Fountain Street Developments Limited and The Companies (Guernsey) Law 2008
Royal Court
30th November

Applications for the compulsory winding up of the Company

IN THE ROYAL COURT OF GUERNSEY
Civil No. 2148
ORDINARY DIVISION

IN THE MATTER OF FOUNTAIN STREET DEVELOPMENTS LIMITED
AND
IN THE MATTER OF PART XXXIII OF THE COMPANIES (GUERNSEY) LAW 2008

BETWEEN

(1) DAVID HODGE
(2) EMMA HODGE
(3) ELIZABETH FITZGERALD

Applicants

and

(1) FOUNTAIN STREET DEVELOPMENTS LIMITED
(2) MGC GROUP LIMITED

Respondents

Hearing dates: **6th and 7th November 2018**

Judgment handed down: **30th November 2018**

Before
Lt-Bailiff Her Honour Hazel Marshall QC and
Constance Helyar-Wilkinson, and David Grut and David Robilliard, Esquires, Jurats

Legislation, Cases and Texts referred to

(1) Legislation:

Companies (Guernsey) Law 2008 ss 349, 350, 406, 407 527
Royal Court (Reform) (Guernsey) Law 2008 ss 14(2) and a6 (5)

(2) Cases

England and Wales:

Loch v John Blackwood Ltd [1924] AC 783 (PC)

Ebrahimi v Westbourne Galleries Limited [1973] AC 360.
Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821 (Privy Council),

(3) Texts

French: *Applications to Wind Up Companies* 3rd Ed. para 8.298
Mortimore: *Company Directors* 3rd Ed para 11.43

J U D G M E N T

Introduction – the parties and the applications

1. There are two applications before the Court. The Applicants in both are Mr David Hodge, Mrs Emma Hodge (Mr Hodge's wife) and Mrs Elizabeth Fitzgerald, (Mrs Hodge's sister). They each currently hold one ordinary share of £1 nominal value in the company known as Fountain Street Developments Limited (hereafter referred to as either "**the Company**" or "**FSDL**"), a company incorporated in Guernsey on 9th September 2013. The other shareholder in the Company, currently holding four ordinary £1 shares in the Company, is MGC Group Limited, ("**MGCG**") a company owned or controlled by Mr Malcolm Gallienne and members of his family.

2. The Company was originally incorporated between the three Applicants and Mr Malcolm Gallienne personally, the four of them then each taking one share. On 7th April 2014, Malcolm Gallienne transferred his share to MGCG. The remaining three shares now held by MGCG were issued to it on 12th December 2016, in circumstances referred to later.

3. The directors of FSDL are and have always been Mr Malcolm Gallienne and his brother, Mr Richard Gallienne. In this capacity, they are hereafter together referred to as "**the Directors"**. They are also directors of MGCG, along with Mr Jordan Gallienne, who is Mr Malcolm Gallienne's son.

4. By the first application, commenced on 1st June 2018, the Applicants seek, as members of the Company, the compulsory winding up of FSDL under s 406 of the Companies (Guernsey) Law 2008 ("**the 2008 Law"**). The application originally relied on the particular grounds set out in s 406(g) of the 2008 - failure to hold Annual General Meetings; s 406(h) - failure to send annual accounts to members; and s 406(i) - the general ground that it is "just and equitable that the company be wound up". Ground (g) is no longer persisted in, because it emerged after the issue of the application that the Company had lawfully waived the obligation to hold Annual General Meetings at its inception. Ground (h) was remedied subsequently to the issue of the application, the Company having apparently also resolved at its inception to be exempt from the requirement for an audit. The complaint of failure to send annual accounts to members for its first four years is therefore now relied only as part of the history and evidence supporting ground (i), the only ground which therefore remained. At the time of the first application, the particular grounds set out in s 406(e), - the insolvency of the Company, (or, more precisely, that the Company fails the "solvency test" set out in s 527 of the 2008 Law), were not expressly relied on, although these grounds came to be part of the Applicants' case by the time of the hearing, and in any event, facts proving actual insolvency could be quite properly argued to come within the general "just and equitable" grounds of s 406 (i).

5. The Company itself is a Respondent to the first application, but as, in the circumstances, the effective dispute was between shareholders, MGCG was later convened as a Respondent.

6. The second application was commenced by the Applicants on 10th October 2018 and seeks the compulsory winding up of the Company, this time on the basis of s 406(e) of the 2008 Law (ie the "insolvency" of the Company), but doing so on the footing that the Applicants are creditors of the Company who had served statutory demands for their respective debts upon the Company, which demands had remained unpaid after 21 days. Under s 407 of the 2008 Law, this fact is deemed to prove that the Company fails the solvency test. Unless it appeared to the court on credible evidence that the failure to pay could in fact be remedied in short order, the compulsory winding up of the Company would follow, virtually as a matter of course. FSDL itself is the only Respondent to the second application.

7. By order of the Deputy Bailiff made on 16th October 2016, both applications were crochetées for the purpose of a consolidated single hearing, and they have come before this court on 7th and 8th November 2018.

8. Advocate Gordon Dawes represented the Applicants. Although both of the Respondent companies (MGCG and FSDL itself) initially had legal representation, by the time of the hearing neither of them did. Messrs Malcolm and Richard Gallienne attended court as directors of both companies. However, they asked the court to allow Mr Jordan Gallienne to speak for them, and to present the Respondents' cases.

9. Mr Jordan Gallienne is not a director of FSDL, but he plays a central role in the administration of FSDL, and is a director and shareholder of MGCG. In the particular circumstances of the case, where all directors of each of the relevant companies were in court as witnesses, and where Mr Jordan Gallienne was already a substantial witness for the Respondent companies and very much involved in the events which happened, the court was prepared to permit him to speak generally for both Respondents. The court wishes to record that Mr Jordan Gallienne presented the Respondents' cases thoughtfully, clearly and with dignity, and to commend him for so doing.

Procedural

10. This is a decision of the Court and this written judgment has been prepared in accordance with Section 16 (5) of the Royal Court (Reform) (Guernsey) Law 2008. Pursuant to Section 14 (2) of this Law, the Lt-Bailiff did not sum up to the Jurats in open court but instead retired with the Jurats.

11. The Lt-Bailiff gave the following general directions to the Jurats. She first reminded them of their respective roles, namely that the Lt-Bailiff is the sole judge of matters of law and procedure and the Jurats must follow her directions on such matters, but that the Jurats are the sole judges of questions of fact. She directed the Jurats that insofar as she might herself appear to express any views on the facts when guiding their deliberations, the Jurats should ignore these and form their own independent judgment. She directed the Jurats, with regard to the decisions that they would be required to make, that the burden of proof in each instance was the ordinary civil standard of proof, namely proof "on balance of probability", and that this meant simply that they must be satisfied that the relevant fact in issue was more likely to be so, than not to be so. Such further more specific directions as she gave to the Jurats are indicated later in this judgment.

12. Therefore, where this judgment sets out holdings of law and reasons therefor, they are the holdings and reasons of the Lt-Bailiff. Where it sets out findings of fact and the reasons therefor they are the findings and reasons of the Jurats.

History

13. The following account gives sufficient history to enable the background to these applications to be understood, but does not go into all the detail of all the evidence before the Court. It is broadly non-controversial, but indicates where there are disputes between the parties. Insofar as it states anything which was not common ground between the parties at the hearing then this this can be taken to be a finding of fact by the Jurats.

14. Malcolm Gallienne is a general builder of more than 35 years' experience. He previously operated as a sole trader, but incorporated his business two or three years ago, as Mac Gallienne Construction Limited. His brother, Richard Gallienne, has also been in the building trade for many years, but his skills are more as an engineer, and he has his own company specialising in supplying sprinkler systems. Jordan Gallienne, the son of Malcolm Gallienne, is 26 years old. After leaving school with science-based A-levels, he worked for about 2 ½ years in office administration and brokerage in the insurance business, but latterly he joined the family building business to take over its office and contract administration, whilst studying (since 2013) for an Open University degree in construction management.

15. In 2013, the Applicants were introduced to Malcolm Gallienne by some friends, a Mr and Mrs Guille. The Guilles had previously carried out a development venture in collaboration with Malcolm Gallienne. This was the redevelopment of Nos 28 and 30 Fountain Street, St Peter Port into commercial and residential units for onward sale. The Guilles had supplied some or all of the necessary cash for the project, and Mr Gallienne had carried out the building works to bring it to fruition. The project had been successful and Mr and Mrs Guille had earned a handsome 22% return on their investment, apparently in about two years.

