



**Midland Resources Holding Limited v Prodefin Trading Limited**

Court of Appeal  
20<sup>th</sup> July 2017

**JUDGMENT  
34/2017**

Appeal against decisions in relation to a Winding Up Order and an Alternative Relief Order.

**IN THE COURT OF APPEAL OF THE ISLAND OF GUERNSEY**

**CIVIL DIVISION**

**20 JULY 2017**

**Before:**

**Robert Logan Martin Q.C., President**

**David Anderson Q.C.**

**Sir Michael Birt**

**Between:**

- (1) MIDLAND RESOURCES HOLDING LIMITED (A COMPANY REGISTERED IN THE BRITISH VIRGIN ISLANDS)**
- (2) LEXINTER INTERNATIONAL INC. (A COMPANY REGISTERED IN THE BRITISH VIRGIN ISLANDS)**

**Appellants**

**and**

- (1) PRODEFIN TRADING LIMITED**
- (2) MIDLAND RESOURCES HOLDING LIMITED (A COMPANY REGISTERED IN GUERNSEY)**

**Respondents**

**Advocate for the appellants: Advocate M C Newman**

**Advocate for the first respondent: Advocate J J Barclay**

**Advocate for the joint liquidators of the second respondent: Advocate T W McGuffin**

**JUDGMENT**

**ANDERSON JA:**

**Introduction**

1. This is the judgment of the Court.

2. This appeal is brought against two orders made by the Royal Court of Guernsey (Ordinary Division, Collas B) on 14 February 2017, the reasons for which were given in a judgment of that date. The orders appealed against are:
  - a. An order (“the Winding Up Order”) granting an application of 28 September (“the Winding Up Application”), as amended on 2 December 2016, by the first respondent in this appeal (“Prodefin”) to wind up the second respondent to this appeal (“Midland Guernsey”, or “the Company”); and
  - b. An order (“the Alternative Relief Order”) dismissing an application dated 18 November 2016 by the appellants in this appeal (“Midland BVI” and “Lexinter BVI”) for Alternative Relief (“the Alternative Relief Application”).
3. We gratefully adopt Collas B’s clear and comprehensive account of the facts giving rise to this dispute. In short summary:
  - a. Midland Guernsey was incorporated in 1998 and is ultimately owned equally by Eduard Shifrin (referred to as the Russian businessman) who owns his share through Prodefin, and Alex Shnaider (referred to as the Canadian businessman), who owns his shares through Midland BVI and Lexinter BVI.
  - b. Midland Guernsey was at one time the holding company of a large group of companies with interests in Eastern Europe and elsewhere.
  - c. In 2009, the Russian businessman and the Canadian businessman agreed to go their separate ways. Between 2010 and 2012 they entered into three Unwind Agreements, in which they agreed how to liquidate and separate their shared business interests.
  - d. Relations had taken a turn for the worse by December 2015, when the Canadian businessman commenced arbitration proceedings against the Russian businessman in the London Court of International Arbitration (“LCIA”), alleging fraud.
  - e. Between 2011 and 2016, Midland Guernsey’s two directors were Robert Edward Lee, a trusted associate of the Canadian businessman, and Inna Sergiyenko, sister of the Russian businessman. As Collas B found, Mr Lee and Ms Sergiyenko have also lost all trust and confidence in the other.

- f. Mr Lee on 18 November 2016, purported to remove Ms Sergiyenko as director and replace her as a director with a Mr Tilis. The validity of the removal is a live issue on this appeal.
- g. Unless that resolution is valid (which Collas B found it was not), the Board of Midland Guernsey is deadlocked.
- h. While the interests of the two businessmen are largely unwound, the Company retains contingent assets in the shape of various pieces of litigation. The Canadian and Russian businessmen are in total disagreement as to how one of those pieces of litigation – the Gorlane Proceedings, currently before the LCIA – is to be dealt with.

#### **The Orders appealed against**

- 4. In the words of Collas B:

“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.”

(Judgment, para 2).

- 5. Those applications were as follows:

- a. Prodefin, the shareholder vehicle of Mr Shifrin, sought the winding up of the Company pursuant to sections 350 and/or 406(i) and 412 of the Companies (Guernsey) Law 2008 as amended (“the Companies Law”). The Winding Up Application of September 2016 was amended in December 2016 to include applications for declarations that the purported removal of Ms Sergiyenko and appointment of Mr Tilis were invalid.
- b. Midland BVI and Lexinter BVI, the shareholder vehicles of Mr Shnaider, responded to the Winding Up Application by the Alternative Relief Application. That application was made on the basis of unfair prejudice as defined in section 349(1) of the Law, and two specific orders (described under the second ground, below) were sought pursuant to sections 350(2)(b) and (d) of the Companies Law.

