

Application to the Court of Appeal to overturn a decision of the Royal Court regarding whether a party had adequate interest to entitle him to make an application for the compulsory winding up of a company.

**44/2012**

**IN THE COURT OF APPEAL OF GUERNSEY**

**CIVIL DIVISION – APPEAL NO 445**

**12<sup>th</sup> December 2012**

**Before:**

**James Walker McNeill QC  
Christopher George Nugee QC  
Sir David Calvert-Smith**

**Between:**

**SYNERGY CAPITAL LIMITED**

**(Applicant)**

**-and-**

**MILAN MARKOVIC**

**(Respondent)**

**regarding**

**PART XXIII OF  
THE COMPANIES (GUERNSEY) LAW, 2008**

**Advocate A L Lund appeared for the Applicant  
Advocate R G Morris for the Respondent**

**McNEIL, JA**

1. This is the judgment of the Court on an appeal by Synergy Capital Limited (hereinafter "Synergy"), a company incorporated under the laws of Guernsey. On or about 5 April 2012 Milan Markovic, the respondent to this appeal, and the international banking company UBS AG ("UBS") jointly made an application in the Royal Court pursuant to the Companies (Guernsey) Law 2008 (hereinafter the "Law") for the compulsory winding up of Synergy.
2. Early in those proceedings Synergy and another party applied for dismissal of the winding up application on the grounds that the applicants had no standing to bring it. A hearing took place in June 2012 and the judgment of McMahan, Deputy Bailiff, was handed down on 20 July 2012.

The learned Deputy Bailiff concluded that UBS had not persuaded him that it had standing to continue the application and directed that it should cease to be a party to the winding up application. The learned Deputy Bailiff found that Mr Markovic was a party with a relevant interest sufficient to entitle him to make such an application and allowed the application to proceed at his behest.

3. Synergy appeals against that determination and contends that the Deputy Bailiff erred in finding that Mr Markovic was a party having adequate interest for the purpose of making the application.

### **The Relevant Statutory Provisions**

4. For the purposes of the present issues, the relevant statutory provision is found in Section 408(1) of the Law; which states:

"An application for the compulsory winding up of a company may be made to the Court by the company, by any director, member or creditor thereof or by any other interested party".

5. The words "or by any other interested party" are not to be found in the co-relative legislative provisions regarding Companies and Insolvency in the United Kingdom. The legislative history in Guernsey commenced with Article LXXIII of the 1908 Loi relative aux Sociétés Anonymes ou à Responsabilité Limitée. As it happens the words with which this litigation is concerned were added during revision of the initial Projet de Loi in consultation between the Guernsey and UK authorities; but there is no clear indication as to why they were added. The consultation process had also noted that, by the original Article, no right had been given to a shareholder to petition for the winding up of a company. Accordingly, and within the same revision, the latter concern was addressed by the inclusion of a reference to "actionnaires" (that is, shareholders) in addition to the original provision in respect of "créanciers" (that is, creditors).
6. The issues in this appeal are as to the proper interpretation of Section 408 and whether or not the underlying facts give Mr Markovic the standing of an "interested party".

### **The Factual Background**

7. In about September 2008 Mr Markovic and another individual discussed, with persons promoting it, the possibility of an investment opportunity including a special purpose investment vehicle to be jointly owned by Mr Markovic and the other (the "Scheme").
8. In about November 2008 some of those involved in the promotion of the proposed structure gave a presentation to officers at the Guernsey Financial Services Commission with a view to exploring whether or not it fell within the regulatory framework. The structure then envisaged involved investors, possibly through limited companies, owning shares in an investment advisory company with a further company being the investment vehicle. It appears that the conclusion was that so long as the number of investors in the structure was restricted to that then proposed, the structure would fall just outside the border of regulation.
9. In early December 2008 discussion between the same parties as to possible corporate schemes was continuing and reference had been made to the possibility of a partnership which would hold the allocation of participation and in which Mr Markovic would commit some 90% of funding.
10. Pursuant to the Scheme, four Guernsey companies were incorporated on 5 December 2008. Each issued a single share. In one company the single issued share was held by a nominee company which held the share as trustee for one of the proposed participants. The position was

the same for a second of the companies. For the third company, Milmasy Limited (“Milmasy”) the single issued share was held in trust by the same nominee company and, by 22 December 2008, in trust for Mr Markovic. The single share in the fourth company, Synergy, was held by the same nominee company but in trust for the three other companies "under a partnership yet to be established ... and to be known as the 'Synergy Partnership'".