16. The Applicants wanted to invest in a similar way. There was a meeting between them and Malcom Gallienne in about June 2013, at the development property which had been identified, namely 32 and 34 Fountain Street. This property comprised two adjacent terraced buildings each containing a ground floor commercial unit with floors above capable of conversion to residential flats. It was agreed that the four participants should become equal shareholders in the special purpose vehicle company, which later became incorporated as FSDL, for the purpose of carrying out this venture.

17. The Applicants, whose evidence was given principally by Mr Hodge, say that it was agreed that each of the four shareholders would invest £250,000 in the venture in cash. The Applicants immediately did so, viewing this (they say) as the payment for their individual shares in the company. They say that whilst it was agreed that Malcolm Gallienne was also going to contribute the like sum in cash to the project, they accepted it when he said that he could not do so immediately, but would do so later, when he was in funds from the receipt of the proceeds of the previous development of Nos 28 and 32 Fountain Street.

18. Malcolm Gallienne disagrees with this, and says that it was never agreed that he would subscribe this sum in cash to the project. Rather, he says, he was going to be doing all the actual building work himself or through his own construction company, and this work would be done at cost, and thus below market rates, therefore making his contribution by that route. The Applicants agree that they understood that the construction works would be undertaken by Malcolm Gallienne or a building company owned by him, but they say that this was a separate matter from the subscription of capital for the shareholdings in FSDL, as between them and Malcolm Gallienne himself.

19. The Applicants also say that it was their understanding, and Malcolm Gallienne concurred, that the projected timescale for the completion of the project was two years. Malcolm Gallienne says that it was rather longer, at least 2 ½ years, and that, in any event, this was always liable to be extended if there were any problems or delays.

20. As to the scheme for the project, it is common ground that the broad intention was that the entire property would be stripped out completely, and that one half (No 32) would then be refurbished, with the commercial unit then being re-let and the upstairs accommodation converted into flats which would be sold off. This was to be done with the parties' initial funds, and the receipts from the first phase would then provide the funds needed to complete similar work to the other half of the property (No 34) as a second phase. At the conclusion of the second phase of the project, the parties' initial injections of funds would be repaid together (it was hoped) with a significant extra distribution of profits, providing the return on their investments. As already mentioned, the Applicants understood that the building works for the property would be carried out by Malcolm Gallienne, or his eventual company, in which they had no financial interest, but with the obvious advantage being that of a potentially co-operative relationship between the owners of the project and the actual builder.

21. The initial shareholding in FSDL on incorporation was registered as one share each to the Applicants and to Malcolm Gallienne, and Malcolm and Richard Gallienne became the first and only Directors. Richard Gallienne said in evidence that he became a director of the company only because he was requested to do so by Malcolm. He described himself as a "backstop". He had no involvement with the day to day management of the enterprise, and was not a signatory to any accounts. This project was the enterprise of his brother, Malcolm, who had sole charge of running it, and he, Richard, was there really only to give substance, or to provide someone capable of acting if necessary in Malcolm Gallienne's absence, or in an emergency or suchlike.

22. It is certainly common ground that the Applicants were to be "in the background" as regards the carrying out of the building works and the operation of FSDL and its affairs, and this is borne out by the fact that, at the outset, none of them became a director of the Company, nor sought to appoint a nominee to the Board. The actual extent of their "background" involvement otherwise, though, is, at least now, a matter of dispute. The Applicants agree that they expected to leave all the functions of supervising or conducting the building work to Malcolm Gallienne, as the interface with any Gallienne construction company which might actually do it, but they say that they did expect, and it was agreed, that they would be kept up to date, with regular reports on progress. Whilst Mr Hodge says that he wanted, and expected, formal monthly progress reports, in particular as to expenditure, because the Applicants viewed the project as a joint business venture on which they would be kept informed, Malcolm Gallienne denies that this was agreed. He says, in effect, that the Applicants were intended to be entirely "sleeping" investors, who would stay out of all managerial or operational functions, simply receiving back their money and return after the completion of what was expected to be a successful redevelopment project.

23. With the investment funds in place from the Applicants, FSDL proceeded to purchase Nos 32 and 34 Fountain Street, on 31st October 2013, for around £530,000 including fees.

24. The Applicants say that, from the outset, they did not receive regular progress reports as they had expected at all, but were given excuses. They initially accepted these as possibly reasonable - they understood that, in particular, there were difficulties over the initial conveyancing which delayed the actual receipt of the property, and they also understood that the project ran into difficulties with the "Heritage" function of the planning authority with regard to the actual works to be permitted. To begin with they were patient, although they did seek information in telephone calls and at site meetings. However - and condensing the account of events somewhat – when the expected timescale of two years overran and became three, with the works being still incomplete and there having been only one flat in No 32 sold, their patience became exhausted and their concern at both lack of progress and lack of financial information prompted them to take action. They decided that they needed to take some control of the situation and they convened an Extraordinary

General Meeting of the Company with Malcolm Gallienne, with a view to their becoming directors of the Company.

25. There are no papers showing the formal convening of any such meeting in evidence, but it is common ground that such a meeting did take place, on 12th December 2016, attended by the Applicants, by Malcolm Gallienne, and for part of the time also by Jordan Gallienne.

26. Shortly before the meeting, a four page document dated 9th December 2016 was prepared by Jordan, entitled "Progress Report". This was produced to the Applicants either at or about the time of the meeting. Mr Hodge says that this is the only written report which the Applicants had ever received on the project up to that time or, indeed up to March 2018 (when a further one page document was sent, describing units as being near completion and providing marketing details, but with hardly any figures).

27. The 9th December 2016 document is quite difficult to understand, and does not follow the form of conventional accounts. Its salient points for present purposes are that it purported to show "shareholder investment" in FSDL of £750,000 by the "MGC Group", as well as the £250,000 each from the three Applicants, ie a total of £1.5M. It also purported to show "private investments" - from Malcolm Gallienne of £100,000, from Richard Gallienne of £100,000, from Jordan Gallienne of £50,000 and from Mrs and Mrs Guille of £85,000, thus totaling a further £335,000. In the course of evidence only Malcolm Gallienne suggested, albeit rather vaguely, that he had made any such investment, but citing the work that he had contributed. He agreed that he had not made the investment in cash attributed to him, and both Richard and Jordan Gallienne confirmed that neither of them had made the investments purportedly attributed to each of them.

28. The document further showed that the purchase costs of the property had been £529,909.50, including legal fees and costs. It went on to attribute values to the flats and the commercial units in the property at round figures totaling £2,125,000, with one Flat (No 1) having been "SOLD". It gave the proceeds of this sale as £248,000 odd, which, together with£3,800 odd in "rents received" was attributed to "income". It gave a list of expenses attributed to the project including administration and overheads as well as pure construction expenses, in a total sum of £1,338,500. Assuming further development expenditure of £50,000 and the realisation of the remaining units in the development at their estimated values less 5% for costs, it projected an ultimate profit of £255,458.29 (after tax) after repaying the stated "private investments" at a sum which included a return on them, and repaying the principal amount, only, of the stated "shareholder investments".

29. This document raised many questions as far as the Applicants were concerned, both as to the stated investment sums, which did not correspond to what they had understood, and also as to the expenditure.

30. Returning to the meeting of shareholders convened on 12th December 2016, Malcolm Gallienne requested that this be adjourned overnight so that he could speak to Richard, as the other Director of FSDL, who was not present. The Applicants agreed to this. In the course of evidence at trial, it was disclosed by Jordan that the Galliennes had consulted advocates during this adjournment. At the reconvening of the meeting the following day, a "revised" shareholders' register for FSDL was produced to the Applicants, which now showed not only that Malcolm Gallienne's original share had been transferred to MGCG but that three further ordinary £1 shares had just been issued to MGCG on the previous day. As a result, MGCG now held four ordinary £1 shares in FSDL and the Applicants only three between them. As the Applicants were therefore now a minority, no change to the constitution of the Board of FSDL was made.

31. Following this meeting, which plainly left matters with much unresolved, Malcolm Gallienne proposed that the Galliennes should buy the Applicants' shares in FSDL so as to enable the business relationship between them to be terminated. The basis would be a repayment of their capital and an agreed additional return of 15%, making the repurchase price £287,500 in each case. The Applicants agreed to this, at the beginning of January 2017.

32. However, and again cutting a long story short, there were then continual delays in implementing the transaction. From the email correspondence in evidence, these were blamed, variously, on Advocates' delays, illnesses and the frustrating non-completion of other transactions by which the Galliennes were selling, or raising money on, other properties, in order to finance the purchase of the Applicants' shares. This situation continued for more than a year, until the Applicants' patience was finally exhausted and they consulted Advocates in about April 2018. They initially consulted Ferbrache & Farrell, but latterly, as a result of that firm's having discovered a conflict of interest, they have been represented by Mourant Ozannes.

