Mr Lee said that when he became a director of the Company in 2011, he was aware that the Blocked Account had not been opened.
14. Mr Lee acknowledged that the failure to open the account was never formally discussed at a board meeting but said it was discussed in e-mail correspondence exchanged with Ms Sergiyenko. He then explained how he and Ms Sergiyenko had conducted their management of the Company. They never held regular physical meetings of the directors. The best way for them to communicate was by e-mail, although there were occasional telephone conversations between the two of them. Email communication worked best because of their geographical separation, the time difference between Toronto and Kiev and language differences (Ms Sergiyenko has a command of English but relies on dictionaries to translate words that she does not immediately recognise and Mr Lee's command of Russian is much worse). The Company's agents in Guernsey arranged for the completion of statutory records and for filing requirements to be satisfied.
15. It was suggested to Ms Sergiyenko in cross-examination that the failure to open the Blocked Account was the reason for the present proceedings. It was also suggested to her that if the account had been opened, the Holdback Amount would have been paid into it. She refused to accept that would be the case as she said that the Gorlane Purchasers would have had to be motivated to make the payment. Regarding the responsibility for the proceedings, she said that difficulties with the Gorlane Purchasers were not the only issue. Indeed, she described a number of difficulties dating back to 2010. The steel business in the Ukraine had been the main source of funding for the Midland Group. After its sale and after other assets had been divided between the businessmen or liquidated pursuant to the Unwind Agreements, it was difficult for her to obtain the finance needed to run the office in Kiev. She was reliant upon the two businessmen providing the funds required and she experienced what she described as major disputes over every item of expenditure. She said that the relationship between the Russian businessman and the Canadian businessman deteriorated day by day because of the lack of a source of finance from the Group's operations.
16. Despite the reference to numerous emails passing between Ms Sergiyenko and Mr Lee, none of the contemporaneous correspondence was produced to the Court by either party even though it might have helped to clarify or explain the conflicting oral evidence.

### **Taking action against the Gorlane Purchasers**

17. In 2011, A&O were instructed to write to the Gorlane Purchasers. Exhibited to the first affidavit of Mr Lee is a letter from A&O dated 28<sup>th</sup> November 2011, addressed to the five purchasers and a memorandum written by A&O dated the 17<sup>th</sup> July 2013, addressed to Igor, entitled "Possible Claims Resulting from Gorlane SPA". Mr Lee said that A&O were not

instructed by him but by Igor. Ms Sergiyenko was asked whether she was involved in instructing the firm. She said she did not know and would have to check, although she acknowledged that she knew of A&O. She said they never asked her for any documents or information and she does not know who they obtained instructions or information from. A&O purported to be acting on behalf of the Company but even though Mr Lee had become a director of the Company on 29<sup>th</sup> March 2011, A&O refused to disclose their file to him when he asked for it. My interpretation of the evidence is that A&O were instructed on behalf of the Company by the Russian businessman and/or by his son acting on his behalf.

18. The letter from A&O dated 28<sup>th</sup> November 2011 noted that no reply had been received to an earlier letter of 28<sup>th</sup> April that year which has not been produced to the Court. Nor have I seen *“the numerous letters you have received about the draft Completion statement or Net Debt Adjustment”* to which it was also said that no replies had been received either by A&O or their client. The Completion statement was long overdue and the 18 month period from the date of Completion during which the Holdback Amount was to have been paid had expired. The letter claimed that the Holdback Amount was therefore now due direct to the Company. A&O concluded the letter by saying: *“It appears, therefore, that you have no possible defence to a claim by [the Company] for the Holdback amount. [The Company] therefore requires you to pay this amount, and an amount equal to the interest which would have accrued had you paid funds into Blocked Account, immediately”*.
19. The Gorlane Purchasers have not replied to the letter of 28<sup>th</sup> November 2011.
20. The memorandum from A&O to Igor dated 17<sup>th</sup> July 2013, stated that it was in response to a request from him for advice *“on a number of points about a possible claim arising from the sale of Gorlane”*. They advised that *“subject to what follows, [the Company] appears to be entitled to receive the Holdback Amount”*. A&O understood that the purchasers had refused to pay the Holdback Amount by arguing that they were entitled to set off against the payment a Net Debt Adjustment. However, the entitlement to receive a Net Debt Adjustment was dependent upon production of the Completion Statement within ninety days of the Completion date. As the Completion Statement had not been produced, A&O advised that *“we do not think this is a strong argument”*. The advice proceeded to explain that the dispute resolution mechanism is arbitration rather than court proceedings. A&O addressed the enforceability of any award against the Gorlane Purchasers, one of which is incorporated in the BVI and the others in Cyprus. They raised the practical consideration of considering whether those companies were shell companies that might not still hold any assets and advised that the Company should check whether they would be worth suing. The advice envisaged that the Gorlane Purchasers would bring counter-claims and anticipated the tribunal would order payment of the full amount of any award, even if there were unresolved outstanding counter-claims and stated *“it is almost inconceivable that they would be able to persuade the tribunal dealing with your claim to off-set any potential award that the Purchasers might receive in a separate arbitration”*. The final paragraph stated, *“Arbitrations can take from around a year, to several years, from the date the request (for arbitration) is issued to the date of an award, depending on the complexity of the case. For the reasons mentioned above, this claim at present appears to be reasonably straightforward and we would therefore expect it would be a relatively quick claim to resolve.”*
21. Ms Sergiyenko was asked in cross-examination to explain why she considered it was not in the best interests of the Company to pursue a claim against the Gorlane Purchasers in accordance with the advice received from A&O. She raised a number of difficulties including that the Company no longer retained the managers who could have assisted by providing any evidence and advice needed. Secondly, she envisaged that the costs of pursuing the claim would be jolly expensive and the Company no longer had the funds to enable it to do so. She was having difficulty at that time in raising sufficient funds from the ultimate shareholders to

pay the staff employed in the Kiev office and said that a decision was taken not to issue proceedings. She added that it was not in the best interests of the Company and pure fantasy to look at the prospects of success identified by A&O unencumbered by the other issues such as potential counter-claims. In taking the decision not to issue proceedings she had taken account of the fact that the Future Interests had not been transferred, notwithstanding that the matter had not been raised by A&O and said she did not know whether A&O were aware of that issue. She maintained that she took the decision not to follow A&O's advice in the best interests of the Company uninfluenced by her brother and his personal interests. She has taken no other legal advice on the claim other than that given by A&O.