6. The Royal Court granted the Winding Up Order and, in the Alternative Relief Order, decided that it was not appropriate to grant the alternative relief that was sought. Both Orders are challenged by Midland BVI and Lexinter BVI on appeal to this court.

### **Grounds of Appeal**

7. The three grounds of appeal may be summarised as follows.
8. First, the appellants contest the finding of Collas B that the removal of Ms Sergiyenko (and as a consequence, the appointment of Mr Tilis by the sole remaining director) were unlawful. They contend that on their proper construction, the Company's Articles of Association allow for one of two directors to remove the other director by written notice, and that the Royal Court erred in law by coming to the contrary conclusion.
9. Secondly, and in the alternative, the appellants take issue with the Alternative Relief Order. They do not contest the Court's refusal to grant the specific relief that they had requested. They claim however that Collas B should of his own motion have explored with the parties alternatives to the relief that was sought, and suggest that one alternative might have been a provisional liquidation.
10. Thirdly, the appellants challenge the Winding Up Order on the basis that the Royal Court (1) was wrong to apply equitable principles on the basis of a finding that Prodefin came to court with clean hands and (2) wrongly took into account, or failed to take into account, six factors of a factual nature set out in the Notice of Appeal.
11. If the first ground succeeds, it is common ground that the Winding Up Order should be discharged since there is no board deadlock. Neither, for the same reason, would the appellants need to seek any alternative relief.
12. We take the three grounds in turn.

### **First Ground: Removal of Ms Sergiyenko**

13. The first ground of appeal challenges the Royal Court's construction of the Articles of Association of Midland Guernsey, as set out in paras 46-51 of the judgment below. It was on the basis of that construction that the Royal Court held the removal of Ms Sergiyenko by her co-director to have been unlawful.

## Principles of construction

14. It was common ground before us that the principles applicable to the construction of the Articles of Association of a Guernsey company are in material respects the same as those set out in the context of the construction of a lease by Lord Neuberger (with whom Lord Sumption, Lord Hughes and Lord Hodge agreed) in *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619. Lord Neuberger summarised those principles at para 15:

“When interpreting a 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”, to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 , para 14. 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 lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.”

He went on to make seven further observations, which it is not necessary to set out here.

15. A suggestion that the approach set out in *Arnold v Britton* involved a recalibration of the earlier guidance given in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900 was dismissed by a unanimous Supreme Court in *Wood v Capita Insurance Services Ltd.* [2017] UKSC 24; [2017] 2 WLR 1095. As Lord Hodge emphasised, the construction of a contract is a “unitary exercise”:

“[O]nce one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.”

(para 12).

16. The principles applicable in Jersey have been described as consistent with those developed by the Supreme Court in *Rainy Sky* and in *Arnold v Britton*: see *Trilogy Management Limited v YT Charitable Foundation (International) Limited* [2012] JCA 152, paras 38-39 and (with specific reference to Articles of Association) 41; *Parish of St Helier v Minister for Infrastructure* [2017] JCA 027, paras 12-13. It was not suggested to us that there are any material differences between the principles of construction set out by the higher courts of the United Kingdom and those applicable in Guernsey, and we proceed on the basis that those principles are the same.

### The words to be construed

17. Article 77 of the Articles of Association of Midland Guernsey provides:

“The First Board of Directors of the Company shall be appointed by the subscribers to the Memorandum of Association. Unless such subscribers appoint a sole Director, the number of Directors shall be not less than two unless and until otherwise determined by the Company in General Meeting.

The Articles were thus drafted on the express assumption that the number of directors might be two, as indeed was the case prior to the purported resolution of 18 November 2016.

18. Article 82 of the Articles of Association provides:

“The office of Director shall, ipso facto, be vacated if:-

...

(d) he is requested to resign in writing signed by all his co-directors;

...”.

19. Article 1 of the Articles of Association (“Interpretation”) provides:

“Words importing the singular number only shall include the plural number and vice versa.”

20. The issue of construction is how to understand the words “*signed by all his co-directors*” in Article 82(d), when, as here, there is only one co-director.

### Submissions

21. The Royal Court accepted the relevance of the Article 1 rule of interpretation cited above, but applied it only to the word “*co-directors*”, not also to the word “*all*”. Applying the Article 1 rule, it arrived at the phrase “*All his co-director*”, which as it pointed out is not grammatically correct. The Royal Court concluded that:

“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.”