33. During the long delay over the purchase of their shares, the Applicants continued to press for accounts for FSDL. They were still members of the Company, and were therefore, of course, entitled to these. However, and despite promises and assurances that accounts were in course of preparation, they still never received them. Advocate Dawes drew the Court's attention in particular to an email exchange in October 2017 in which Jordan Gallienne purported to send to Mrs Hodge accounts attached to an email, but which did not have the attachment when received by Mrs Hodge. She had responded to Jordan Gallienne, requesting that the accounts be re-sent. This response was never answered and the accounts were not re-sent. Jordan Gallienne said in oral evidence that, at the time, he did not think that it was obligatory to provide such information to shareholders; he had since learned differently.

34. Further matters of which the Applicants had not been aware, or fully aware, at the time have come to light during and since this period, in consequence of further investigations carried out by the Applicants or on their behalf. These (say the Applicants) coupled with the circumstances surrounding the issue of the further shares in FSDL, and the continual delays and prevarication over providing financial information and implementing the agreed severance agreement, have caused them to question whether the conduct of the Directors of FSDL might even be fraudulent.

35. The first of these matters was the discovery that the only flat sale, namely that of Flat 1 (in No 32), which had taken place in November 2015, had been made at a sale price of £125,000 to a company called Genesis Property Limited, which they had discovered to be owned by Malcolm Gallienne and his wife. The flat was valued at about £250,000, and this sale at an apparent undervalue, in effect to Malcolm Gallienne, was obviously a matter of great concern.

36. The explanation given by Malcolm Gallienne in his evidence was that it was felt by the management of FSDL that a sale of a unit was needed to try to generate market interest in the development, as well as cash flow for the Company. The price had been fixed to reflect the fact that the flat was only 80% finished. However, additional payments bringing the actual money paid to FSDL up to the valuation figure of £250,000 had in fact been made later, and redacted pages from relevant bank statements, showing such entries, were disclosed in order to substantiate this assertion.

37. The Applicants objected to the redaction, but it seemed to the Lt-Bailiff that this was more on the basis that the remaining entries in the bank statements might reveal something of interest, rather than that the entries disclosed were clearly incomplete or potentially mis-informative in the absence of disclosure of the further entries recorded in the bank

statements. She therefore directed the Jurats that they could not infer anything simply from the fact of the redaction, but that the evidence showed no more than that the recorded payments had been made and described as shown in the entries; they should simply decide, if they needed to, whether they accepted the Respondents' account of the transaction. She reminded them that the "Progress Report" of December 2016 had, apparently, attributed a sum of around £250,000 to this sales receipt.

38. A second matter was the discovery that FSDL had incurred additional borrowings, of substantial sums, without the Applicants' knowledge, inconsistently with their expectations of the way in which the project was to be funded, and also inconsistently, even, with the information given to them in the 9th December 2016 "Progress Report" document. The first set of such borrowings was a total of £250,000, borrowed as unsecured loans from three private investors (Mr and Mrs Critchlow, Mr and Mrs Warren and Mr and Mrs Stephens) shortly after the start of the project, in April/May 2014, at an interest rate of 10%. Documents relating to these loans also showed that the lenders had been promised "additional interest" dependent on the eventual "profits" of the project. These loans were unsecured. They were later said, in accounts eventually produced, to have been subsequently "assigned" from these lenders to MGCG, although, as Grant Thornton explained in a report referred to below, the effects of these "assignments" on how these loans were dealt with as part of the Company's finances was far from clear, either at all or as a matter of accounting practice, and was inconsistent within the documents themselves.

39. The second set of such unrevealed borrowings was a total of £878,000 taken as loans from three further lenders, upon three separate transactions in July 2014, December 2014 and May 2015, respectively. These, though, were secured loans, with bonds having been granted over 32/34 Fountain Street, again without the Applicants' knowledge.

40. All these borrowings were incurred (the Applicants point out), despite the fact that their agreement had been that the funds for the project were to be provided by the four original parties' capital injections of a total of £1M, and that this would finance the development, at least for its first phase. They had not been made aware of either the intention to borrow, or of the borrowings themselves. Advocate Dawes also drew attention to the fact that these borrowings were not disclosed in the "Progress Report" prepared by Jordan Gallienne, even though they had plainly been taken out long before December 2016.

41. The third matter, which the Applicants discovered from outside sources, was that the commercial unit in No 34 Fountain Street had apparently been sold on 29th November 2017 on a long lease to a company - MS & DG (Guernsey) Limited - which runs a model shop. This was another fact of which they were not made aware at the time, but in addition they discovered that, of the £130,000 payable as premium for the lease, £125,000 had been paid by way of "deposit", not to FSDL, but to MGCG.

42. Mr Hodge explained in evidence that with no satisfactory financial or other progress information being produced prior to the issue of proceedings, the Applicants had made private enquiries, mainly on site, and had discovered that the remaining flats in No 32 Fountain Street had been rented out and not sold, and were being advertised for rent since December 2015. Shortly before the issue of these proceedings, a site inspection of the unoccupied flats, which Mr Hodge managed to procure by attending at the same time as there was to be an inspection by the Guernsey Fire Service, appeared to disclose also that certain fittings from kitchens, and also water tanks, had been installed but then later removed, a matter which, once again, had been a cause for disquiet in the absence of any information or explanation.

43. The triggering matter for the issue of the first application, though, was the Applicants discovery in late May 2018, that it was apparently intended by the Directors to sell the

whole of No 32 Fountain Street, on 7th June 2018, to another of the companies controlled by Malcolm Gallienne or his family members. When no satisfactory information about this transaction was given by the Advocates who were then acting for the Galliennes, the first application was launched.

Procedural history

44. At the first urgent hearing of this application on 6th June, the Applicants sought and were granted an injunction restraining FSDL from selling, disposing of or otherwise reducing the value of its assets (save in the ordinary course of business, which expressly was not to include a sale of the whole of No 32 Fountain Street) pending the further hearing of the application. That further hearing took place on 20th June although the Order was subsequently misdated 18th June. The order was then varied to permit FSDL to make payments of interest under the now disclosed bonds, and to complete the intended sale of the lease of the commercial unit in No 34 Fountain Street, and with the express further proviso that it might sell, dispose of or otherwise reduce the value of its assets by any transaction to which the Applicants would give prior written consent, or (in effect) by an order of the court, express liberty to apply being given.

45. These orders were, of course, intended to preserve the position pending further investigation and the determination of the dispute between the parties without preventing transactions from going ahead if they were proper and appropriate. However, no sale of No 32 has been pursued, and it appears from recent accounts produced for the Company that even the completion of the disposal of the commercial unit lease, which was specifically authorised, has not been effected. Insofar as the Directors, or MGCG, have complained in these proceedings, that FSDL's operations have been frozen, and the due completion of the development project at 32/34 Fountain Street has been adversely affected by these proceedings, this complaint loses force against the background that there were steps available, and a route preserved by the Court's orders, to enable any reasonable and proper transaction to be executed.

46. One effect of the issue of proceedings, though, was that the Applicants were at last provided with formal financial information. Draft unsigned accounts for the Company for the period to 31 December 2014, and for the years ending 31 December 2015 and 2016 were attached to Malcolm Gallienne's affidavit of 6th June 2018, sworn in the first application. Signed finalised financial statements for the year ending 31 December 2014 (but apparently dated as early as 23rd December 2015) were disclosed to the Applicants on 21st June 2018. Financial Statements for the year 2015 (dated 11 January 2017) were disclosed on 22nd June 2018. Those for 2016 (dated 29th June 2018) were disclosed on 29th June 2018. Financial statements for 2017 were disclosed on 29th July 2018.

47. The Applicants commissioned Grant Thornton to provide a report on these accounts, and on the state of the Company's affairs, with regard to the possible winding up of the Company. Grant Thornton produced an interim report, on 31st July 2018. It was taken as read at the hearing and it is unnecessary to refer to all the detail. In summary, it considered issues to which attention had been drawn, such as Malcolm Gallienne's supposed investment of £250,000 cash in the Company, the unsatisfactory aspects of the sale of Flat 1, inconsistencies and errors in the various accounts, and the implications and lack of clear recording of the previously unrevealed further loans. The report further drew attention to Grant Thornton's inability to establish whether claimed building costs shown as totaling around £1.5M, and paid mostly to Mac Gallienne Construction Ltd, had been properly and reasonably incurred and, most seriously in Grant Thornton's view, it highlighted the issue of the three additional shares in the Company to MGCG in December 2016, without any evidence that their proper value was either considered by the Directors, or obtained by them for FSDL, and with the actual effect having been the immediate "disenfranchising" of

the Applicants as shareholders, at the time of the shareholders' meeting which they had called.