22. For his part, Mr Lee said he was aware that A&O had been instructed by the Russian businessman through Igor and that A&O had written to the Gorlane Purchasers to chase payment. He described himself as being only loosely involved. He had requested to be kept informed. He was comfortable leaving others to deal with the matter notwithstanding that he acknowledged that he was not kept fully informed. He considered it was a matter for the Russians (i.e. the Russian businessman, Ms Sergiyenko and Igor) to deal with as they were the ones principally involved with the Gorlane Purchasers, they conducted discussions in Russian and were familiar with dealing with them. However, with the passage of time, he became increasingly dismayed at the lack of progress and concluded that there was some ulterior motive for their lack of progress. He had been unable to obtain any information from A&O who had told him that they would need a board resolution, signed by Ms Sergiyenko, before releasing any information to him. He described A&O as being obstructive towards him. He referred to extensive correspondence between him and Ms Sergiyenko on the matter and he said the issues were repeatedly dealt with by him but not by her. Mr Lee exhibited to the Court correspondence passing between him and Ms Sergiyenko in respect of the period starting in April 2016. The Bailiff understood Mr Lee also to have referred to other extensive correspondence that was not exhibited to the Court.
23. There was little other evidence before the Court of the steps being taken by Ms Sergiyenko or anyone else on behalf of the Company to pursue the payment of the Holdback Amount during the period from Completion until about 2015. On 30<sup>th</sup> April 2015, Ms Sergiyenko wrote to Mr Lee advising him of a meeting with the Gorlane Purchasers "*to negotiate final settlement*". The meeting took place on 17<sup>th</sup> June 2015 at the office of representatives of the Gorlane Purchasers. The Company was represented by Ms Sergiyenko and Mr Zyuba, a lawyer. Mr Lee explained that he chose not to attend because he had been told by Ms Sergiyenko that no decision-makers would be present and that the meeting would be conducted in the Russian language. After discussion with the Canadian businessman, they determined that the most efficient way was to engage the Russian lawyer who was instructed to report to Mr Lee after the meeting. Ms Sergiyenko described her purpose in attending the meeting as being to try to understand the nature of the claims that the Gorlane Purchasers might pursue against the Company with a view to assisting with negotiations. At the meeting, the Gorlane Purchasers presented a list of their counter-claims and a calculation of the Net Debt Adjustment. The total value of the threatened counter-claims was \$136,000,000 which greatly exceeded the Company's claim for payment of the Holdback Amount of \$50,000,000 plus interest and consequently Ms Sergiyenko concluded that a settlement should be reached if at all possible. In her oral evidence, Ms Sergiyenko said that she has continued to have meetings with the Gorlane Purchasers, including as recently as the week before the hearing, with the view to trying to resolve outstanding issues. There is no clear evidence before the Court as to what these meetings and discussions have achieved.
24. Mr Lee became increasingly concerned about the non-payment of the Holdback Amount as the date of expiry of the limitation period for commencing any proceedings of 22<sup>nd</sup> May 2016 (six years after Completion) was approaching. On 18<sup>th</sup> April 2016, he e-mailed Ms Sergiyenko seeking her agreement that the Company should commence proceedings and Ms

Sergiyenko responded asking him not to do so as Igor was dealing with the matter. Mr Lee questioned Igor's authority and referred to a board minute of 19<sup>th</sup> May 2010, executed immediately prior to Completion of the transfer of the steel business under the terms of the SPA, under which he asserted that he had authority to deal with the matter. The resolution upon which he was relying reads:

*“Any one Director (or his alternate) is authorised to do all other such acts and things as might in his sole opinion and absolute discretion be necessary or desirable for the purposes of the effecting (sic) the transactions contemplated by the SPA”.*

25. Ms Sergiyenko responded with reference to the risk of the counter-claims; the difficulties of enforcing any arbitral awards against the Gorlane Purchasers, each of which might be shell companies with little or no assets; requiring the Canadian businessman to fund the claim whilst indemnifying the Russian businessman; and suggesting that an extension of time be negotiated for filing the claim.
26. Without authorisation from Ms Sergiyenko, Mr Lee instructed DWF to act on behalf of the Company to seek recovery of the Holdback Amount, plus interest, claiming a total of approximately \$86,000,000 US dollars. When asked why he had not gone back to A&O who previously had been instructed in the matter, Mr Lee said he did not ask them to quote in relation to the present matter because he considered them to be expensive based on his previous knowledge of their services. He had also been dissatisfied on previous occasions with the quality of advice given by them and he said that, in his experience, such large firms do not give the client *“the right bang for your buck”*.
27. DWF were already acting for the Canadian businessman in relation to the fraud claim brought against the Russian businessman, a matter to which I turn later in this judgment.
28. He did not seek Ms Sergiyenko's agreement to instruct DWF because she was strongly resisting the commencement of proceedings against the Gorlane Purchasers and he knew that she and the Russian businessman would object to the actions he was taking. The arrangements for payment of DWF's fees are that the Canadian businessman is paying them; the payment would be recorded as an expense in the books of the Company, shown as being funded by a loan from the Canadian businessman. Ms Sergiyenko had proposed to Mr Lee that a standstill agreement be entered into in order to agree an extension of time for issuing any proceedings. Had the same been agreed, she said it would have given more time to properly consider whether to issue proceedings, taking into account all the issues. Mr Lee saw no merit in proposing any standstill agreement to the Gorlane Purchasers because, in his view, they were certain to object to it.

### **Relationship between the Businessmen**

29. In the background of all these events and of the applications before the Court is the relationship between the Russian businessman and the Canadian businessman as well as the question of whether Mr Lee and Ms Sergiyenko were at all times acting in the best interests of the Company, which they both repeatedly claimed to be doing, or whether they were acting in furtherance of the interests of the businessman at whose behest each had been appointed.
30. It is apparent that relations between the two businessmen had deteriorated by 2010, hence the decision taken the previous year to go their separate ways and the reason for entering into the first Unwind Agreement between the two of them on 5<sup>th</sup> October 2010. Ms Sergiyenko gave evidence that after the sale of the steel business in the Ukraine, relations became more difficult because the Group had lost a significant revenue source. Expenses had to be funded

by the two businessmen and expenditure items were queried, giving rise to difficulties for those managing the affairs of the Group.