The reference to “*at least three, if not four*” perhaps relates to the linguistic distinction between “*all*” and “*both*”.

22. The Royal Court supplemented its literal construction of Article 82(d) by adding:

“.. it seems inconceivable that [the parties] 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 on which director struck first.”

(Judgment, para 50). We reject the attempt of the appellants to characterise these words as an illegitimate recourse to the subjective intention of the parties. Rather, it seems to us to have been an appeal to what the Royal Court considered to be commercial common sense. That, as Lord Neuberger pointed out, is an important factor in the construction of any contract, though not one that should be invoked retrospectively or that can justify a court in re-writing a contract whose meaning is clear (*Arnold v Britton*, paras 17-20).

23. The first respondent supports the reasoning of the Royal Court, adding that it fully accords with the unpublished ruling of LB Hazel Marshall QC in *Harlequin Chemicals et al v Werner Urban* (Royal Court, 11 November 2015, para 110). In that ruling, the learned Lieutenant Bailiff held as follows in relation to a materially identical Article of Association (in that case, Article 97(5)):

“I find that Article 97(5) can only be operated if there are “directors” capable of giving the notice; in other words, a majority of the Board. This Article not only uses the plural, but also stresses “all” his co-directors. I accept that a singular term includes the plural and vice versa, so the plural would *prima facie* include the singular, but first the word “all” is not a plural, and second,

the relevant interpretation provision which gives rise to this is qualified, being introduced by a provision which says –

*“In these Articles the following words bear the following meanings if not inconsistent with the subject or context.”*

I am quite satisfied that to hold that one director could expel the other by the simple expedient of getting in first with a notice to request him to resign shows that the subject matter of this provision cannot apply if there are only two directors. It would be extraordinary if that were the basis on which the company would have been intended to operate. In my judgment it is apparent that, in this context, the intention is that it must be the entire majority of the Board apart from the individual director who is being requested to resign who are empowered to make such a request effectively. The context, and the way in which it would operate if it were to purport to be operated by a single (other) director is, in my judgment, sufficiently inconsistent as subject or context to exclude the general deeming provision that the plural would include the singular.”

(original emphasis).

24. Though the judgment of Marshall LB in *Harlequin Chemicals* was not available to Collas B in the court below, his reasoning corresponds closely with hers. The one additional point on which she relied - the words *“if not inconsistent with the subject or context”* – was not available equally to Collas B. Though the same words appear also in Article 1 of the Articles of Association of Midland Guernsey, they are applied there not to the singular/plural provision cited above (as one might infer was the case in *Harlequin Chemicals*) but only to a separate list of words arranged in two columns.
25. The appellants contend that the resolution of 18 November 2016 was perfectly valid insofar as it purported to remove Ms Sergiyenko from her directorship. In making that argument, they attack both the literal construction placed on Article 82(d) by the court below, and what we have described as its assessment of commercial common sense.
26. They take as their starting point the rule of construction cited above from Article 1, contending that *“all”* (as well as *“co-directors”*) is a word importing the plural number. The effect of Article 1, the appellants argue, is that the phrase *“all his co-*

*directors*” (which means “*every co-director*”) must be read as “*his co-director*” in circumstances where only one such co-director exists.

27. The appellants present further reasons why a court should be slow to overturn what professionally-advised parties appear to have agreed. Their submissions were as follows:

- a. The mischief to which both Collas B and Marshall LB drew attention (the ability of a director appointed by one joint venture party to dismiss the director appointed by the other) would not be cured by the Royal Court’s interpretation. Had there been three directors in total, the two who had been appointed by one shareholder could on any construction of Article 82(d) remove the one appointed by the other, depriving the other shareholder of representation on the board.
- b. If one of a pair of directors could not remove the other, then on every occasion when there was a dispute between the directors, the parties would have to resort to the courts for relief and possibly a winding-up order, even in circumstances where one director was not acting in the best interests of the company or was in breach of duty: this would be costly and even unworkable as no deadlock could ever be overcome without court interference.
- c. Collas B (and Marshall LB) also failed to take into account the existence of a safeguard against the capricious removal by one director of another: the fiduciary duty on directors to act in the interests of the company as a whole. A director who exercises the right to remove another director in breach of that fiduciary duty thus exposes himself to the risk of litigation, including an injunction preventing the notice of removal from taking effect. Reference was also made to the possibility of an application by shareholders in respect of unfair prejudice (an example being the Alternative Relief Application) under sections 349-350 of the Companies Law.
- d. It was pointed out in argument that the appointment of Mr Tilis could, by Article 87 of the Articles of Association, in any event have been reconsidered by the shareholders at the next Annual General Meeting.
- e. In short, the appellant submitted that if the Canadian and Russian businessmen had wished to ensure that each had a representative on the board who could not be removed by the other, they were free to agree

Articles of Association to that effect. Their failure to do so may have proved a bad bargain but should not on that basis be set aside by the courts under guise of interpretation.