48. Advocate Dawes probed the inconsistencies and discrepancies between the draft financial statements and the final signed statements at the hearing. He drew attention to the fact that, quite apart from inconsistencies between the draft accounts and the final versions, it was notable that the page containing material Notes to the draft accounts had not been included in the versions annexed to Malcolm Gallienne's evidence on 6th June. Because of this, it was only later, when the finalised accounts were sent to them, (after, it would appear, the statutory obligation to supply accounts had been appreciated by the Directors), that the Applicants had learned of the information contained in these Notes. They revealed two important points, namely the extent of the significant additional secured borrowings undertaken by FSDL, and the fact that the Applicants' own £750,000 contributions to FSDL's funds were being characterised in the Company's official accounts, signed off on behalf of its Board, as "loans" repayable on demand.

49. The Applicants had previously held the view that their payments were correctly classed as equity capital, being effectively the subscription price for the original share in FSDL allotted to each of them. They were therefore somewhat surprised at this treatment in the accounts. However, if it were correct that their funds were indeed loans repayable on demand, they were entitled to issue a statutory demand requiring repayment, and if this demand was not complied with within 21days, this would provide conclusive evidence that FSDL was insolvent and unable to pay its debts, and ought to be wound up (see above). They therefore issued statutory demands on 30th July 2018, and the time for payment of these demands would thus expire on or about 20th August 2018.

50. By this time, the trial of the first application had been listed for three days commencing on 10th September 2018. Negotiations between the parties were continuing, however, and in late August 2018, with the parties being allegedly "on the cusp of an agreement", they jointly applied to the Court for vacation of the trial date and a general adjournment of the first application. The Lt-Bailiff refused to grant a general adjournment, but instead adjourned the hearing to the first available date six weeks later than the scheduled date of the hearing, so as to enable any settlement with a serious prospect of success to be concluded. In the event, though, no settlement took place, and instead the Applicants launched their second application on 10th October 2018, this time seeking the winding up of the Company in their supposed capacity as loan creditors. As already noted, at the first hearing of this application, on 16th October 2018, the Deputy Bailiff ordered that the second application be adjourned to be tried together with the first application, the hearing having by then been fixed for 7th November.

51. FSDLs' response to the second application was to seek to have it struck out, or to defend it, on the grounds that the debts upon which it was based were disputed, and that that dispute required, therefore, prior and separate determination. Indeed, they argued at a pre-trial review that this point should be treated as a preliminary issue with the trial of the first application being adjourned to await its determination. The basis for claiming that the debt was disputed, however, was that FSDL and Malcolm Gallienne now withdrew the assertion contained in FSDL's accounts and also made in Malcolm Gallienne's affidavit of 6th June, that the Applicants' £750,000 payments had been loans. This was said to have been a mistake, with the mistake being blamed on incorrect advice.

52. The Lt-Bailiff declined to order separate trials and directed that the issues in both applications should be determined together, at this hearing.

53. At this hearing, when pressed on the question what they said was the true nature of these £750,000 total payments, the Respondents have continued to assert that they were not

loans, but equally, that they were not subscriptions for the original issue of shares in FSDL, either. Malcolm Gallienne and Jordan Gallienne both argued that these sums were not correctly described either as payment for shares, or as loans, but simply as an "investment".

54. The Court has found it difficult to understand the Respondents' argument on this point. The injection of capital into a company is one of two basic kinds, namely equity, which is money subscribed in return for, in effect, ownership of a share in the business itself and thus a right to that share in the eventual profits of the business, and loans, which may, of course, be made on a variety of terms, but which are in principle borrowings repayable as an expense of the business, before its profits (hopefully) are distributed to the owners of the business. There are of course a variety of possible terms on which either kind of transaction may take place but the basic distinction remains, and monies paid over to a company for its use must fall into one or other general category.

The Law

55. Whether the Company will be compulsorily wound up by this Court depends on a two-stage consideration. First, the Applicants must make out one of the grounds listed in s. 406 of the 2008 Law. This is a "gateway" requirement, entitling the court to exercise its jurisdiction if facts making out the relevant grounds are proved. Whether the Court will then make a winding up order is the second question, and a matter of its final discretion, in all the circumstances. However, in simple cases, such as clear evidence of an inability of the company to pay its debts, the exercise of the discretion will follow virtually as a matter of course.

56. As already mentioned, the substantial gateway grounds relied on here by the Applicants are s. 406 (e)(that the Company fails the solvency test), and s 406(i) that the Court should be of the opinion that it is just and equitable that the Company be wound up. The failure to deliver annual accounts is now only relied on as one of the circumstances supporting the weight of the other evidence relied on under s 406(i). If the failure to deliver accounts had been the only gateway grounds which the Applicants could make out, the Court would plainly be very unlikely to exercise its draconian power to wind up the Company on that simple fact alone, provided it had been remedied and it could be expected that such a default would not occur again.

(1) Gateway 1: Section 406(e) "That the company is unable to pay its debts".

57. This subsection refers, for the definition of inability to pay debts, to s. 407 of the 2008 law. By s. 407, such inability is proved by either a failure to comply within 21 days with a statutory demand for payment of a debt exceeding £750 (see s.407 (a) and (b)) or otherwise by the court's being satisfied that the company fails to satisfy the "solvency test". The "solvency test" is defined in s. 527 of the 2008 Law. It involves broadly (and sufficient for this case) that the company should both be able to pay its debts as they fall due ("the cash flow test") and that the value of the company's assets should exceed the value of its liabilities (the "balance sheet test"). If, on the evidence before the court, the company fails either limb, then it is "unable to pay its debts" within the meaning of ss 407 and 406(e) and it can be wound up by the court.

58. Thus, logically, the first issue in this case is whether the Applicants have the status of creditors of the company in respect of their three payments of £250,000, ie, whether these payments were loans, or whether they were share capital. If they were loans, then the Applicants are creditors, the failure of the Company to meet the statutory demands made by them proves that the company is unable to pay its debts as they fall due and the court will then *prima facie* order the winding up of the Company upon the second application in this case, as a matter of course.

59. If these payments were not loans, however, the Applicants have no status to wind up the Company as creditors, but only as members. As such, they rely on two alternative grounds for seeking the compulsory winding up of the company on their first application. The first is, again, the "insolvency" of the company, (ie that the company is either unable to pay its debts as they fall due or the value of its assets does not exceed the value of its liabilities), which could be invoked either directly under s 406 (e) or in support of the general "just and equitable" grounds of s 406 (i), but in this instance the fact of insolvency requires proof in the normal way, and on evidence other than the evidence of the unpaid statutory demands which *ex hypothesi* were without foundation and ineffective. However, if the Court is satisfied, on the basis of such other evidence, that the Company fails the solvency test, then, once again it has a discretion to wind up the Company and in those circumstances would normally do so as a matter of course.

(2) Gateway 2: Section 406(i) "That the court is of the opinion that it is just and equitable that the company should be wound up"

60. The second substantive ground relied on by the Applicants in their capacity as members of the Company is the above-stated general ground, treated as a different and separate matter from insolvency. Under this subsection of the 2008 Law the Court the court can and must look at all the circumstances relating to the state of the company's affairs and the way in which these have been managed, and form a view as to whether a compulsory winding up is "just and equitable".

61. As to exactly what is meant by this, the 2008 Law was based on the English company statutes applicable at the time, and under which the jurisdiction of the English court to wind up a company if it were "just and equitable" to do so was historically long-established. That fact, together with the use of the classic English law phrase "just and equitable" shows that the States intended that the law of Guernsey should follow English law principles, and justifies, therefore, having regard to the meaning of this phrase as it has been interpreted in English company law cases.

62. As to that, Advocate Dawes relied in particular on dicta in the case of *Loch v John Blackwood Ltd* [1924] AC 783 (Privy Council, on appeal from the West Indian Court of Appeal, but considering similarly worded legislation in Barbados) to the effect that a "just and equitable" winding up was appropriate where there was proved to be a "*justifiable lack of confidence*" on the part of members of the company in the directors' conduct of the company's affairs. The quotation, from Lord Shaw, continues

> "…*this lack of confidence must be grounded on the conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up."*

63. The Lt-Bailiff derives from this quotation that what is a "justifiable lack of confidence" in the running of the company's business is a matter of fact, and that whilst demonstrated lack of probity in this will be a sufficient condition for such justification, this is not a totally necessary condition; it may be possible, according to the particular circumstances, that something short of this could nonetheless give grounds for a lack of confidence which was justifiable within the intendment of the principle set out in *Loch,* and thus of the relevant legislation.