31. By 4<sup>th</sup> December 2015, the relationship had deteriorated to the point where the Canadian businessman commenced the Fraud Claim in the LCIA. The details of that arbitration claim are confidential to the parties and, I was told, are not material to the Applications before this Court. It is not disputed that both businessmen have lost all trust and confidence in each other, just as Mr Lee and Ms Sergiyenko have each lost all trust and confidence in their fellow director.
32. In these proceedings, the Second and Third Respondents allege that the reason the Russian businessman and Ms Sergiyenko have not actively pursued the Holdback Amount is that the money has been diverted by the Russian businessman for his own purposes. The Second and Third Respondents have no direct proof, but invite me to draw that inference on the basis that it is the only plausible explanation for the conduct of Ms Sergiyenko and the Russian businessman. In addition, Mr Lee said on oath that he is firmly of the opinion that is what has happened. This allegation was strongly denied by Ms Sergiyenko.
33. The solicitors acting on behalf of the Canadian businessman in the Fraud Claim are DWF, the firm instructed by Mr Lee to represent the Company in the Gorlane Proceedings. The Applicant challenges the ability and propriety of DWF acting in both matters. Mr Lee said in cross-examination that DWF had taken advice from the Solicitors' Regulation Authority to the effect that there was no conflict. I do not see it as the function of the Royal Court of Guernsey to express an opinion as to whether an English solicitor is or is not acting with a conflict of interest. In any event, I am not in a position to do so as the answer will depend upon the precise instructions given to DWF in both sets of proceedings and those have not been disclosed to me. Within DWF, the same partner is supervising both sets of proceedings and some of the associates involved are concerned with both matters. Ms Sergiyenko said that DWF could not properly act without full instructions which would include statements and documents from her, yet they had not contacted her. Mr Lee's response was that as a director of the Company, she had an obligation to volunteer such information as she has to the liquidator in the event he is appointed, in order to maximise recovery on behalf of the Company.
34. Ms Sergiyenko and the Applicant maintain that DWF have been instructed to pursue the Gorlane Proceedings as a fishing expedition to obtain documents and evidence for use by the Canadian businessman in the Fraud Claim. That allegation was denied by Mr Lee. Nevertheless it is, in my view, understandable that Ms Sergiyenko has not volunteered to contact DWF in circumstances where they are acting against her brother. It is apparent from the evidence of Mr Lee that DWF have not set up any Chinese walls within their firm and it is difficult to see how they could deal with issues of confidentiality if matters disclosed to them by Ms Sergiyenko in relation to the Gorlane Arbitration were also relevant to the other set of proceedings they are conducting against her brother on the instructions of the Canadian businessman.
35. The present proceedings in the Royal Court commenced with the Applicant's Application issued on 28<sup>th</sup> September 2016. The Second and Third Respondents replied with the Alternative Relief Application issued on 17<sup>th</sup> November, alleging, *inter alia*, deadlock between the two directors of the Company. In an attempt to resolve the deadlock, on 18<sup>th</sup> November 2016, Mr Lee purported to remove Ms Sergiyenko as a director of the Company and replace her with Mr Tilis. There was in evidence a letter of the same date giving notice to Ms Sergiyenko that he intended to do so. He purported to be acting in accordance with the provisions of the Articles of Association of the Company and to have acted lawfully. The

basis on which he acted, and the question of whether it was lawful to do so, are considered later in this judgment.

36. On 28<sup>th</sup> October 2016 an article was published on [www.dispatchweekly.com](http://www.dispatchweekly.com) written with intimate knowledge of the Guernsey proceedings. Mr Lee alleged that the information could only have originated from Ms Sergiyenko or the Russian businessman. He alleged that publication of the article is contrary to the best interests of the Company as it will alert the Gorlane Purchasers to the proceedings in Guernsey and the allegations contained therein which, he says, will further dent the Company's bargaining position in the Gorlane Proceedings with the Gorlane Purchasers.

### **The Offer Letters**

37. On 9<sup>th</sup> November 2016, the Canadian businessman wrote to the Russian businessman and Ms Sergiyenko marked "subject to contract" with two alternative offers. The first was an offer to buy shares on the following terms –

*"We enter into an agreement pursuant to which:*

- (2) You procure the transfer of your shares in [the Company] (i.e. the shares held by [the Applicant]) to a company nominated by me; and*
- (3) (After being paid the legal fees that I pay for running the Gorlane Arbitration) I will pay to you 50% of the net proceeds of the sums recovered in respect of:
  - (a) The Gorlane Arbitration; and*
  - (b) The sums owed to [the Company] in the Shtaif Case."**

38. In the alternative, the Canadian businessman proposed that he would fund the Gorlane Arbitration and indemnify Ms Sergiyenko against any liability arising from her directorship as a result of pursuing the claim. He offered to do so on the basis that the Company would receive the sums recovered, the Canadian businessman would be repaid the costs incurred in running the claim and the two businessmen would share the net proceeds equally. The Canadian businessman requested a response within seven days i.e. by the 16<sup>th</sup> November. As it transpired, no response had been received by the 17<sup>th</sup> November, the date upon which the Alternative Relief Application was served.
39. By letter dated 18<sup>th</sup> November, Ms Sergiyenko responded repeating an earlier request for copies of correspondence between DWF and the Gorlane Purchasers and asking whether DWF had considered the earlier A&O memorandum particularly in relation to the counter-claim and the prospect of recovering any money that might be awarded. She asked for assurances that the Canadian businessman would not simply make off with any proceeds received from a claim and questioned how she and the Applicant could be protected from any third-party costs exposure. She requested an irrevocable guarantee or letter of credit to support the indemnity being offered in the magnitude of \$30,000,000 to \$50,000,000 US dollars.
40. On the same day, Mr Lee wrote to Ms Sergiyenko formally requesting her resignation as a director of the Company. In a separate letter of the same date, he advised that he had removed her as a director and referred to the three 'well considered' proposals in his earlier letter and the stay in the Gorlane Arbitration which was due to come to an end on 25<sup>th</sup> November. He wrote that it was the need to make progress prior to that date which had caused him to remove Ms Sergiyenko, purportedly under Article 82(d) of the Articles of Association, and appoint Mr Tilis in her place. The letter also advised that irrevocable instructions had been given by him to DWF to hold any funds recovered in the Gorlane Arbitration, after payment of legal fees, in their client account until agreement could be

reached as to the distribution of the proceeds between the businessmen or pursuant to any court order.

41. Ms Sergiyenko did not accept her removal from the board and, on 20<sup>th</sup> November 2016, purported to sign a Consent Order on behalf of the Company extending the stay in the Gorlane Arbitration until 25<sup>th</sup> February 2017. On 25<sup>th</sup> November 2016, the Russian businessman wrote to the Canadian businessman offering that he (the Canadian businessman) and Mr Lee pursue the Gorlane Arbitration on terms that the Russian businessman and Ms Sergiyenko be provided personal indemnities secured by way of bank guarantee or letter of credit and that the Company also be indemnified with a similar security. In the event of any recovery being made following successful proceedings, after payment of any legal costs incurred by the Canadian businessman, the proceeds would be divided equally between the two businessmen.
42. On 9<sup>th</sup> January 2017 the Canadian businessman wrote to the Russian businessman stating that the basis for requesting indemnities was misconceived. He repeated his offer to purchase the shares on terms that they would submit to a reputable jurisdiction such as the LCIA to deal with any enforcement concerns and that the Russian businessman would be indemnified in respect of a non-party costs order, even though he saw no legal basis for it.
43. The Russian businessman responded on 12<sup>th</sup> January stating that he had been advised there was a risk of a costs order being made against him, to which he did not wish to be exposed and therefore required an indemnity, fortified by way of an irrevocable bank guarantee or letter of credit. He also made reference to the Shtaif proceedings. As an alternative to the Canadian businessman's offer, he indicated the Applicant would be willing to sell its shares in the Company for \$50,000,000 US dollars in order to achieve a clean break.
44. His proposals were answered, and rejected, by the Canadian businessman by letter dated 18<sup>th</sup> January.
45. Thus the position at the hearing was that all offers had been rejected.