First Ground - Discussion

28. The researches of counsel did not turn up any cases from outside Guernsey in which this point of construction has arisen. That is perhaps surprising, given that similar clauses are said to be “often” found in a company’s articles (albeit not included in the Companies Act 2006 Model Articles): Palmer’s Company Law, vol 2, 8.1329. But in any event, the approach taken in this jurisdiction by Marshall LB and Collas B (independently of each other) is in our view the correct one.
29. In both cases the Royal Court took a word-by-word approach to Article 82(d). Collas B read “all” as necessarily importing the plural number and declined to treat it, in the context of the Article, as capable of being read in a singular form. For the reasons he gave, that seems to us to be a plausible literal construction of Article 82(d), albeit (as the appellants demonstrate in the submission summarised above) not the only possible one.
30. The matter is put beyond doubt, in our judgment, by consideration of commercial common sense. Marshall LB was justified in describing as “extraordinary” the notion that commercial parties could have been taken to agree that one director should be able to expel the other by the simple expedient of getting in first with his request to resign. Indeed Advocate Newman, in his oral submissions for the appellants, himself described that prospect as “gunshot at noon”, “undesirable and extraordinary”, and as amounting to a “design flaw” in the Articles.
31. The safeguards advanced by the appellants as mitigating the arbitrary effects of their preferred construction are, on close inspection, less than persuasive.
32. The first point made is that the appellants’ construction of Article 82(d) should not be viewed as unduly problematic, given that where there are more than two directors, the removal of one may – however Article 82(d) is interpreted – be procured by the unanimous request of his or her (plural) co-directors. The appellants seek to characterise that as comparably harsh to the removal of Ms Sergiyenko in the present case. We disagree. The ability of two or more directors to remove another serves the purpose of ensuring that a company can continue to function on a basis approved by a majority of its directors. It is not comparable to the unstable and arbitrary governance that is inherent in a power vested in each of

two directors to procure the resignation of the other at any time. To deny one director the power to dismiss another may indeed result in deadlock, with the possible need for an application to the court to resolve matters. But this, as it seems to us, is preferable to the arbitrary and unpredictable results that are liable to follow from the appellants' interpretation.

33. The alleged protection afforded by an action for breach of fiduciary duty is more apparent than real. The directors of a company are under a duty to act *bona fide* in the proper interests of the company. But the shareholders will not be able to establish a breach of that duty if the remaining director believed in good faith that the interests of the company were better served by the replacement director than by the director whose resignation was requested. Furthermore, as is apparent from the decision of the Privy Council in *Samuel Tak Lee v Chou Wen Hsien* [1984] 1 WLR 1202, 1206H, the existence of bad faith on the part of the requesting director does not vitiate the notice or leave in office the director whose resignation is sought.
34. It is also open to a member of a company, by section 349 of the Companies Law, to apply to the Court for an order under section 350 on the basis of unfair prejudice. But apart from the time that such an action would necessarily take and notwithstanding the wide powers available to the court in section 350(1), it seems improbable in the light of the guidance given in *Samuel Tak Lee v Chou Wen Hsien* that a court could order a director to be reinstated. This possibility would as it seems to us be far from constituting an effective check on the abusive use of the Article 82(d) power as it is construed by the appellants.
35. Finally, we accept that Mr Tilis, appointed by the sole remaining director Mr Lee to succeed Ms Sergiyenko pursuant to Articles 87 and 96 of the Articles of Association, was by the terms of Article 87 to hold office only until the next following Annual General Meeting. But that protection, such as it is, would be cold comfort to shareholders against whose interests the remaining sole director chose to act in the meantime.
36. To conclude under this ground, this is not a case in which commercial common sense is invoked in order to correct a one-sided bargain that the parties on an objective construction plainly chose to reach. The Supreme Court in *Arnold v Britton* was rightly cautious about judicial interventions in such circumstances. Rather, it is a case of a provision where alternative constructions may be argued, but in which one of them produces a result that any commercial person would regard as obviously

flawed. In the circumstances, we have no hesitation in rejecting the construction put forward by the appellants and affirming the ruling of the Royal Court.