64. As an illustration of matters which would ground such a justifiable lack of confidence, Advocate Dawes cited the facts in the *Loch* case, namely the directors' failing to hold general meetings or to submit accounts (or, in that case to recommend dividends), so laying themselves open to the suspicion that their conduct was designed to keep the petitioning shareholders in ignorance of the company's true position and affairs, and to enable the directors to acquire the shares at an undervalue. He submits that whilst this case is not, obviously, exactly the same, the matters which were relied upon in *Loch* are very similar to the present case, and provide the clear flavour of what is sufficient – secrecy, equivocation and acts which give rise to an objectively reasonable suspicion that the affairs of the company are being conducted without proper regard for the interests of the general body of the company's shareholders, but rather in the interests of those in control of its affairs, or persons favoured by them. That, he submits, is this case.

65. Advocate Dawes reminded the Court that the former paradigm example of this ground for winding up a company had been that the company was a "quasi-partnership", in effect embodying a partnership into a corporate structure. This would give rise to a situation in which the expectations of good faith and participation, etc, which would apply in a partnership could be found to underlie the corporate structure, and a failure to give effect to such duties and expectations could therefore justify winding up the company, even if the constitution of the company had been strictly observed, as in *Ebrahimi v Westbourne Galleries Limited* [1973] AC 360. However, the prescriptive requirement of finding an actual quasi-partnership as a fact had subsequently been disavowed, and it is now no longer necessary to go that far. Quasi-partnership is simply a clear example of the kind of situation in which the court's jurisdiction to wind up a company on "just and equitable" grounds can be exercised. The more general approach exemplified in *Loch v John Blanchard* (above) sets out the broad principle: see French *Applications to Wind Up Companies* 3rd Ed. in particular at para 8.298.

66. The Lt-Bailiff accepts Advocate Dawes' exposition of general principle. It is important to bear in mind the qualification contained in Lord Shaw's speech, cited above, that, to invoke the "just and equitable" ground, it is not sufficient that the complaining member may be merely outvoted on, or be in disagreement with, policy decisions regarding the company's affairs as carried on by its directors. Such outvoting, or disagreement with a duly appointed Board of directors, is an inherent possibility in a normal limited company structure. There has to be an element of unfairness going beyond this inherent position. Lack of probity plainly suffices, but it is not necessary for the applicant under s. 406(i) to go so far as to prove actual fraud or dishonesty on the part of those conducting the company's affairs. It is sufficient if, objectively viewed, the conduct of those affairs would give rise, in the mind of the reasonable man in the position of the complainants, to an apparently well-founded lack of confidence that the directors of the company were conducting its affairs with both probity and a properly dispassionate regard for the interests of the general body of the shareholders. The Lt-Bailiff will so direct the Jurats.

67. For the sake of completeness, the Lf-Bailiff observes that the 2008 Law contains, at ss 349 and 350, specific jurisdiction for the court to grant relief in the case where it is proved that the affairs of the relevant company are being or have been conducted in a manner which is "unfairly prejudicial" to the interests of members, or some part of the members, of the company. Section 350 sets out various forms of relief which may be granted, and which are more nuanced than the simple alternatives of winding up or not. It might therefore be argued, in an appropriate case, that it would not be "just and equitable" to wind up a company if an alternative remedy under these sections were potentially available as a less draconian alternative, if those sections were invoked. However, that is not a point which has been argued in this case. Advocate Dawes referred the Court to those sections for the purpose of noting the similarity of the kind of conduct which would found an "unfair prejudice" application, and solely for that purpose. It is also the case that the jurisdiction

under ss. 349 – 352 of the 2008 Law is stated to be "without prejudice to any other remedy": s 349 (5). The Applicants' entitlement to apply solely for the winding up of the Company is therefore not in issue in this case.

68. This judgment now turns, therefore, to the determination of the identified above.

The issues - General

69. The court heard oral evidence from four witnesses, Mr David Hodge on behalf of the Applicants and Messrs Malcolm, Richard and Jordan Gallienne on behalf of the Respondents. Each had previously sworn affidavits in the two applications and, subject to corrections in the case of Malcolm Gallienne (to withdraw the statement that the Applicants' payments had been loans), they each confirmed the truth of their affidavit evidence, and they were each cross-examined.

70. The Jurats record that they found Mr Hodge to be a careful and honest witness on whose evidence they feel they can rely with confidence. They were also quite satisfied that Richard Gallienne gave evidence with complete candour and sincerity; they found his professions of lack of involvement with FSDL's affairs to be perfectly credible. They have less confidence in the evidence of Malcolm Gallienne which they felt had been coloured by self-serving hindsight. They were also less confident of Jordan Gallienne, whose evidence, they also felt, was somewhat influenced by his obvious consciousness of being in charge of fighting the Respondents' corner. The Jurats are therefore disposed to prefer the evidence of Mr Hodge to the evidence of Mr Malcolm Gallienne or Mr Jordan Gallienne where there is a dispute between them. In the event, though the parties' testimony plays little part in the determination of the material issues, because the most important facts are either common ground or recorded in reliable documents, and they largely speak for themselves.

Issue (1) Are the Applicants creditors of the Company?

71. This is principally an issue of fact. It turns mainly on whether the court finds that the three payments of £250,000 made by the Applicants were understood and intended to be loans or were understood and intended to be subscriptions for shares. This will determine the position unless there is some other reason, on the actual facts of what happened, why the transactions could not then take effect in the intended way.

72. Having considered the totality of the evidence the Jurats are firmly and unanimously of the view that these payments were not provided by the Applicants as loans, but were payments made as the subscription price for a single share in the Company out of four which were intended to be issued and allotted on the Company's formation, and they were so regarded by all parties at the time.

73. The Jurats are quite satisfied that these payments were seen as being such a capital subscription by the Applicants. Indeed, this has always been their positive evidence.

74. They are also, though, satisfied that this was the intention of Malcolm Gallienne, even if (being "*a builder and not a director*", as he said himself), he did not think in terms of the legal analysis. On any basis, it is clear that Malcolm Gallienne was not expecting or intending that the Applicants' money should be liable to being paid back on demand; his intention was that their payments should only be repayable after the project had been completed and generated funds to make those repayments and the anticipated further profit share. That is a payment in the nature of a subscription for a share, and the Company's Memorandum of Association reflects this division of intended ownership, consistently with the Applicants' evidence.

75. The Jurats find support for this even from the Respondents' own evidence and submissions. Malcolm Gallienne himself, in denying that the payments were loans but asserting that neither were they subscriptions for the shares in the Company (relying on the fact that the shares were issued for the recorded sum of only £1), insisted that they were therefore just some other kind of innominate "investment", but when pressed to explain what he meant by this, he said, at one stage, "*It was equity into the company, I would say*.". In his closing submissions for the Respondents, Jordan Gallienne described the Applicants' payments as having been "*risk capita*l". Both these descriptions support the view that they were not loans, but, equally, the Jurats find, they support the conclusion that they were, indeed viewed as having the attributes of subscriptions for equity in the Company.

76. The Jurats also accept Mr Hodge's evidence that the Applicants understood and believed that Malcolm Gallienne would be making a similar contribution to the enterprise in actual cash at a later date, when he was in funds. It is unnecessary for them to make any finding as to Malcolm Gallienne's intention in his own mind at the time of the original agreement; they are satisfied that this is what he led the Applicants to believe, and that they reasonably did so.

77. It is apparent that the arrangements were negotiated quite informally, and perhaps not very completely. It is somewhat surprising that, even as mere financial participators in the enterprise, the Applicants did not seek to appoint or nominate a director to the Board. There is also no evidence of any clear agreement as to the basis of any charging for works being done for the Company by Malcolm Gallienne or his own building company, which would obviously have had an effect on the actual financial benefits of the venture to the different parties. Malcolm Gallienne clearly came to the view that he was justified in treating his contribution to the project as being made by his work and expertise and/or by his company's carrying out works at concessionary rates, and not by a contribution of £250,000 in cash; he confirmed this in his evidence. It was faintly suggested in Jordan Gallienne's closing speech for the Respondents that it might be said that Malcolm Gallienne had contributed £250,000 to the project by procuring the private investments of £250,000 from Mr and Mrs Critchlow, Mr and Mrs Warren and Mr and Mrs Stephens. That, however, misses the point that these were not capital investments, but loans which carried interest, and the Jurats reject that suggestion.