#### **Declaration concerning the Removal of Ms Sergiyenko**

46. In purporting to remove Ms Sergiyenko as a director, Mr Lee relied upon Article 82(d) of The Company's Articles of Association which provides that "*the office of Director shall, ipso facto, be vacated if .... (d) he is requested to resign in writing signed by all his co-directors*". To interpret the article, Advocate Newman quoted Article 1 which provides, "*words importing the singular number only shall include the plural number vice versa*". Thus, taking the two Articles together, it is submitted that one director has the power to remove another director in a situation where, as here, there are only two directors of the company. In doing so, Mr Lee claims he was acting *bona fide* in the best interests of the members of the Company in view of Ms Sergiyenko's conduct which was detrimental and prejudicial to the Company as she had placed the personal interests of her brother ahead of the Company's interests.
47. Advocate Newman submitted that the principles applicable to the construction of documents were established under the law of England and Wales, most recently, in the UK Supreme Court in Arnold v Britton [2015] AC 1619 per Lord Neuberger (with whom Lord Sumption and Lord Hughes agreed):

*"When interpreting the written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have*

*understood them to be using the language in the contract to mean' ... and it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of:*

- (i) *The natural and ordinary meaning of the clause,*
- (ii) *Any other relevant provisions of the [contract],*
- (iii) *The overall purpose of the clause and the [contract],*
- (iv) *The facts and circumstances known or assumed by the parties at the time the document was executed and*
- (v) *Commercial common-sense, but*
- (vi) *Disregarding subjective evidence of any parties' intentions."*

48. Advocate Newman noted that in some recent decisions of the Jersey courts, such as O'Brien v Marett [2008] JCA 178, a more subjective approach has been adopted pursuant to Pothier's Traité des Obligations and Modern French Law. He submitted however that in the present case there is no real difference between an objective and a subjective test because the Court has no evidence of any subjective intention when the Company's Articles were drafted and the Company incorporated. Thus he submitted the Articles are to be construed objectively.
49. If I were to find in favour of his submissions, the current constitution of the board would be Mr Lee and Mr Tilis, both of whom are employed within the Canadian businessman's group of companies and (it is to be assumed) will work together, thereby removing the deadlock that currently exists between Mr Lee and Ms Sergiyenko. The Company would then be able to continue to operate under the new board of directors and there would be no need to proceed to consider the other heads of relief being claimed in the Application and the Amended Relief Application.
50. In my judgment, I note that if the singular of the word "*co-directors*" were substituted in Article 82(d), it would read that "*the office of director shall, ipso facto, be vacated if ... (d) he is requested to resign in writing signed by all his co-director*". "*All his co-director*" would not be grammatically correct. Any interpretation of the Article cannot ignore the word "all". If that word were absent, the Article would read that "*a director could be removed if requested by his co-director*" and the meaning sought by the Second and Third Respondents would be permissible. However, the inclusion of the word "*all*" means that the Article can only be invoked if there are at least three, if not four, directors all but one of whom unanimously agree to the removal of the other director. That is the natural and ordinary meaning of the clause, construed objectively in accordance with the principles set out by Lord Neuberger. Advocate Newman correctly stated that we have no evidence of the subjective intention of the parties at the time of approving the Articles. However, it seems inconceivable that they would have intended that if there were only two directors, one representing each shareholder, one director could remove the other, thus depriving one of the shareholders of any representation on the board, with the result depending upon which director struck first.
51. Having reached that conclusion, there is no need, in this context, to consider whether or not Mr Lee was acting *bona fide* in the best interests of the Company. Indeed, the Article does not apparently require any such good intentions.

### **The Law – Relief for Unfair Prejudice**

52. In the Amended Application, the Applicant seeks the winding up of the Company by way of relief in respect of unfair prejudice suffered by it pursuant to Sections 349 and 350 of the CGL. Alternatively, it seeks the winding up of the Company pursuant to Section 406(i) of the CGL on "just and equitable" grounds and pursuant to Section 412 by which the Court may grant such an application "*on such terms and conditions as it thinks fit*" or may "*make such*

*order as it thinks fit*". The Second and Third Respondents also rely upon Sections 349 and 350 of the CGL in the Amended Relief Application.

53. I will consider first the circumstances in which the Court may grant relief for unfair prejudice and the nature of the relief available, before addressing the "just and equitable" winding up provisions.

54. The material parts of Section 349 and 350 of the CGL are as follows:

"349. (1) *A member of a company may apply to the Court for an order under section 350 on the ground that –*

*(a) the affairs of the company 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) an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."*

.....

(5) *The provisions of sections 349 and 350 are without prejudice to any other remedy.*

"350. (1) *If the Court is satisfied that an application under section 349 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), an order of the Court may –*

*(a) regulate the conduct of the company's affairs in the future,*

*(b) ....*

*(c) authorise civil proceedings to be brought in the name and on behalf of the company by such persons and on such terms as the Court may direct,*

*(d) provide for the purchase of shares of any member of the company by other members of the company or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly,*

*(e) ...*

*And the Court may make such consequential alterations to the company's memorandum or articles and any of its resolutions as the Court thinks fit."*

55. There is little, if any, Guernsey authority on the interpretation and application of the unfair prejudice provisions. Consequently both counsel addressed me on English authorities on the similar (but not identical) provisions contained in Sections 994 *et seq* of the UK Companies Act 2006 which, I accept, are persuasive authority in this jurisdiction. The English provisions were helpfully summarised by Hildyard J in Apex Global Management Limited v Fi Call Limited [2015] EWHC 3269 (Ch) at paras 34 – 51, and in particular at para 37 where the learned judge said that the petitioner must establish three things:

- “(1) first, that the matters of which he complains are either actual or proposed acts or omissions of the company or consist of the conduct of the company’s affairs;*
- (2) secondly, that those matters have caused prejudice to his interests as a member of the company; and*
- (3) thirdly, that the prejudice is unfair.”*

56. I am satisfied that the natural meaning of Section 349(1) of the CGL requires the applicant for relief from unfair prejudice to establish the same three elements to the civil standard of proof.

57. Regarding the nature of the prejudice that must be established, David Richards J in Re: Coroin Limited (No 2) [2012] EWHC 2343 (Ch), (affirmed by the Court of Appeal in the same matter at [2013] EWCA Civ 781), held that prejudice is capable of being established either as economic prejudice in some capacity connected with the members’ shareholding or in a non-economic sense.

*“The prejudice must be to the petitioner in his capacity as a member but this is not to be strictly confined to damage to the value of his shareholding. Moreover, prejudice need not be financial in character. A disregard of the rights of a member as such, without any financial consequences, may amount to prejudice falling within the section.”*

58. In Section 349, “prejudicial” is qualified by the adverb “unfairly” indicating that there may be some managerial decisions taken by a company which are prejudicial to one or more of its shareholders but that the court will only intervene in cases of unfairness. I do not consider it necessary to give a comprehensive definition of what could amount to unfairness in this context, but Advocate Newman helpfully referred me to certain persuasive English authorities including O’Neill v Phillips [1999] 1BCLC 1, Ebrahimi v Westbourne Galleries Limited [1973] A.C. 360 and Grace v Biagioli [2006] 2 BCLC 70. Those decisions show that the required degree of unfairness may be established: either by breach of an applicant’s contractual rights, especially where the board has acted in bad faith or for an ulterior purpose; or where equitable factors such as those available in a quasi-partnership relationship may be proved. The particular conduct relied upon by the Applicant can be summarized as:

- (1) The Canadian businessman and the Russian businessman were engaged in a joint venture, akin to a quasi-partnership which has now come to an end and the Canadian businessman is accusing the Russian businessman of fraud in connection with the business of the Company. In those circumstances it is wholly unrealistic to suppose any such relationship can continue.
- (2) Ms Sergiyenko has been excluded from the management of the Company and denied access to the Company’s documents and information, both before and after her purported removal as a director.
- (3) Mr Lee is conducting the affairs of the Company in a manner which is wholly hostile, both to Ms Sergiyenko and to the Russian businessman, for example by instructing DWF to act on behalf of the Company in pursuing the Gorlane Purchasers.