11. The first three companies entered into a partnership agreement (the “Partnership”) on 11 December 2008 with the following declared purpose:

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

12. There is no evidence that Mr Markovic was engaged in any active participation in agreeing to this corporate structure. But the Synergy structure has been funded by payments from Mr Markovic, apparently by way of loan to Milmasy, following which that company made a capital contribution of the amount loaned to the partnership, the amount then being loaned to Synergy "unsecured, interest free and repayable on demand." In total Mr Markovic claims that the sum of £8.5 million was paid from his accounts and the other parties have not questioned that claim.
13. In February 2012 lawyers for Mr Markovic commenced demands for immediate repayment of the £8.5 million from the company in which he held the beneficial interest and from Synergy. The absence of an adequate response led to the institution of the winding up proceedings with which this appeal is concerned.

### **Findings Below**

14. Giving his judgment McMahon, DB recognised that he should not jump to conclusions on certain aspects of the material before him; but he expressed the inference that Mr Markovic's interests had been poorly protected by the others involved. (Paragraph 46)
15. In his view there appeared to have been little or no contact between Mr Markovic and other participants from the time of the execution of the deed of trust in his favour in December 2008 and the latter part of 2011 when questions were first raised about the money paid into the structure.
16. On the information before him, the learned Deputy Bailiff concluded that Mr Markovic had made the relevant payments. (Paragraph 49)
17. The Deputy Bailiff agreed with counsel for Synergy that the legal burden to establish that Applicants have standing, under Section 408, rested with those Applicants. (Paragraph 51) He went on to conclude that Mr Markovic did not have standing as a creditor to make the winding up application. (Paragraph 60)
18. The Deputy Bailiff went on to consider what the position might be in the event that his first conclusion was incorrect and that, in the alternative, Mr Markovic could indeed establish that he, as opposed to the company in which he held the beneficial interest, was the principal creditor of Synergy. In so doing he adopted the test set out by Lady Smith in *Baker Hughes Limited v*

*CCG Contracting International Limited* 2005 SC 65; where, at paragraph [10], her Ladyship said:

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

19. Adopting that test, the learned Deputy Bailiff was satisfied that Synergy was disputing the debt in good faith, that the grounds for disputing the debt were real and substantial and that, in consequence, Mr Markovic would not have standing as a creditor.
20. Those conclusions took the learned Deputy Bailiff to the issue which is the subject matter of this appeal, namely whether UBS and Mr Markovic had standing as "any other interested party". He noted that the inclusion of those words, in a provision leading to winding up, appeared to be unique to Guernsey and, in particular, as we have already indicated, were not part of the provisions set out in Section 124 of the Insolvency Act 1986 which are applicable both in England and Wales and in Scotland.
21. Having considered the legislative history the Deputy Bailiff did not find that he obtained any assistance from that quarter in the proper interpretation of Section 408. The words "ou autre person intéressé" were expressed in very general terms and, had the States wished to limit standing to specific categories of persons, they could have achieved that aim quite readily by conferring standing on specified persons. (Paragraph 77)
22. He noted that none of the Counsel appearing before him had sought to rely upon any particular canon of construction; but referred to the guidance offered by Viscount Simonds in *A-G v Prince Ernest Augustus of Hannover* [1957] AC 436, 461 that "words, and particularly general words, cannot be read in isolation; their colour and their content are derived from their context.". That guidance, in the view of the learned Deputy Bailiff lent support to his opinion that he ought to have regard to the preceding words so that a less restrained act of interpretation did not run the risk of undesirable expansion of the list of those capable of instigating winding up. (Paragraph 78)
23. Following this approach to interpretation, the learned Deputy Bailiff concluded:
  - "79. A "director, member or creditor" of a company necessarily has a close connection with the company itself (which is also given standing). In my judgment, an "interested party" must be a person who is interested in the company in respect of which the application is being made and that interest must be treated as something broadly equivalent to, but distinct from, the interests of the persons actually specified. The public authorities to which reference has been made, (and I would potentially add the Law Officers of the Crown to the list), will generally have that level of interest because of their supervisory functions or on behalf of the government. As such, their interest relates to companies generally or particular types of companies. Other persons who are "interested parties" may be in some contractual relationship with the company, but I am not limiting the category of person who can bring themselves within the term to those who have, or have had, such a contractual relationship. I am merely offering that type of link as being of the nature that can potentially lead to the conclusion that the applicant is an "interested party".
  80. In every case where the issue arises, I think it will be necessary to have regard to all the circumstances in which an applicant for a winding up order claims to have