78. None of this, though, directly affects the simple question of identifying the nature of the payments which the *Applicants* made and, on the evidence the Jurats are perfectly satisfied that they were subscriptions for the initially issued shares in the Company and they were not loans. Insofar as the issue is a matter of law, based on the findings of fact made by the Jurats, the Lt-Bailiff confirms this conclusion.

79. This point cannot be left without recording that the contention that these payments were loans is, in fact, neither side's actual case in the matter. The Respondents have withdrawn and disavowed their one-time contentions to this effect. The Applicants only ever contended that these payments were loans on the "conditional" basis that the contention previously made by the Respondents was correct, whilst actually themselves asserting that it was not correct. Once that contention is withdrawn as a "mistake", however, that really removes the evidential basis of any positive case for the Applicants that the payments should be regarded as loans, and it would in fact involve a finding that Mr Hodge's own evidence and belief, stated on oath, was itself incorrect. This would be a bizarre conclusion in the face of neither side actually supporting it, and could only be arrived at if other objective facts drove the Court to reach that conclusion as a matter of law. That is most certainly not the case.

80. It follows that the second application must fail and be dismissed. Consideration of the Applicants' case therefore moves to the issues raised under their first application.

Issue (2) Does the Company pass or fail the solvency test in s 527 of the 2008 Law?

81. On behalf of the Respondents, - in effect MGCG and Malcolm Gallienne and Richard Gallienne as the *de iure* Directors of FSDL - Jordan Gallienne argued that the most recent set of formal accounts of FSDL, those for 2017, showed that, once the mistake as to the £750,000 of the Applicants' money being treated as loans was rectified (and that sum was thus removed from the quantum of FSDL's liabilities), the accounts showed that FSDL's assets *did* exceed its liabilities, albeit by a very small sum, and it therefore met the balance sheet test. As for the cash flow test, namely that of being able to pay its debts as they fell due, he argued that there was no evidence of other, true, creditors going unpaid. There was thus no evidence that the Company could not pay its debts as they fell due, and its Directors' evidence was that it could do so.

82. Advocate Dawes contested this. He took both Malcolm Gallienne and Richard Gallienne to the latest accounts and suggested that they showed that FSDL was operating at a loss. Malcolm Gallienne accepted this appearance, but denied that it meant that the Company was not paying its debts; it was doing so.

83. Advocate Dawes referred, in oral cross-examination, to reports in the previous day's newspaper of proceedings having been commenced against the Company for unpaid legal fees by their former Advocates and also a claim for unpaid tax payments (although this may have been against Mr Gallienne personally, or against his building company). The Respondents accepted that the reports were accurate as to the fact of such proceedings being taken, but said that the fees claimed by the Advocates were disputed, on the grounds of their advice having been bad and negligent, and that the other proceedings were "irrelevant" (it is inferred, for not being against this particular company). In the event, and as directed by the Lt-Bailiff, the Jurats have therefore not placed any weight on the existence of such proceedings as necessarily being evidence of the Company's inability to pay its debts.

84. Advocate Dawes was largely left, therefore, to relying on the inconsistencies in the various accounts, and to the lack of background explanation for entries in these, to found his argument that the court should find that, leaving the statutory demands out of account, the Company was insolvent and unable to pay its debts. On the other hand, the Respondents maintained that the Company was not insolvent and that the evidence did not support any other conclusion.

85. Having considered the accounts and the other evidence, the Jurats incline to the view that the Company might well fail the solvency test, but because the financial details were not probed in great depth at the trial, they prefer not to make any concluded decision as to this. It is unnecessary for them to do so in the light of their firm and confident findings on the only remaining issue.

Issue (3) Is it just and equitable that the Company should be wound up?

86. As regards this aspect, the Lt-Bailiff directed the Jurats on the law, as already mentioned above. She advised them, in effect, that that they should consider the complaints made by the Applicants as to the way in which the Company's affairs had been handled by its Board of Directors, how far such complaints were made out upon the evidence which they had produced in support of these complaints, and they should then balance this against the explanations and further evidence filed by the Respondents, and given orally by Malcolm Gallienne, Richard Gallienne and Jordan Gallienne. They should ask themselves whether, on the totality of the evidence, they considered that a reasonable shareholder in the position of the Applicants would be justified in having a lack of trust and confidence that the affairs of the Company were being conducted with probity or with proper regard to the

interests of the whole general body of the shareholders in the Company. If they came to the conclusion that the Directors' conduct of the Company's affairs did give rise to such a justifiable lack of confidence, they should then ask themselves the wider, overarching question, namely whether, as a result of this, they were of the opinion that, it was "just and equitable" to wind the company up. If it assisted, they could treat "just and equitable" as a paraphrase for "fair and reasonable in all the circumstances".

The Applicants' arguments

87. In support of his argument on this ground, Advocate Dawes, on behalf of the Applicants, relied on the general course of events outlined above. Making 18 separate points in his written opening, he first pointed to the initial absence of any financial information given to the Applicants prior to December 2016, despite the fact that they had (he invited the court to find) continually requested this from the outset, three years previously. He relied upon the absence of proper accounts from 2013 until June 2018, produced only after proceedings had been started. This provided a background of unsatisfactory conduct, against which further matters should be considered.

88. As to these, the first financial information which the Applicants had been given had been the December 2016 "Progress Report". He submitted that even taking this at face value at the time, it raised questions and reasonable doubts for the Applicants; its account of the investments into the Company did not correspond with their understanding, and it revealed large expenditure, apparently paid mainly to Gallienne companies, without supporting breakdown or explanation. In the event, of course, it had turned out that this document was even more unsatisfactory, for failing to reveal the extremely large unsecured and secured loans which had been taken out by the company, and for including investments attributed to Malcolm, Richard and Jordan Gallienne which were admittedly fictitious. No reasonable explanation for this had ever been given.

89. As to financial information in more conventional form, the initial accounts, only disclosed in June 2018, were unsigned and omitted key pages of the Notes. The subsequent signed versions were materially inconsistent with the earlier draft versions, and all of these were completely inconsistent with the earlier "Progress Report".

90. Advocate Dawes relied on Malcolm Gallienne's admitted failure to contribute his £250,000 in cash (already discussed above) submitting that the discovery of this, and Malcolm Gallienne's attempt to justify it by claiming that he was entitled to make his "contribution" though work allegedly done at cost, were in themselves matters going to found a justifiable lack of confidence in him.

91. Turning to the sale of Flat 1, Advocate Dawes pointed out that this transaction, its terms and the fact that it was a sale to another company owned by Malcolm Gallienne, with, to put it at its lowest, questions being raised as to whether this had been for proper value, had all been concealed from the Applicants. He submitted, once again, that the discovery of these facts at a later time justified a loss of confidence in the Directors of the Company. He invited the Court to be sceptical of the explanations given by the Respondents as to this transaction, and the claim that ultimately the full value of the Flat had been paid over, and to place no reliance on these, given the Respondents' secrecy, and the obvious inconsistencies, inaccuracies, and unreliable assertions pervading their evidence in other areas.

92. He referred to the evidence of other loans which had been taken by the Company, but were not revealed to the Applicants at the time and only discovered later. The first were the three loans totaling £250,000 from Mr and Mrs Critchlow, Mr and Mrs Warren and Mr and Mrs Stephens, referred to above, but which had mysteriously been "assigned" to another

company in the Gallienne group fairly recently, with unclear accounting consequences. There was, he submitted, no proper explanation of these transactions, and they raised justifiable suspicions about what was going on. Moreover, the terms on which these loans had been granted, only months after the initial agreement forming the Company itself, had purported to grant a profit share to the lenders, which, on the face of it would be detrimental to the Applicants' position. Whether or not this grant was effective, either in terms of being enforceable by the lenders (which might be doubtful) or enforceable as against the Applicants themselves, the important point was that the very inclusion of such terms was evidence of an attitude by the Directors towards the Applicants' interests which would justifiably damage the Applicants' confidence in them.

93. The second set of such unrevealed loans were the three, very significant, further loans - originally being £878,000 in total, but by the time the Applicants learned of them, having apparently accrued interest and exceeding £1M – which had been secured on the property without informing the Applicants, and without it being at all clear whether FSDL itself had actually had the benefit of the funds generated. The only evidence in support of this was the unsupported evidence of the Galliennes themselves, which Advocate Dawes submitted, was not reliable. He pointed out Grant Thornton's finding that the signed-off accounts revealed payments of over £1.5M to other Gallienne-owned companies, apparently claimed as trade creditors, but with no way of assessing whether these costs were reasonably or properly incurred. He pointed out the great difference between this figure and the figures which, according to Mr Hodge's evidence of the original agreement, were the original projections.