### **Second Ground: Alternative Relief Order**

37. In the Alternative Relief Application, brought on the basis of unfair prejudice as defined in section 349 of the Companies Law, the appellants sought two specific grounds of relief under section 350:

- a. under section 350(2)(b), that the Company should be required to continue the Gorlane Proceedings; and
- b. under section 350(2)(d), that Prodefin's shares in the Company be purchased by the Canadian businessman or a company nominated by him.

The application also requested "*such further or other relief as the Court sees fit*". This conventional formulation echoes section 350(1) of the Companies Law, which confers upon the Court the general power to "*make such order as it thinks fit for giving relief in respect of the matters complained of*". The appellants referred to this request for further or other relief as the "*third plea*" in their Alternative Relief Application.

### The judgment

38. Collas B considered both the appellants' specific proposals with care, having noted that an order for compulsory liquidation, as sought by Prodefin, would be "*more Draconian and .. a remedy of last resort*" (para 84). Both proposals were however rejected as unacceptable. In relation to the Gorlane Proceedings, Collas B stated that he lacked the evidence he would have required to make an order. In relation to the sale of Prodefin's shares, he considered that he lacked a sufficiently detailed proposal, and that the terms proposed would not achieve a clean break between the parties.

39. Collas B concluded in relation to the Alternative Relief Application (at para 92), that:

"... 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."

He then went on to consider, and eventually to grant, the Winding Up Application.

### Submissions

40. No challenge is brought on this appeal to the Royal Court's rejection of the two specific options that were presented to it. The appellants instead criticise Collas B for failing to consider what other forms of relief it might have been open to him to grant. More particularly, they suggest that:

“an order for the provisional liquidation of the Company may have achieved a just resolution for all parties and a breathing space in which the various offers made by the Russian businessman and the Canadian businessman had been properly considered, finessed and finalised, taking into account, inter alia, the Bailiff's comments in the Judgment.”

Had the judge come up after the hearing with the idea of provisional liquidation (or any other supposedly workable alternative), the appellants accept that he could not simply have ordered it without reference to the parties, but would have had to reconvene the court to hear submissions on the subject.

41. It is relevant to note that provisional liquidation was at no stage urged upon the Royal Court, despite there being every opportunity for the appellants to do so had they considered it appropriate. It is not even clear whether, had the possibility occurred to them at a suitable time, the appellants would have favoured it. Though they now suggest that provisional liquidation for a period of a month or two would afford the advantage of a breathing space, in oral argument before the Royal Court they submitted rather (in relation to the Winding Up Application) that delay would be undesirable because it would give the Company's litigation opponents an opportunity to have the Gorlane Proceedings dismissed.

#### Legal principles

42. The principles applicable to the grant of relief not specifically requested by the parties are well established, and were not disputed before us.

43. *Grace v Biagioli* [2005] EWCA Civ 1222; [2006] 2 BCLC concerned the exercise of judicial discretion over the relief to be granted once unfair prejudice has been established under the UK Companies Act 1985. The appellants relied upon the following passage, in which the Court of Appeal, having noted the breadth of that discretion, held:

“It was, therefore, incumbent on the judge to consider the whole range of possible remedies and to choose the one which on his assessment of the

existing state of relations between the parties was most likely both to remedy the unfair prejudice already suffered and to deal fairly with the situation which had occurred. The principal criticism of his judgment on this issue is that it concentrated on the precise nature of the prejudice already suffered (i.e. the non-payment of the dividend), but failed to look at matters in the round.”

(para 74, emphasis added). The Court of Appeal went on to hold that the judge had exercised his discretion on too narrow a basis, and should have ordered the respondents to buy out the petitioner’s shares at a price to be determined by the court (para 85).

44. That case is however of no assistance to the appellants. It had nothing to do with the consideration of relief not requested by the parties. Rather, the petitioner had specifically sought a buy-out order, and the judge had set out in some detail his four reasons for not making it (para 76). That which it was held to be incumbent on the judge to do, on the facts of that case, did not extend beyond the proper consideration of a specific application that was made to him.