links to, and so an interest in, the company in question entitling it to bring the application. The basis of the person's interest in the company will need to be assessed against the touchstone of whether an appropriate degree of connection or association with the company exists so as to warrant the person taking steps to bring about its dissolution. I will apply those broad principles to the position of UBS and Mr Markovic separately."

24. Applying that approach, the Deputy Bailiff concluded, following a thorough review of the evidence, that the position of UBS was too remote from Synergy for it to be an "*interested party*".
25. He considered the position of Mr Markovic to be quite different. In a systematic and clear analysis he commenced by characterising the structure as one in which Mr Markovic and one other were in substance the two shareholders of Synergy. (Paragraph 84) In his view, however, the fact that a person might be the closest one could get to being a member or creditor would not, necessarily, be a decisive factor. (Paragraph 85)
26. The learned Deputy Bailiff went on to consider the need to respect the integrity of the chosen structure. At paragraph 87 he said:

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

27. The learned Deputy Bailiff then proceeded to consider the implications of any suggestion that concluding Mr Markovic to be a person with standing involved any element of piercing the corporate veil, or veils, within the Synergy structure. Insofar as it might do so, he was satisfied that the present was a proper case in which to do so. The directors of Milmasy were the same as those of Synergy and there were no other persons outside of Mr Markovic who had an interest in Milmasy. The member of Milmasy was, of course, CB Nominees Limited, but the evidence pointed to Milmasy effectively being the alter ego of Mr Markovic who could just as easily have provided the funding directly to Synergy Capital. Further, in the special circumstances before him, it appeared to the learned Deputy Bailiff that Synergy appeared to have carried on its business solely as a result of monies provided to it from Mr Markovic.
28. The Deputy Bailiff accordingly concluded that, although Mr Markovic was not a director, member or creditor of Synergy, his interest in that company was as close as anyone else could attain.