94. He pointed out the many instances where the Company had apparently been involved in transactions with other Gallienne companies, and that it was far from clear that their respective assets and affairs had been kept properly separate, once again raising justifiable suspicions as to whether the Company's own affairs had been properly conducted. As one example, he cited the unusual £125,000 "deposit" out of the agreed £130,000 premium payable for the lease of the ground floor commercial unit of No 32 which had, it was discovered, not been paid to FSDL but to MGCG. No satisfactory explanation for this had ever been given.

95. However Advocate Dawes placed particular reliance, for the purpose of founding the justification of the Applicants' loss of confidence in the Directors, on the hasty and surreptitious issue of the further three shares in the Company to MGCG on 12th December 2016, for the admitted purpose of changing the balance of shareholder control of the Company in favour of MGCG. He submitted that this issue of shares was, on any basis, made for improper purposes, because, in reality, they were not issued to promote the best interests of the Company, but, - and as was actually admitted by the Galliennes - for the purpose of protecting the Directors from possible (not even actual) liability on personal guarantees which had in fact been in place for 18 months already. He urged the Court to reject the Respondents' suggestion that this share issue had been made in good faith and in what the Directors believed to be the best interests of the Company in the face of a disruptive threat to its continuing "business as usual", but he submitted that, in any event, that argument could not justify the issue of the further shares as a matter of law. The power to issue shares was given to the directors, in principle, for the purpose of raising further share capital, and on any basis it was certainly not given for the purpose of altering the balance of shareholder power for partisan ends.

96. Advocate Dawes submitted that this issue of shares, being an obvious and partisan manoeuvre, was such a gross breach of faith as to justify a "just and equitable" winding up virtually on its own. Even if the issue were not actually *ultra vires* (since the power to issue shares did of course, rest in the Company's Directors), using that power for the purpose, not of raising capital or possibly some other *bona fide* reason, but rather for the purpose of

obtaining voting control at general meetings, was a breach of a director's fiduciary duty: see Mortimore: *Company Directors* 3rd Ed at para 11.43, and *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821 (Privy Council), at p 837. There had also plainly, he submitted, been no attempt by the Directors to ascertain the proper value of the shares which they were issuing and therefore to obtain proper value as consideration for this issue, and that on its own vitiated the transaction.

97. Finally Advocate Dawes referred to the discovered intention of the Directors, in June 2018, to sell 50% of the property, again to a Gallienne-owned company, and again without prior disclosure to the Applicants (who remained shareholders notwithstanding the inchoate intended transaction by which their interest would be bought out) and with no attempt to explain or justify the purchase price or the propriety of the transaction.

98. He submitted that the combined weight of all the matters referred to above were grounds for an eminently justifiable loss of trust and confidence in the Board of the Company on the part of the Applicants, and made it just and equitable for the Company now to be wound up.

The Respondents' arguments

99. The Respondents' answers and explanations on the above points were given to the court by Jordan Gallienne, principally in a well-prepared closing speech.

100. His submissions with regard to Malcolm Gallienne's capital contribution have already been noted above. He went on to stress that that the Applicants had always accepted and intended that they were to be involved only "in the background" to the project, and suggested that initially they did not wish to be directors of the Company (although this precise point was not put to Mr Hodge in evidence). He submitted that the enterprise, and the Company's affairs, had been properly conducted by its Directors and management, on the understood basis that the Applicants only wanted "background" involvement. He stressed that the venture was a property development project, and therefore (he submitted) not just a matter of company law, and it required to be understood on this basis. In particular it was natural, and understood, that losses would be sustained to begin with, before the development was completed and its value realised. He pointed out that it was also accepted that, in addition to normal problems, the project had encountered two particular, unpredictable, ones, the first being unexpected difficulties with planning permissions, and in particular meeting the requirements of "Heritage", and the second being a downturn in the housing market in Guernsey, but that neither of these was the fault of the Respondents. He suggested that the Applicants had had unrealistic expectations.

101. It was denied that the Applicants had requested financial information from the outset of the venture or, in effect, until about the end of 2016 when Jordan Gallienne had provided the Progress Report. He pointed to the absence of any emails or correspondence in the evidence dating from before this time, in contrast to the position from January 2017 onwards.

102. The Respondents accepted that the failure to produce accounts to the Applicants had been "an error", but it was submitted that this had been remedied as soon as this was realised. Jordan Gallienne stressed that none of the Respondents (including himself) was a professional company administrator. He emphasised that the Respondents had not known at the time that the production of company accounts to members was mandatory, and they believed that, with the arrangement being that the Applicants would remain in the background, it was not obligatory for them to provide financial information. Importantly (he submitted) there had been no shareholders' agreement that they were entitled to such information. He said that this belief (namely that supplying financial information or accounts was not obligatory) was also the explanation for his not having re-sent to Mrs

Hodge the accounts which had apparently failed to be transmitted by email to her in 2017; this was not a deception, nor his being deliberately evasive.

103. The Respondents submitted that the evidence showed that the sale of Flat 1 had been carried out with propriety and for full value in the end. The transaction was fairly explained by the fact that the Company needed (and gained) £125,000 in immediate cash flow to it, which it could not otherwise obtain by the sale of an incomplete flat to a third party, because there was, as yet, no "immunity certificate" (in respect of compliance with building regulations). This also explained the stated price being 50% of the value of the completed flat, even though it was estimated to be 80% complete. Neither had it been an attempt to avoid document duty. As to the full value being paid for the Flat, Jordan Gallienne submitted that the bank account entries were confirmed to be genuine and accurate by the sworn evidence of the Directors, and should therefore be accepted.

104. As regards the complaint that there had been unrevealed borrowings from other lenders, he submitted that additional finance was obviously going to be needed, and the Applicants must, or ought, to have appreciated this. That would, once again be a matter for the Directors' sole judgment, but he also submitted that, again in the context of there being no shareholders' agreement, the Applicants did not have "a monopoly" on the right to invest monies, and the Directors were quite entitled to take such investments from others in their own discretion, as they thought appropriate.

105. As to the issuing of the shares on 12th December 2016, he invited the court to accept the Directors' explanation of this, given in evidence, namely that, after taking legal advice, they regarded it as something which they were entitled to do, and that the shares were issued appropriately, and even with proper (in all the circumstances) regard to the Applicants' position. First, the shares were issued with the intention that the effects of the issue would be only temporary; the Respondents' witnesses all gave evidence that it was always intended, from the outset, that once the project had been completed, further shares would be issued to the Applicants to restore the original ratio of the shareholdings for the purpose of distributing profits; it was never intended to prejudice the Applicants in this respect. Second, whilst the issue of the shares had indeed been made with a view to protecting the Directors' position under their personal guarantees given to other lenders, this was reasonable because those guarantees had been given in good faith to enable the Company to obtain necessary funds for the project. Third, though, and most importantly, the issue of these shares had also been decided on in the *bona fide* belief that it was in the best interests of the Company itself to issue them. This was because the Directors honestly believed that the Company's best interests lay in enabling the project to continue to be conducted, to completion, by the present Directors and in the manner in which it had been had done up to then, and the intended intervention of the Applicants, by appointing themselves as co-directors, would prejudice this. He emphasised that there had been no malice behind the Directors' actions in respect of this event, or at any other time.

106. Lastly, Jordan Gallienne complained, on behalf of the Respondents, at the fact that the Applicants' injunctions had effectively frozen the pursuit of the Company's business, prevented a reasonable sale of part of the property and thereby, in the end, prevented the obtaining of the very funding which would have enabled the Applicants to be bought out as they had wanted. When it was pointed out that the Order making the injunction preserved the possibility of carrying out any such sale by providing that it could be done with the Applicants' agreement, or, if they were not reasonable, by coming back to the Court for permission, showing that any intended sale was indeed a proper and reasonable one, Jordan Gallienne said that that had not been the Respondents' belief. However, he blamed this on legal advice which they had received, as they had understood it.

107. Jordan Gallienne's final submission was therefore, not only that the Company passed the solvency test, but that it was not just and equitable for the company to be wound up, in all the circumstances. When everything was understood and explained (he argued), this was a "blunt instrument" approach, which was not appropriate.