45. The other authority relied upon by the appellants is *Re Neath Rugby Ltd* [2009] EWCA Civ 291; [2010] BCC 597, a further case on a petition in respect of unfairly prejudicial conduct under the UK Companies Act 1985. In that case (unlike *Grace v Biagioli*), the judge had made an order distinct from those that were suggested to him. The Court of Appeal was however concerned not to delineate the scope of any judicial *duty* to roam beyond the scope of the proposals put to the court, but merely to emphasise that there is a judicial *power* to that effect (paras 85-91). As pointed out by Stanley Burnton LJ:

“The all-but universal inclusion in the prayer of petitions of ‘that such other order may be made as the court thinks fit’ itself means that the discretion of the court as to the relief to be granted is unfettered by the petition.”

(para 90).

46. It is proper and desirable that any court confronted with an application for discretionary relief in circumstances such as these should consider whether that relief could be framed differently or more appropriately than the parties have proposed. It is also open to the court, in the interests of justice and within the boundaries of its allowable discretion, to implement a creative solution that has not occurred to the parties, so long as the parties are apprised of the court’s intention and given an opportunity to comment. But in our system it is the function of the parties, not the court, to identify possible and appropriate forms of relief.

Professional advisers may be assumed to have advised their clients properly on the available options. Additional judicial creativity may be welcomed but should not, as a rule, be expected.

### Provisional liquidation

47. Applying those principles to this case, the second ground of appeal seems to us hopeless.
48. It could not at the time of the hearing before the Royal Court have been described as clear that an order for provisional liquidation was available as a matter of law, let alone that it would have been appropriate to grant such an order in the context of the applications that were made by the appellants.
49. A provisional liquidation order may be made at the suit of a creditor pursuant to section 411 of the Companies Law on the making of an application for compulsory winding up of a company or at any time thereafter. But the appellants were not creditors of the Company, and were not making an application for compulsory winding up.
50. It was submitted to us that an order for provisional liquidation may also be made by the Royal Court pursuant to its broad general powers to grant relief under section 412. We were shown, by way of precedent, an order made by Collas B on 21 April 2017 in the case of *IPIS (Battersea London 1) Limited*. But the section 412 powers, although they may be invoked by shareholders who are not also creditors, are also available only on an application (this time, under section 408) for compulsory winding-up.
51. To avail the appellants in the context of their unfair prejudice application, an order for provisional liquidation would have had to be available in that context. The court's powers to grant relief under section 350(1) are certainly broadly expressed. As was said of an equivalent section of the UK Companies Act 2006, the effect of that general wording:

“is to confer on the court a very wide discretion to do what is considered fair and equitable in all the circumstances of the case, in order to put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of other shareholders of the company; ...”

(*Re Bird Precision Bellows* [1986] Ch 658, per Oliver LJ at 669d-e, describing what is now section 996(1) of the Companies Act 2006).

52. But provisional liquidation is an interim remedy, designed to preserve the *status quo* during the period between presentation and hearing of a winding-up application. Advocate Barclay for the first respondent may have been right to accept before this Court that the making of a provisional liquidation order could in the appropriate circumstances be within the wide terms of the unfair prejudice machinery. But we were not referred to any precedent for the appointment of a provisional liquidator in response to an application in which (by contrast to applications under sections 408 and 411) winding up is not sought, and did not hear detailed argument on the point.
53. In our judgment it is simply untenable to suggest that Collas B erred in law by failing to direct his mind to this uncertain and untested possibility, in circumstances when neither side had asked him to do so and when the appellants themselves were urging on him the drawbacks of delay. Nor is there any reason to suppose, even with the benefit of hindsight, that provisional liquidation would have provided an effective mechanism for solving the deadlock that was at the root of the Company's problems.
54. Unless an independent officer having the status of a liquidator is appointed, the deadlock between the directors would continue, and the likelihood of an agreed valuation for the first respondent's shares, which is substantially dependent on the prospects in the Gorlane Proceedings, is unlikely to be ascertained, never mind agreed, for the purposes of a purchase by the Canadian businessman for many months, if not for years. It follows that there would have been abundant grounds for the Royal Court to conclude, had the proposal been made to it, that the appointment of a provisional liquidator would be inappropriate in all the circumstances.
55. We reject the second ground of appeal.

### **Third Ground: Winding Up Order**

56. The third and final ground of appeal relates to the making of the Winding Up Order itself. It has two elements.

#### First element – clean hands

57. The ground that was principally advanced for placing Midland Guernsey into liquidation was that it was “*just and equitable*” to do so (Article 406(i) of the Companies Law). Whilst Prodefin in the Winding Up Application sought also to rely on the Court’s powers under section 350 of the Companies Law to deal with unfair prejudice, the Royal Court took the view that there was sufficient overlap between the two grounds for there to be no need to consider the unfair prejudice ground, and that approach was not challenged before the Court of Appeal.