### Written Contentions on Appeal

29. For the appellant, Synergy, it was contended that the learned Deputy Bailiff, as he expressed himself at paragraphs 79 and 80 (set out above at paragraph 25) had either construed the words "interested party" too broadly or failed to define the term at all. His reasoning was said to be circular and unsound in that he sought to define the phrase "any other interested party" by reference to a person who is "interested".
30. It was said to be incumbent upon the Deputy Bailiff to define the composite term, or the meaning of "interested", or the nature of the "interest" required with adequate certainty precision and clarity. It was not sufficient to use phrases such as "links to" and "appropriate degree of connection and association" without defining the concept of interest.
31. On an ordinary and proper meaning of "interest" the Deputy Bailiff should have found that, as a matter of law, an "interested party" was a person with a legal concern, title or property. In this respect the learned Deputy Bailiff had failed to address properly or at all the present appellant's reference to the Canadian decision of *Re Crittenden and City of Vancouver* (1984) 14 DLR (4<sup>th</sup>) 599, BCSC.
32. To have found, as the learned Deputy Bailiff had, that the debt was disputed in good faith and on real and substantial grounds, but to allow someone with an interest less direct than a creditor to have standing was an anomalous outcome and offended the rationale of the insolvency regime upon which the principle in *Mann v Goldstein* [1968] 1 WLR 1091, 1094B was grounded.
33. Further, in finding that any element of piercing the corporate veil was proper in a case such as that of Mr Markovic, the learned Deputy Bailiff had allowed the expansion of the category of persons who may wind up a company to an unacceptably wide class and had done so without giving adequate or any reasons.
34. It was also contended that, upon any proper interpretation, the Deputy Bailiff should have been compelled to conclude that Mr Markovic fell outwith the meaning of the term "any other interested party".
35. At its highest, any interest which Mr Markovic may have held would be a financial one which could have arisen only by reason of a remedial constructive trust which would only arise once a declaration to that effect had been made by a court. Reference was made to *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* [1969] AC 669, at 714 and 716.
36. Separately, the need to respect the integrity of the Synergy structure and the underlying company law principles outweighed the inconvenience to Mr Markovic in undertaking minor steps to take control of Milmas, which appeared to have been the primary motivation for the Deputy Bailiff in reaching the views expressed at paragraph 87.
37. Further, the learned Deputy Bailiff had disregarded the fact that Mr Markovic was only the beneficiary of the shareholding in one of the three companies in the Partnership, all of whom were distinct and separate legal entities.
38. In finding, at paragraph 88 of the judgment, that Mr Markovic's investment in Milmas was a sufficient basis for standing the learned Deputy Bailiff had failed to identify any interest of Mr Markovic in Synergy. It was implicit in the learned Deputy Bailiff's own words in paragraph 88 that he was "elevating Mr Markovic in person into a position where he is an *"interested party"*".

The learned Deputy Bailiff had shown that, even upon his own analysis, interpretation and application, Mr Markovic, as an individual, did not have an interest.

39. The contentions for the Respondent were in support of the learned Deputy Bailiff. The words "any other interested party" undoubtedly extended the category of persons who could make such an application beyond those named in Section 408. The learned Deputy Bailiff had not extended the category of "interested party" to all those beneficially interested in the members or shares of a company. It was only because Mr Markovic was in such a limited class, on the facts of the case, that the Deputy Bailiff was able to find Mr Markovic to be an "interested party".
40. Whilst the joint creditors of Synergy are the three partners in the Partnership, each of whom could make a demand and seek to wind up the company, all of the monies ultimately advanced to Synergy came from Mr Markovic. The *Mann v Goldstein* line of authorities does not apply to such a situation as the court is not here concerned with whether a person is a creditor of the company but whether he is an "interested party".
41. It was maintained, further, that Mr Markovic appeared to be a victim of fraud and, as such, had a sufficient interest in Synergy to be entitled to seek its winding up.
42. In response to the grounds of appeal, the respondents maintained that the criticism of circularity was unjustified. In construing the phrase as wide as "any other interested party" it was almost inevitable that synonyms would have to be used. The Deputy Bailiff had provided a means by which the standing of an applicant could be assessed on a case by case basis.
43. The interpretation contended for by Synergy, namely that an "interested party" was restricted to a person with a legal concern, title or property did not withstand scrutiny as it did not give sufficient weight to the juxtaposition of the identified persons and the phrase in question. Those persons with a legal concern, title or property in the company had already been identified expressly in Section 408. Further, the only other persons who could have sufficient legal concern, title or property, other than the persons identified, would be the public bodies referred to in Section 410 of the Law, namely the GFSC and the Commerce and Employment Department. But, as the Deputy Bailiff had noted (in paragraph 73) both the GFSC and the Department had been given express statutory standing under Section 410(2).
44. Turning to the alleged inappropriateness of piercing the corporate veil, it had been held in *Wolfson v Strathclyde Regional Council* 1978 SLT 159, 161 (HL) that this was permissible in special circumstances such as where the company had been created only as a façade concealing true facts. The same approach would be adopted, in appropriate circumstances, where the company in question was the "alter ego" of its beneficial shareholder: see *TSB Private Bank International SA v Chabra* [1992] 1 WLR 231, 238.
45. Finally, it was contended that if, as appeared to be accepted, Milmas would have sufficient interest as one of the beneficial owners of Synergy, there was no reason to exclude the position of Mr Markovic as sole beneficial owner of the Milmas share.