Discussion and decision

108. The Jurats first record some findings of fact. As already stated, they are satisfied that the original agreement between the three Applicants and Malcolm Gallienne was to the effect that they would each subscribe £250,000 in cash, although Malcolm Gallienne would do this later. This is the obvious explanation for Malcolm Gallienne's mentioning the anticipated receipt of funds from the previous development project, and the Jurats accept Mr Hodge's evidence of this.

109. They also accept that the Applicants did request financial information and progress reports from the outset, although only orally, and without beginning to press really hard for this until the project had been under way for significantly over the two years which they had had in mind as its timescale. They accept Mr Hodge's evidence to this effect, but they also find that this is consistent with the title given to the 9th December 2016 document by Jordan Gallienne of "Progress Report", which was the language used by Mr Hodge.

110. The Jurats do not make any finding as to whether the Sale of Flat 1 was in fact fully paid for by Genesis Property Ltd in the end, as the further cash payments were not and could not be investigated for accuracy and reliability on the evidence available at the trial. They do note, though, that the "Progress Report" appears to be consistent with its having been. However, even assuming that in the end it was fully paid for, and even if the transaction was well-intentioned on the part of the Directors, they consider that the fact that it took place as it did, to an associated Gallienne company, without revelation or explanation to the Applicants at the time, and with their only discovering it later and from other sources, provides a factor which would naturally tend to bring about suspicion and mistrust on their part, as to how the affairs of the Company were being conducted by its Directors. The Jurats make the same observation with regard to the superficially similarly questionable transaction with regard to the payment of the initial "deposit" of £125,000 out of £130,000 for the long lease of the commercial unit in No 34 going to MGCG rather than to FSDL.

111. The most significant matter relied upon by Advocate Dawes in support of the Applicants' position is the hurried issue of the three further shares in FSDL, overnight on 12th December 2016, effectively during an Extraordinary General Meeting of FSDL (even if probably an informal one), called by the Applicants specifically with a view to exercising their rights as shareholders to appoint directors, and to protect their interests in the face of the lack of information and the delayed progress of the project.

112. The parties' respective submissions about this event have been summarised above. As to these, the Jurats find that the hasty issue of these three additional shares in FSDL to MGCG was clearly not motivated by a desire to raise capital. It was motivated by a desire to protect the position of the Directors with regard to their personal guarantees, but also, and principally, in order to obtain shareholding control of the Company itself. They accept, and they therefore so find (but only on balance, and with differing degrees of confidence), that the evidence of the Directors and Jordan Gallienne that they genuinely believed this issue of shares to be in the best interests of the Company was honestly given, but they are satisfied that this was a view which the Directors convinced themselves of because it provided a supposedly respectable reason for the issue of these shares, and their primary motivation was the protection of the interests of the Gallienne family.

113. The Jurats state that in reaching the findings which they have made with regard to the issue of these shares, they do not find that any of the Directors, or Jordan Gallienne, was acting deliberately dishonestly. They are satisfied that their conduct occurred principally because of a failure to understand and appreciate the rules and requirements of company law, and the duties placed upon company directors, and was not an attempt to cheat the Applicants. They honestly believed that what they were doing was permissible and lawful, but their understanding was mistaken. The Jurats add, however, that such an egregious demonstration of the Directors' failure to understand their duties to the Company, even if not dishonestly motivated, would in itself be a powerful factor in support of a justifiable lack of confidence in their conduct of the Company's affairs.

114. Upon these findings of fact, the Lf-Bailiff holds that the issue of the three additional shares was an improper exercise of the Directors' power to issue shares.

115. Whilst the Jurats would regard this event as providing sufficient grounds in itself for a justified lack of confidence by the Applicants in the Directors of the Company, they consider that this justification is amply reinforced by the further matters already mentioned, such as the Directors' attitude to producing financial information. The Jurats consider that even if the Directors had believed that there was no legal obligation on them to produce financial accounts to the Applicants, the fact that they did not think it appropriate to do so for over three years, was (the Jurats consider) sufficiently unreasonable as to give grounds for the Applicants to lose trust in them.

116. The Jurats also accept Advocate Dawes' submissions as to further matters which justify the Applicants claiming to have reasonably lost all confidence in the Directors' conduct of the affairs of the Company. These matters are, in essence, the unsatisfactory way in which financial information was later produced to them (with inconsistencies and raising many questions in itself), the subsequent revelations as to the taking of additional borrowings without the Applicants having been, at least, kept informed, the evidence of large sums of money having been paid over to various other Gallienne companies (apparently far larger than the originally envisaged likely level of expenditure understood by the Applicants,) again without their being kept informed and without explanations to demonstrate that these costs were properly and reasonably incurred on FSDL's own business, and, lastly, transactions being entered into or intended to be entered into with other Gallienne companies, without the Applicants being informed and without clear evidence demonstrating their propriety in the interests of FSDL itself.

117. Lastly, the Jurats note that within a very short time after the 12th December meeting, the Galliennes made an offer to the Applicants to purchase their shares in the Company at a price which would have given them both their capital and some return by way of interest, and which the Applicants were willing to and did accept. If this course had been followed through, then the parties could have gone their separate ways, and there would have been no need to wind up FSDL,

118. However, this did not happen over a period of some 18 months subsequently, with promises of the transaction being completed being continually broken and deferred. Having carefully reviewed the sequence of correspondence between the Applicants (principally Mr Hodge) and the Respondents (conducted by Jordan Gallienne), the Jurats are satisfied that this shows only that the Applicants were extremely (and unsurprisingly) reluctant to go to court if there were a prospect of the matter being resolved acceptably without the need to do so; the Jurats do not regard this as any evidence that the Applicants' claim to have lost confidence in the conduct of the Directors of the Company was not genuine, or has been exaggerated.

119. In short, the Jurats are amply satisfied that the Applicants have justifiably lost all trust and confidence in the conduct of the affairs of FSDL by the Directors and those in current control of the Company. They reach this conclusion without hesitation, and in the circumstances, they prefer to rest their decision on this ground (ie s 406 (i) of the 2008 Law) rather than on the grounds of insolvency in s. 406 (e) of the 2008 Law.

120. The Jurats therefore proceed to ask themselves the final, over-arching question, namely whether they are also of the view that, in the light of this conclusion, it is just and equitable that the Company be wound up. To answer this question the Jurats consider the totality of the evidence including all surrounding circumstances, and ask themselves whether these provide any good reason why a winding up order might not be "just and equitable".

121. If there appeared to be a genuine prospect that a winding up could be avoided by enabling the Applicants to be bought out of the Company on reasonable terms, then this might provide such a reason. It is apparent that the Applicants have regarded reasonable terms as being the terms which were originally offered and accepted by them for a purchase of their shares, as long ago as January 2017. However, on examining the evidence, the Jurats are satisfied that there is nothing to support the view that there is any real prospect that such a transaction can or would be implemented within a reasonable time if a winding up order were not made.

122. First, the delays from January 2017 to May 2018, even if not deliberate prevarication on the part of the Galliennes, casts doubt on the possibility of this transaction being achievable. Second, if the Respondents were genuinely of the view that such a transaction could, realistically, be implemented so as to avoid a winding up, then one would have expected them to make serious efforts to produce evidence of this to the Court on this hearing. They have not done so but have merely relied on the injunction obtained by the Applicants as a reason for there having been no progress. These facts, combined with the fact that, even if the Company may not be strictly "insolvent", it is plainly in weak, rather than robust, financial health, cause the Jurats to conclude that it is, indeed, just and equitable, in all the circumstances, that FSDL should be compulsorily wound up.

123. The Court will therefore make that order, as sought by the Applicants.

Further matters

124. In the course of submissions, Advocate Dawes stated that he would, in addition to seeking a winding up order, be inviting the court to order that the register of members of FSDL should be rectified to cancel the three ordinary shares issued to MCGC Ltd on 12th December 2016 In view of the findings of the Jurats and the Lt-Bailiff's holdings. based on these, that the issue of those shares was improper and in breach of the Directors' fiduciary duty, the Lt-Bailiff holds that the making of such an order is justified, and will so order.

125. The Court will make further consequential orders as to the implementation of a winding up order as above, and is provisionally minded to do so in terms of Paragraphs 8 (ii), (iii) and (iv) of the first application.

Costs

126. As regards the question of costs, it is not possible for the court to form a view as to the prima facie likely correct order at this time, as the proceedings are complicated both by there being two consolidated applications, and by the fact of several parties being involved. In the circumstances the Court will invite written submissions on costs from the successful Applicants, to be served on the Respondents and filed with the Court within 7 days, with permission to the Respondents to serve and file submissions in answer, within a further 7

days. The Court will then consider how to take the matter forward in the light of such submissions.