59. The Second and Third Respondents allege unfair prejudice based on different facts although they preface their contentions by saying that if the appointment of Mr Tilis as a director had been valid, there would be no continuing boardroom deadlock. In the light of my decision that Ms Sergiyenko was not validly removed and that Mr Tilis has not been validly appointed to the board of the Company, Mr Lee and Ms Sergiyenko are the continuing directors and they are deadlocked. The matters of prejudice alleged by the Second and Third Respondents can be summarized as follows:

- (1) The failure to pursue payment of the Holdback Amount and the failure to arrange the opening of the Blocked Account.
- (2) Despite instructing A&O on behalf of the Company in 2011, the failure to make progress in pursuing the Gorlane Purchasers prior to Mr Lee commencing the Gorlane Arbitration.
- (3) The inference drawn by them that the Russian businessman is prioritising his personal interests, with the assistance of Ms Sergiyenko, in priority to the best interests of the Company.
- (4) Publication of the Article in *Dispatch Weekly* based on information supplied by the Russian businessman or a person or persons acting on his behalf, such as Ms Sergiyenko.

### **The Law – “Just and Equitable” Winding-Up**

60. Section 406(i) of the CGL provides as follows;

“406. A company may be wound up by the Court if –

- ....
- (i) *the Court is of the opinion that it is just and equitable that the company should be wound up.*”

61. The leading English decisions on the principles that constitute “just and equitable” grounds for winding-up a company, such as Ebrahimi v Westbourne Galleries Limited [1973] 360 have been followed in this jurisdiction, see for example Hubert v Circuit Skips Limited (unreported, Royal Court, 24<sup>th</sup> January, 2001). Such English decisions make clear that the “just and equitable” principles were borrowed from the law of partnership, recognising not only that in many cases there may have been a pre-existing partnership but also that behind many companies, “*there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure*”, per Lord Wilberforce at page 379C. He went on to say, at 379E: “*It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may apply*”.

62. Lord Wilberforce added the following, at page 379G:

*“The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be “sleeping members”), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members’ interest in the company – so that if confidence is lost, or one member is removed from the management, he cannot take out his stake and go elsewhere.*

*It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly through the force of the words themselves.....A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in.”*

### **Discussion**

63. The board of directors of the Company is deadlocked. Both sides are agreed on that fact and, even if they were not agreed, there is very clear, uncontroverted, evidence that it is so.

However, that fact needs to be placed in context. This is not a normal company acting in accordance with normally accepted standards of good governance. There are two directors but they never meet, they do not hold board meetings, the only board minute that has been drawn to my attention is the minute of 19<sup>th</sup> May 2010 authorising the entry into and execution of the SPA and other activities in connection therewith, a minute which reads as if it has been prepared by lawyers for the purpose of ensuring that the Gorlane transaction was properly authorised. There are reasons why the directors operate as they do and it is helpful to set those out.

64. The Company was formed as a joint venture holding company to hold the shared interests of the two businessmen. That was in 1998 when the two businessmen reposed mutual trust and confidence in each other. There is no evidence of any underlying shareholder agreement or partnership agreement and the inference is that none exists or, at least, if there is an agreement, it did not make provision for what would happen if the two businessmen wished to separate their interests and dissolve their relationship. Had there been such a prior agreement, it is likely that one or other of them would have been seeking to enforce its terms, rather than relying upon the provisions of the CGL and the Articles of Association of the Company that do not seem to have been tailored to suit a joint venture.
65. The Court was told that at one time the board of directors was larger, up to eight in number. I have no evidence as to how it operated at that time or whether formal meetings were convened. What is in evidence is how the board has operated with only two directors: Mr Lee and Ms Sergiyenko. Precisely who nominated each of them and who appointed them may be unclear but the evidence shows that each was appointed to represent the interests of one of the businessmen. Mr Lee is a senior employee of the Canadian businessman and Ms Sergiyenko is the sister of the Russian businessman.
66. Although the two directors claim to act at all times in the best interests of the Company, they consult with and may take instructions from their respective businessman. They do so in circumstances where the two businessmen have lost all trust and confidence in each other. As long ago as 2009 they agreed to go their separate ways and since then have been working to separate or unwind their mutual interests. The events that led to the decision to separate are not material. I note that Mr Fenn suggests (in a statement that is hearsay) the reason was that during the period 2005 to 2009, the Canadian businessman had made a number of business decisions that were unprofitable and in some cases extremely loss-making to the joint venture. For his part, Mr Lee said (in a statement that may also be hearsay) that the reason to separate was that the Russian businessman wanted to continue to invest in new business projects in Russia and the Canadian businessman did not. I am not required to determine why they decided to separate as nothing turns on the truth of their reason to do so.
67. The entry into the SPA for the purpose of selling the Ukrainian steel business was a significant step in unwinding the joint venture. As a result, and possibly following the disposal of other profitable assets, Ms Sergiyenko explained that the Company's activities no longer generated sufficient funds to operate the Kiev office and she was dependent upon the businessmen providing funds, the requests for which were often challenged. She said that as a result of the lack of an internal source of funds, the Company was not functioning normally and it experienced problems which started in 2010 and became exacerbated later.
68. I conclude from that evidence that since about 2010, the need to request funds and justify expenditure has inevitably limited the directors' ability to act independently in the best interests of the Company. When taking decisions they have had to be conscious of the requirement to justify their actions to the businessmen and/or to whoever in their respective organisations controlled the purse strings.