#### **Additional Authority**

46. Before the commencement of the hearing the court drew to the attention of parties the decision of the late Lord Macphail (then Sheriff I D Macphail) in *Tinlin v Accountant in Bankruptcy* 2000 SLT (Sh. Ct) 57, particularly at page 59. In that matter, a discharged bankrupt had lodged a note of appeal in the bankruptcy process in respect of two determinations of the Accountant in Bankruptcy, fixing his permanent trustee's outlays and remuneration. The court held that the debtor had failed to demonstrate sufficient interest in the outcome of the appeal.

47. The learned Sheriff addressed the issue in his case as to whether the bankrupt had shown title and interest. In particular he referred to the statement by Lord Clyde in the Judicial Review case of *Scottish Old People's Welfare Council Petitioners* 1987 SLT 179, 186 – 187, indicating that pecuniary right and status would not be an exhaustive or complete description of what may comprise an interest. Lord Clyde concluded that "the interest must be such as to be seen as material or sufficient. The pursuit of an academic issue would not suffice, nor would an attempt to seek a general pronouncement of law on facts which were hypothetical. There must be a real issue. But the existence of a sufficient interest is essentially a matter depending upon the circumstances of the particular case. The variety of adjectives which are employed to describe the quality of interest required by the law reflects the difficulty of defining any single criterion."
48. The learned Sheriff went on to point out that the last two sentences in that passage had been quoted in *Air 2000 Limited v Secretary of State for Transport* 1989 SLT 698, 700, a further judicial review application and that the general law on title and interest had been applied in bankruptcy and winding up proceedings.

### Oral Argument

49. Before us Advocate Lund for the Appellant insisted that, unless the Law was interpreted as requiring a direct interest in, or in the property of, a company, the resulting lack of precision would make companies vulnerable to applications from a wide section of persons with only tenuous interests. She reminded us that Mr Markovic's claim that the moneys had been misappropriated from him had not been sustained by the Deputy Bailiff. It followed that there was no reason to disregard the corporate structure; a structure which the Deputy Bailiff had indicated required to be shown respect (paragraph 56). The effect of the corporate structure was to preclude Mr Markovic from having title to or a legal interest in such funds as were in the hands of Synergy. Advocate Lund accepted that Mr Markovic had the power to collapse the corporate structure, and to do so immediately and without requiring the consent of anyone else. She also accepted that, through his control of Milmasy and through Section 5 of the Partnership (Guernsey) Law 1995, Mr Markovic had power to claim repayment of the debt to the Partnership. But until such steps were taken, Mr Markovic could not be said to have an interest, as a matter of law, in the company or its assets.
50. Advocate Morris, for the Respondent, submitted that the approach of the learned Deputy Bailiff accorded with that set out in *Tinlin* and in *Scottish Old People's Welfare Council*. The court ought to approach matters on a case by case basis to identify whether, in particular circumstances, there was a sufficient degree of connection and association. In his submission it was hard to see what closer qualities of connection could be displayed apart from those of member or creditor. The corporate structure had been put in place for Mr Markovic's participation, the funds had emanated from him and he had power to bring the structure to its demise. The corporate structure apart, there was no other party put forward as having an interest in competition with that of Mr Markovic or likely to defeat it.