58. The appellants submitted before the Royal Court that a petitioner who relies on the “*just and equitable*” ground must come to court with clean hands, and claimed that in the case of Prodefin and/or the Russian businessman, this was not so. The Royal Court accepted the first of these points and rejected the second.

59. In his judgment (paras 100-102), Collas B:

(a) accepted that by adopting the “*just and equitable*” ground, it must be inferred that the Guernsey legislature imported English equitable principles into the test to be applied;

(b) assumed for the purposes of his judgment that there remains a requirement under English law that an applicant shall come with clean hands;

(c) found that Prodefin (the applicant for the Winding Up Order) did have clean hands, since there was no evidence that it had ever done anything in relation to the Company other than to act as the vehicle through which its shares were held by the Russian businessman;

(d) treated the “*hands*” with which he needed to be concerned as those of the Russian businessman;

(e) noted that no allegations in the nature of dishonesty or fraud had been proved in these proceedings, though both the Russian and the Canadian businessman had been seeking to act in their own interests; and

(f) found that 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 seeing equitable relief*”.

60. The origin of the requirement that equitable considerations may make it unfair for those conducting the affairs of a company to rely on their strict legal powers derives from the origins of company law in the law of partnership, which was treated by equity as a contract of good faith: *O'Neill v Phillips* [1999] 2 BCLC 1, per Lord Hoffmann at 7g-8b.

61. In *Ebrahimi v Westbourne Galleries Limited* [1973] AC 360, Lord Wilberforce (with whom Viscount Dilhorne, Lord Pearson and Lord Salmon agreed) remarked of the words “*just and equitable*” in the context of an application for winding up that “*the courts may sometimes have been too timorous in giving them full force*”. He added at 379A-D:

“The words [just and equitable] are a recognition of the fact that a limited company is more than a mere legal entity with a personality all of its own, that there is room in company law for recognition of the fact that behind it or amongst it there are individuals with rights, expectations and obligations which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The ‘just and equitable’ provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.”

62. Lord Wilberforce proceeded at 379E-G to examine the circumstances in which the superimposition of equitable circumstances would be appropriate, remarking that it would be impossible, and wholly undesirable, to define them but indicating that the relevant elements might include “*an association formed or continued on the basis of a personal relationship, including mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company.*”

63. Advocate Newman for the appellants relied also on the following passage from the speech of Lord Cross (with whom only Lord Salmon agreed) at 387G:

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

The language of Lord Cross is more absolute than that of Lord Wilberforce, and we consider that it needs to be read in the context both of Lord Wilberforce’s speech and of subsequent case law. In particular, it does not seem to us that Lord Cross is likely to have meant that any misconduct causative of a breakdown in confidence will automatically preclude relief.

64. In *Fiona Trust & Holding Company v Privalov* [2008] EWHC 1748 (Comm); [2008] 2 P&CR DG21, Andrew Smith J referred to the need for “*a sufficiently immediate relationship between the misconduct and the relief*”, and said of the clean hands maxim:

“The enquiry whether the maxim is to be applied is, of its nature, fact-sensitive, and there is a danger in making any general statements about the limits of its application. However, the authorities do, I think, justify these observations: that the maxim is directed, at least typically, to conduct that is in some way immoral and deliberate; that not all misconduct deprives an applicant of equitable relief and the misconduct may be too trivial for it to import this consequence; and the court will assess the gravity and effect of misconduct cumulatively, so that, while the elements of misconduct taken individually might be too trivial for the maxim to be applied, they might be sufficient taken together.”

(paras 18-19).

65. It was common ground before us that the clean hands maxim was potentially applicable in the context of this case, and we are content to proceed on that basis.

66. The first issue that arises is whether the Royal Court was correct to treat the hands with which it needed to be concerned as those of the Russian businessman or whether, as the first respondent maintains, it should have limited its consideration to Prodefin as the party making the Winding Up Application. In our view the Royal Court was correct to look at both, for essentially the reasons given by Lord Wilberforce in the extract cited from *Ebrahimi*, above.