69. I mentioned that there were never formal board meetings. Both Ms Sergiyenko and Mr Lee said that they conducted the management of the Company through email exchanges, apparently on a very frequent basis although very few emails have been produced in evidence, giving the impression that the full facts may not have been disclosed to the Court, save in respect of the period from April 2016 onwards.. I accept that I have to decide the outcome of the Applications on the evidence that is before the Court, not on what might be undisclosed.
70. Much of the evidence was in the form of documents that were not challenged. Regarding the evidence of the two main witnesses, Mr Lee and Ms Sergiyenko, there were some discrepancies but by and large the discrepancies were not material. I agree with Advocate Newman's assessment of Ms Sergiyenko's evidence, that at times she attempted to avoid questions, she was unnecessarily verbose, she was not candid and was sometimes evasive. I should add that I have allowed for the fact that she was giving evidence through an interpreter. I do not agree with Advocate Newman's assessment of Mr Lee as being at all times cogent and frank. I paid careful attention to both witnesses and having observed the demeanour of them both when giving their evidence, the impression I have is that neither of them told "the whole truth". As for Mr Fenn, he gave largely hearsay evidence and without the protection of a Hearsay Notice having been served, little weight can be attached to his hearsay. However that is not significant as Ms Sergiyenko was able to plug some of the gaps with her evidence and the documents produced by Mr Fenn spoke for themselves (save when they were in the Russian language without a translation, when they were of no assistance to me whatsoever).
71. Returning to how the directors operated, I understand that one of the ways in which they managed was by delegating. Mr Lee and/or others based in Canada took care of the Company's activities in the western hemisphere while Ms Sergiyenko and others situated in Eastern Europe, including the Russian businessman's son Igor, took care of activities in that area. The East European activities included responsibility for negotiating the SPA and dealing with post-completion matters. However, delegation to one director does not absolve the other director from responsibility if he or she fails to supervise. The failure to hold regular board meetings might explain why there was apparently no process for reporting back to the board the progress, or lack of progress, in dealing with post-completion matters such as the opening of the Blocked Account and chasing payment of the Holdback Amount.
72. Both directors tried to blame the other. Ms Sergiyenko said in cross-examination that it was Mr Lee's responsibility to open the Blocked Account; he dealt with accounts from the office in Toronto, together with Mr Tilis. Mr Lee said that after Completion of the sale, he suggested the names of two banks but neither was acceptable to the Gorlane Purchasers so he left it to those who were dealing with the Purchasers, that is to say people in the Kiev office, to agree the arrangements. It is not clear precisely what each of Mr Lee and Ms Sergiyenko knew at different times but they have both known for several years that the Blocked Account has not been opened. Mr Lee said that when he became a director of the Company in 2011 he was aware that the account had not been opened. Ms Sergiyenko was aware in 2014 when A&O were involved and I am satisfied that she was aware long before that date. Even though both directors were aware that the Blocked Account had not been set up, they did not convene a board meeting to discuss what should be done. It was not the board of directors who instructed A&O nor was it the board who authorised the involvement of A&O. That was arranged by someone on the Russian side of the joint venture, possibly Igor. Mr Lee was not made aware or kept informed; he was even denied access to A&O. That is not how a properly functioning board of directors should act especially when the sum involved is a significant amount of money: US\$50 million.
73. The nature of the Company's operations changed after the two businessmen took the decision to separate, since when the focus has been on separating and liquidating the assets. The

management has inevitably had to change too. The two businessmen have co-operated with each other in agreeing how to divide the assets and have been able to agree the terms of three separate Unwind Agreements. Since 2014, the pursuit of the Fraud Claim in the LCIA by the Canadian businessman against the Russian businessman has not prevented them working together when it has suited them, for example in the handling of the “Shtaif” case. There the Company has obtained a judgment on a counter-claim for US\$137million, which is subject to appeal by the judgment debtor. It is not known whether there is any real value in the judgment as the Company does not know what assets may be available to satisfy the judgment. If and when there is any recovery, Mr Lee said that he had given irrevocable instructions to the solicitors acting for the Company to hold the net proceeds of the claim in their client account pending division between the two businessmen. What is interesting about the handling of the claim is that, apart from those instructions, the directors are not involved in it. Instead, Mr Lee informed the Court that the solicitors have been taking their instructions direct from the two businessmen and have continued to do so.

74. I have concluded from Mr Lee’s evidence on the Shtaif claim that the directors are not in full control of the Company. I have also concluded that the two businessmen can continue to work together when it suits them. It is not surprising that they do so. The evidence is that these are two successful businessmen who take pragmatic, commercial, decisions by assessing the risks and rewards of a decision and then acting accordingly. When it suits them, their commercial instincts override their mutual distrust of each other.
75. Who then is truly controlling the Company and has been doing so for the past several years? Is it the two directors in the, now deadlocked, board or is control exercised from elsewhere? Understandably, neither businessman would wish to be found to be a shadow director so they are seeking to protect themselves from any allegations that they are. When asked whether the Canadian businessman and Russian businessman directed the business of the Company and determined what was to happen with it, Mr Lee replied that *“they were both active, and they were the ultimate beneficial owners. So, it’s fair to say that everyone else regarded them as their bosses.”* Ms Sergiyenko said that the two businessmen participated more when the business was larger. Presently, her brother does not issue much by way of instruction and she does not communicate with him a lot because it is difficult to do so as communications are poor between their countries. The impression given by both of the directors is that the businessmen are involved. Whilst the directors may retain some element of control, the scope they have for reaching independent decisions as to what is in the best interests of the Company is limited because of the need to discuss with the businessmen and not least because it is the businessmen who fund the Company’s activities.
76. Further evidence of the involvement of the businessmen can be seen in the actions taken to instruct solicitors to pursue the Gorlane Purchasers for the Holdback Amount. Mr Lee could not have instructed DWF to commence the arbitration claim without the consent of the Canadian businessman who is funding the proceedings. Previously, A&O had been instructed but not by the directors; Mr Lee was not involved and could not even get access to the solicitor’s file. Ms Sergiyenko could not recall who had instructed A&O and did not know what instructions they had been given. A&O addressed their memorandum of advice to Igor and it may have been he who instructed them. If he did, it was not with the authority of a board resolution from the Company; most likely, it was on instructions from his father.
77. The Shtaif claim is, as I have said, being run directly by the two businessmen giving instructions to the solicitors.
78. There is a further claim in the Ukraine known as the “Amstor” claim which may or may not realise any value eventually. Again, the board is not in control of the action which is being run by a person or persons in Kiev. It is inconceivable that such persons could do very much

unless they have the agreement of the Russian businessman who is presumably funding it or assisting in some way. I cannot say much about the claim because the evidence was very limited but what was clear to me is that the board of directors of the Company do not have control of it.