### Discussion

51. We commence with the proper interpretation of Section 408. As the class is defined as "any director, member or creditor thereof or by any other interested party", it is clear that the States had in mind that, in addition to directors, members and creditors, there might be other persons who should be entitled to make application for winding up. Given that the States, in 1906, had been advised that the draft legislation was deficient in failing to make provision for applications by shareholders it is perhaps not surprising that a draftsman thought it apposite to include a catch-all. Further, in respect that the Law, as it presently stands, makes specific provision for

that right to be enjoyed both by the Department and the Commission (Section 410), the class of interested persons must extend further than those official bodies. And, as the learned Deputy Bailiff has pointed out, had the States in 1908 had in mind only specified additional persons or bodies, it is only reasonable to expect that those would have been identified specifically rather than leaving the class more open.

52. Although the inclusion of a general class is not found in the Company and Insolvency legislation enacted for England and Wales and Scotland (to which jurisdictions most regard is had in this jurisdiction in company law matters: *Flightlease Holdings (Guernsey) Limited v Flightlease (Ireland) Limited* 2009 – 10 GLR 38) there is no inherent difficulty in positing that, albeit in exceptional circumstances, there could be others with such an adequate interest that they - in addition to directors, members and creditors - should be given the power to seek a winding up. It is, of course, trite to say that the company, its directors, members and creditors are those with the most direct interest in its continuance or winding up: but the fact that another person may also have the right to apply for winding up does not mean that the views of those most directly involved will not be taken into account in the determination of the application. In our opinion, the task of interpretation in the present matter must be instructed by the views of Viscount Simonds in *A-G v Prince Ernest Augustus of Hannover*. Given that this is a company and insolvency statutory provision, given that the winding up of a company at the instance of someone other than the company itself is an extremely serious matter and given that the potential applicants other than the company are specified, it is clear that the very general words "any other interested party" cannot be read in isolation and must be interpreted according to their context which, like the learned Deputy Bailiff, we take to be an emphasis on the character of the specified persons.
53. In our opinion the learned Deputy Bailiff was well founded in his view that to found upon the inclusion as an "*interested party*" required that there be shown an interest in the company itself. The power of the court to grant a winding up order on the application of someone other than the company itself can only be characterised, properly, as a remedy, granted at the discretion of the Court, in respect of some right which the applicant enjoys. Given the severe nature of the remedy it is understandable that, in almost all jurisdictions, the class of applicant is restricted. We therefore further agree with the learned Deputy Bailiff that, in order to be a relevant interest for the purposes of Section 408, the interest should in some broad way be equivalent to, albeit distinct from, those held by a director, member or creditor.
54. In our opinion, the contention for the appellants that some more precise definition must be discerned has no logical foundation; and, like Lord Clyde in *Scottish Old People's Welfare Council, Petitioners*, we see no reason for the courts in this jurisdiction to impose any greater definition of interest or list of relevant criteria when the States have not themselves done so. In our opinion the approach of the learned Deputy Bailiff properly has regard to both the use of the very general words and the need, in a legislative provision such as this, for a circumscribed class.
55. In reaching that opinion, we do not find anything in the views of McLachlin J (as she then was) in *Re Crittenden and City of Vancouver* to suggest the adoption of criteria other than that of broad equivalence of interest between the Applicant and the persons specified by the statute. The decision in *Re Crittenden* was given in respect of an application relating to town and country planning. Certain persons owning property in the vicinity of the subject premises, not named as parties to the application, appeared at a preliminary stage to seek dismissal of the application because they had not been served with copies of the petition and supporting documentation. They contended that this was in contravention of Section 293(1)(b) of the Vancouver Charter 1953 (B.C.) c. 55 which provided: "All parties interested, including the city, shall be served with the petition, together with all material intended to be used at the hearing of the appeal".

56. The learned judge set out her views on this point as follows (page 601):

"At law, the word "interest" is typically used to connote legal concern, title or right in property, rather than in the larger sense of concern or curiosity. The objectors in the case at bar claim no legal interest, title or right in the property, although as neighbours, they are generally concerned in the outcome of this application. In my opinion, they are not "parties interested" within the meaning of s. 293.