67. The second issue relates to the Royal Court's assessment. The burden of the appellants' criticism, set out in detail in the notice of appeal, is that the findings of the Royal Court summarised above were inconsistent with previous findings in the judgment that the conduct of the Russian businessman was in bad faith and/or had caused unfair prejudice to the appellants. But in our judgment, those findings fall well short of establishing the sort of immoral and deliberate conduct that one would expect to find in a case such as this if the maxim is to be successfully invoked. Collas B correctly summarised his own conclusions at para 102 of his judgment. He was right in our view to be slow to apply the clean hands maxim in circumstances where the relationship was characterised by mistrust and suspicion on both sides, and where the Winding Up Order appeared to be the only feasible mechanism for resolving the deadlock that prevented the businessmen from proceeding with their economic divorce.
68. Shortly before the hearing, the appellants sought to bolster their case under this head by an application to admit new evidence. That evidence took the form of a fifth affidavit of Robert Lee dated 30 June 2017, exhibiting a Power of Attorney purportedly granted on 21 June 2016 by the Company to the Russian businessman, and said to have been used by him at about that time to commence criminal proceedings in Russia on the Company's behalf against former employees of the Company. Objection was taken in particular to the fact that neither the existence of the Power of Attorney nor the criminal proceedings in Russia were disclosed in Prodefin's evidence before the Royal Court.
69. Whilst Prodefin did not concede that this evidence should be admitted, the Russian businessman swore a responsive affidavit dated 13 July 2017 in which he explained the background to and use of the power of attorney. He stated that he had not given it another thought since providing it to the Russian investigative authorities in June 2016, and that he had not used or attempted to use the power of attorney in any other way, whether before or after the appointment of joint liquidators on 14 February 2017. An affidavit of Ms Sergiyenko, dated 13 July 2017, gave further background and stated that she had not disclosed the existence of the power of attorney to Mr Lee because she did not believe he could be trusted with the information.
70. We reserved consideration to this judgment of the application to adduce new evidence.

71. By rule 12(2) of the Court of Appeal (Civil Division) (Guernsey) Rules 1964, as amended:

“The Court shall have full discretionary power to receive further evidence upon questions of fact ...

Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.”

72. On this point we were referred to the judgment of the Court of Appeal in *Kirk v Blackwell* [1986] 4 GLJ 65, in which the power to receive further evidence on questions of fact was said to be governed by the principles stated in the then current edition of Halsbury’s Laws, vol 37, para 693:

“Before further evidence will be admitted, (1) it must be shown that the evidence could not have been obtained with reasonable diligence for use at trial; (2) the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and (3) the evidence must be apparently credible, although it need not be incontrovertible.”

We have noted that these principles were described as well established in the more recent Court of Appeal decision of *Smith v Atlantique Holdings* [2013] GLR 279, para 29.

73. Having considered the application and the proposed evidence in response, we do not propose to grant leave for the further evidence to be admitted. Although the first and third limbs of the above test are satisfied, the second is not. While it evidences both the deadlock and the profound mistrust that have unfortunately characterised these proceedings on both sides, it is not of such a nature as to alter the proper analysis of the clean hands issue. We do not consider it likely that, if admitted, the evidence of Mr Lee would have an important influence on the result of the case.

74. We would accordingly reject the first limb of the appellants’ third ground of appeal.

#### Second element – weighing of various factors

75. The second element of the third ground of appeal is that the Royal Court failed to exercise its discretion properly in relation to the Winding Up Application, by taking into account irrelevant factors and/or not taking into account relevant factors.
76. Six factors to which it said that incorrect or no weight was given were set out in the Notice of Appeal. They relate to such matters as the interests of the Company in the Gorlane Proceedings, the costs incurred by the liquidator and the responsibility for the deadlock which gave rise to these proceedings.
77. The appellants chose to address the second element only very briefly in their skeleton argument, and not at all in their oral submissions. It seems to us to be without substance as a ground of appeal.
78. We have already referred to the likelihood that only the appointment of an independent officer could deal with the deadlock between the two directors and their principals that would otherwise continue, and to the ability of liquidators to provide a process which will allow the Gorlane Proceedings to reach a point either where substantial assets are recovered for the benefit of the shareholders or where the Company can be wound up without reference to the continuing differences between the two directors and their principals.
79. Collas B acknowledged that taking the Company into liquidation was a “*Draconian step*”, and foresaw that with limited funds it was doubtful how much the liquidators would be able to achieve. Nonetheless, he was driven to that course of action by the absence of a credible alternative to the appointment of independent liquidators for resolving the deadlock. In doing so, he weighed the appropriate factors with conspicuous care. Nothing in the Notice of Appeal comes close to surmounting the high threshold that applies to judicial intervention in the case of a discretionary decision such as this.

## **Conclusion**

80. We dismiss this appeal.