79. Since 2009, the activities of the Company have been directed towards giving effect to what was described as the “economic divorce” between the two businessmen. By and large, the businessmen have been able to agree what should happen and they continue to be able to do so when it suits them, for instance over the Shtaif claim. The underlying cause of the present proceedings appears to be that the two of them are at loggerheads over the Gorlane Proceedings where they have very different views as to what should or should not happen.
80. Each side challenges the other’s motives. The Canadian businessman thinks that the Russian businessman has diverted the Holdback Amount of US\$50 million for his own purposes. The evidence against him is that Ms Sergiyenko, Igor and, no doubt, others working from Kiev are the ones handling the post-completion issues with the Gorlane Purchasers. Ms Sergiyenko said that she continues to communicate with them and had done so as recently as in the week before the hearing. If there has been so much contact, it is surprising that no correspondence or meeting notes were produced to evidence the discussions and that there is little evidence of any progress having been made either in securing payment of the Holdback Amount or in the transfer of the Future Interests. A&O were instructed to write to the Gorlane Purchasers and gave a memorandum of advice but that firm has not been instructed to do anything to chase replies to correspondence or to commence proceedings. Ms Sergiyenko and Mr Zyuba attended a meeting in 2015 but the purpose of the meeting was very limited, no decision makers were present and little or nothing was achieved. Ms Sergiyenko gave some potentially plausible reasons for not commencing proceedings such as the risk of a counter-claim and the prospect of the Gorlane purchasers having no assets against which a judgment could be enforced. However, she had not taken advice on those issues and does not appear to have explored them in the competent and thorough manner that is to be expected of the directors of a Company wishing to recover a potentially very valuable debt. When expiry of the limitation period was fast approaching her response was to seek a standstill agreement even though they have, in effect, been standing still for years. The overall impression is one of inactivity, obstruction and prevarication. The clearest evidence of the unwillingness of the Russian businessman to pursue the Gorlane Proceedings is that he will not fund the liquidators to do so (if they are appointed) and he is not co-operating constructively with the Canadian businessman’s offer to conduct the Proceedings at his expense. Despite the concerns advanced by the Second and Third Respondents, there is no evidence before me upon which I could find that the Russian businessman has diverted the Holdback Amount for his own benefit and I cannot say what motives he may have when he has not given evidence.
81. As for the Canadian businessman, the Russian businessman is suspicious of his motives in instructing DWF to pursue proceedings. The proceedings were commenced without further express authority from the board, in the knowledge that Ms Sergiyenko had expressed opposition to them. It is not clear what instructions were given to DWF but I was told that they had no information from Ms Sergiyenko or Igor about their ongoing discussions with the Gorlane Purchasers. The precise legal advice on which the decision to issue proceedings was based has not been disclosed, the Court was only told that DWF and an unnamed counsel had agreed with A&O’s memorandum of advice given in 2013. It is not clear what advice has been given on the merits or otherwise of any potential counter-claim. Mr Lee expressly refused to disclose the advice for fear, he says, that someone on the Russian side will leak it to the Gorlane Purchasers and thereby weaken any negotiating position. Unilateral action has been instituted by the Canadian businessman who is funding the action, or at least on his instructions. The Russian businessman is unhappy that it is DWF who have been instructed when the same supervising partner and some of the associates engaged on the case are

pursuing the Fraud Claim against him. Mr Lee may have added to those concerns by saying in evidence that DWF have been told that the Canadian businessman believes that the Russian businessman has diverted the Holdback Amount for his own purposes. The reasons given by Mr Lee for instructing DWF instead of A&O who were previously instructed require examination. He said that A&O would be more expensive but he did not seek a fee quote from DWF to confirm whether that would be so. He said he had been dissatisfied with the quality of A&O's advice on other occasions but he has no concerns about the advice they gave in relation to the Gorlane Purchasers, indeed he relied upon their advice as justification for issuing proceedings. The Canadian businessman is prepared to fund the Gorlane Proceedings while he (or Mr Lee) is in control but he will not presently agree to do so if liquidators are to be appointed. Against that background, it is not surprising that Ms Sergiyenko and, presumably the Russian businessman, suspect that the reason or one of the reasons for issuing the Gorlane Proceedings is to attempt to gather evidence for use against the Russian businessman in the Fraud Claim.

82. The evidence established that it is in relation to Gorlane that the parties have had their biggest differences. If there have been other differences, the businessmen have been able to resolve them. The management of the Company has no doubt been difficult for some time whilst its activities are wound down. There may be many factors that have had a bearing on the current deadlock but it is in relation to Gorlane that matters have come to a head. The reason they have done so is more likely to be because the two businessmen are of different minds as to what to do. If they were in agreement, I can see nothing that would prevent them from running the Gorlane Proceedings in the same way that they are instructing lawyers on the Shtaif claim.
83. In conclusion, the board of directors is in deadlock, but that deadlock would not prevent the businessmen from proceeding with their "economic divorce" if they were in agreement as to what should happen in the Gorlane Proceedings.

### **The Alternative Relief Application**

84. I turn now to consider the relief sought in the Amended Application and in the Alternative Relief Application, starting with the latter as an order for compulsory liquidation would be more Draconian and would be a remedy of last resort.
85. The basis for the Alternative Relief Application is that the affairs of the Company are being conducted in a manner that is unfairly prejudicial to the Second and Third Respondents, two of the members in the Company. There was very little evidence about any of the Second and Third Respondents or the Applicant other than that they were the owners of the share capital of the Company and held the shares ultimately for the benefit of the respective businessmen and their families.
86. "Prejudice" is to be interpreted broadly. It includes, but is not limited to, financial prejudice as David Richards J held in Re Coroin. The prejudicial acts alleged by the Second and Third Respondents relate in one way or another to the cost implications of the Gorlane Proceedings, their impact on the value of the Company and hence of the shares held by its members. The allegations are that the value of the Company has decreased because of the failure to secure payment of the Holdback Amount, the failure to pursue the Gorlane Purchasers and the publication of an article in Dispatch Weekly which will have reduced the strength of the Company's negotiating hand.
87. I accept that the delay in securing the Holdback Amount and the furnishing of information to the magazine are matters capable of causing unfair prejudice to the members of the Company and therefore could invoke the Court's powers to grant relief under section 350 of CGL.

88. The two alternative orders sought are either an order that the Company continue the Gorlane Proceedings or an order for the sale of the Applicant's shares. Neither proposal can be acceptable. (Paragraphs 1 and 2 of the Alternative Relief Application refer respectively to paragraphs "x" and "39" of Mr Lee's first affidavit; I have taken those references to be to paragraphs 38, 39 and 40.)
89. I do not have the evidence that I would require before making an order that the Gorlane Proceedings be continued. I would require expert evidence by way of a legal opinion given by or on behalf of those conducting the extant Gorlane Proceedings, opining upon matters such as the merits of the claim as issued, the merits of any counter-claim, the costs of the proceedings and the prospects of recovering any award. The memorandum issued by A&O in 2013 is wholly insufficient, lacking in content and of course being several years out of date.
90. I am also unable to order a sale of the Applicant's shares on the terms proposed for lack of a sufficiently detailed proposal and for the reason that terms proposed would not achieve a clean break between the parties. Advocate Newman relied upon the judgment of Patten J sitting as a judge of the Court of Appeal in Grace v Biagioli [2006] 2 BCLC 70 (at para 75):

*"[75] In most cases, the usual order to make will be the one requiring the respondents to buy out the petitioning shareholder at a price to be fixed by the court. This is normally the most appropriate order to deal with intra-company disputes involving small private companies. This is the relief which Mr Grace says that the judge should have granted and which he seeks on this appeal. The reasons for making such an order are in most cases obvious. It will free the petitioner from the company and enable him to extract his share of the value of its business and assets in return for foregoing any future right to dividends. The company and its business will be preserved for the benefit of the respondent shareholders, free from his claims and the possibility of future difficulties between shareholders will be removed. In cases of serious prejudice and conflict between shareholders, it is unlikely that any regime or safeguards which the court can impose will be as effective to preserve the peace and to safeguard the rights of the minority. Although, as Lord Hoffmann emphasised in O'Neill v Phillips, there is no room within this jurisdiction for the equivalent of no-fault divorce, nothing less than a clean break is likely in most cases of proven fault to satisfy the objectives of the court's power to intervene."*

91. For all the reasons given by Patten J, a buyout of shares would be a good solution to the present matter if it could achieve a clean break but it would not do so. One major drawback is that the payment of the purchase price would be deferred, and not only the payment but ascertainment of the price would be delayed pending the conclusion of legal proceedings. There is no clarity or precision as to what is meant by "running the Arbitration" or what is meant by "the sums owed to the [Company] in the Shtaif case" (quoting from the Canadian businessman's letter of 9 November 2016). In particular, the letter does not specify what the Canadian businessman would be undertaking to do in order to run the Arbitration or to ascertain the sums owed in the Shtaif claim. Could he settle either claim by agreement with the other parties to each claim or would he have to pursue each to the conclusion of proceedings? Would "the proceedings" be deemed to include appeal proceedings? Would he have to use his best endeavours, reasonable endeavours or what? There are so many uncertainties, I cannot list them all. In his oral evidence, Mr Lee admitted that in respect of the Gorlane Proceedings there would have to be a funding agreement between the Company and the Canadian businessman which he would prepare. In saying that, he acknowledged that the present arrangement regarding the funding of the litigation is not finalised and hence is unsatisfactory.

92. In conclusion in relation to the Alternative Relief Application, the evidence may have been sufficient to engage the Court's powers to order some form of alternative relief but unfortunately, neither of the options presented to the Court would be appropriate. I therefore have to consider whether grounds have been established that would justify an order for compulsory liquidation.

### **The Amended Application**

93. The principal ground on which it is sought to place the Company into liquidation is that it is "just and equitable" to do so. The Applicant also sought to rely upon the Court's powers under the "unfair prejudice" provisions of the CGL. I consider that there is sufficient overlap between the two grounds on the facts of the present case that there is no need for me to consider the "unfair prejudice" ground.

94. English authorities such as Ebrahimi considered the basis and origins of that test, tracing it back to the law of partnership and the circumstances in which the courts would intervene to dissolve a partnership. Counsel disagreed as to whether the two businessmen could properly be described as "partners" in the joint venture. As I have said, there was no evidence before the Court of any agreement between the two businessmen underpinning the joint venture so I cannot say that the two of them had formed a legal partnership. I do not consider it necessary to equate their joint venture either to a partnership or to a quasi-partnership, but insofar as the former is suggestive of a legal relationship and the latter of something less than a formal legal agreement to work together, the latter may be the more accurate. It is sufficient to say that the two businessmen were equal beneficial owners and participants together in a joint venture that operated through the Company.

95. I do not accept the submission that the Company should be wound up on the ground that the purpose for which it existed has come to an end. As the owner of the remaining activities of the joint venture, the Company will continue to have a purpose until all those activities have either been liquidated or distributed between the two businessmen. However, the fact that the decision has been taken to unwind the activities of the joint venture is a factor to be considered when deciding whether liquidation is appropriate.

96. It is apparent that the CGL borrowed the expression "just and equitable" from the English legislation and it is to be inferred that in doing so the legislature intended that the expression should be interpreted by the Guernsey courts with the same meaning as the expression has been given by the courts of England and Wales. Hence the relevant English authorities are to be regarded in this jurisdiction as being highly persuasive. The passage from the judgment of Lord Wilberforce cited above from Ebrahimi is apposite. The joint venture was formed or continued on the basis of a personal relationship involving mutual confidence and there was an understanding that the two businessmen were to participate in the decision making, at least indirectly if not directly. I have heard no evidence as to whether there was a restriction on the transfer of shares but there may well have been. However, Lord Wilberforce said that not all of those elements need be present; he said that one or more of those elements is "typical" of the circumstances where equitable considerations may apply. I am satisfied that the circumstances in the present matter are such as to bring the just and equitable clause into play, as he put it.

97. The facts I set out above, such as the deadlock within the board of directors of the Company, the failure of the two businessmen to agree a common approach to handling the Gorlane Proceedings, the steps taken by one director to remove another and, generally, the failure to agree what is in the best interests of the Company in dealing with the Gorlane Purchasers and the outstanding issues arising from the sale of the steel business are all sufficient to justify making an order for liquidation on just and equitable grounds.

98. The factor that I find especially troubling and which justifies taking the Draconian step of placing the Company into liquidation is that there are two directors who both claim to have the authority to act in relation to the Gorlane Purchasers including taking steps to instruct lawyers or to engage with the Purchasers, or both, without requiring the authority of a board decision and without fully informing the other director of what they are doing. In doing so they may contradict each other and undermine the steps taken by the other director. Such behaviour is not in the best interests of the Company. It is a consequence of the deadlock. The circumstances are such that the Court has the jurisdiction to intervene and it is just and equitable to do so. There is no proposal before me which would resolve the deadlock other than to appoint independent liquidators in place of the directors.
99. I have reservations as to how much the liquidators will be able to achieve with the limited funding offered by the Russian businessman. I am also conscious that in deciding what action to take in the best interests of the Company, the liquidators will be dependent upon the information supplied to them, including what is supplied by the present directors and the two businessmen. I would hope that the full support and co-operation of them all will be forthcoming. I take comfort from the fact that the two directors have both said on oath that they act only in the best interests of the Company. The liquidators will have access to the files held by the solicitors instructed by the Company and those files will contain instructions, correspondence and advice that will undoubtedly be of assistance to the liquidators in carrying out their duties under the supervision of the Royal Court from whom they may seek directions at any time. Although the initial funding promised by the Russian businessman is limited to £20,000, it should be sufficient to enable the liquidators to investigate the principal issues and advise whether the Gorlane Proceedings should be pursued. When they have received the liquidators' informed opinion, the two businessmen will be better able to decide what further action, if any, they wish to have taken.
100. In Ebrahimi, Lord Cross of Chelsea held (*per curiam*) that a petitioner who relies on the "just and equitable" clause must come to court with clean hands. I accept, as I have said, that by adopting the "just and equitable" ground, it must be inferred that our legislature imported English equitable principles into the test to be applied by the Royal Court. I will assume for the purposes of this judgment that there remains a requirement under modern English law that an applicant shall come with clean hands.
101. The Applicant company has "clean hands". There is no evidence that it has ever done anything in relation to the Company other than to act as the vehicle through which shares in the Company are held on behalf of the Russian businessman. However, I will treat the "hands" with which I need to be concerned as being those of the Russian businessman.
102. No allegations in the nature of dishonesty or fraud have been proved in these proceedings. Having taken the decision to unwind the joint venture, the two businessmen have been working to dissolve or distribute their joint activities. On the whole, they have done that successfully but in relation to the issues arising from the sale of the steel business to the Gorlane Purchasers, they have been unable to agree and instead, each of them has been seeking to act in his own best interests. In the absence of proof of something more, that does not amount to "unclean hands" or to conduct which would deprive either of them of the right to come before the court seeking equitable relief.

## Conclusion

103. In conclusion, whilst it might have been preferable to make an order of relief on the unfair prejudice principles, the proposals in that regard that are before the Court are not acceptable. Taking all the circumstances into account, I am persuaded that it would be just and equitable

to order that the Company be placed in compulsory liquidation, being the only other relief available to the Court.