I am satisfied that it cannot have been the intention of the Legislature that all persons interested, in the sense of being concerned because of their interest in nearby properties, must be served with a petition and the supporting documentation for an application such as this. The class of persons required to be served would be vague and uncertain."

57. There are a number of reasons for rejecting the contention that consideration of the opinion of McLachlin J. should lead to an interpretation of the Law different to that which we have set out above. In the first place, the legislative provision in *Re Crittenden* was a procedural requirement, and the result of failure in observation would lead to dismissal of the application. The present provision is merely one which entitles a person to make an application, but being a member of the relevant class does not necessarily lead to entitlement to the remedy.
58. In the second place, the views of McLachlin J. reflect the approach of Viscount Simonds, set out above, and looked at the general words in their particular context. That is what the approach of the learned Deputy Bailiff, with which we agree, sets out to do. The context here includes specific reference to directors, members and creditors and it is the requirement of broad equivalence to such categories which avoids the difficulties of vagueness and uncertainty which, as McLachlin J. correctly stated, are otiose in a proper interpretation.
59. It therefore follows, in our opinion, that a proper interpretation of Section 408 requires that a person, other than one of those specified, must show an interest in the company which is broadly equivalent to that of a director, member or creditor. This, in our view, will require an almost direct interest. By that we mean that there should be excluded a merely future interest where the direct link cannot be claimed until some future date has arrived. In our opinion the proper interpretation would also exclude a contingent interest where the emergence of the contingency was outwith the control of the applicant.
60. The particular category of interested person which we have in mind is the individual whose shareholding is held by and in name of a nominee company. Typically such a nominee company will hold a significant number of shares in a single company in respect of the interests of a number of different persons. The nominee company, whether for its own reasons or because of a known difference of views among the persons for whom it holds shares, might be reluctant to make an application for winding up. Yet, in the view of one of the individuals, known circumstances might make the application for winding up a matter of urgency. Such an interest is broadly equivalent to that of a member and, properly characterised, is neither future nor contingent. There will be other categories, and consideration of each will be an individual matter when it arises, but the category of the nominee shareholding seems to us to provide a practical example of the value of a provision such as this.
61. In our opinion the circumstances of Mr Markovic, relied upon by the learned Deputy Bailiff, were perfectly apposite to indicate that Mr Markovic had shown appropriate standing. He could have directed that the Milmasy share be transferred into his name. He could then have taken action for payment in name of the Partnership. It is not disputed that, subject to any claims for outlays, funds held by Synergy would be payable to the Partnership. Like the Deputy Bailiff, it seems to us that, where that result could be achieved by Mr Markovic without the need to have

the consent of any other party, there is no reason to force Mr Markovic to take those steps for the sole purpose of showing entitlement to make this application. We add that although Mr Markovic claims that his moneys were misappropriated, the steps which we have mentioned do not depend upon his proving entitlement to a resulting trust. Consideration of that matter might have been relevant to the issue as to whether or not Mr Markovic was a creditor, but not as to his interest.

62. In our opinion the finding of the learned Deputy Bailiff, pursuant to *Mann v Goldstein* and *Baker Hughes Limited v CCG*, that Mr Markovic could not be considered as a creditor for the purposes of Section 408 does not preclude the finding that Mr Markovic was an interested party. Mr Markovic claimed that the sum of £8.5 million had been paid from his accounts. The other parties have not questioned that claim and the Synergy structure was funded by those payments. On a proper legal analysis he is not a direct creditor of Synergy but, given the Synergy structure and the fact that it was created as a vehicle for his investing, the relationship between Mr Markovic and Synergy is broadly equivalent to that of debtor and creditor.
63. Separately, even assuming that there was no broad equivalence in respect of the position of a creditor, the Synergy structure, and the power of Mr. Markovic to collapse it, places him in a position so closely akin to that of the individual whose shareholding is held by a nominee that, for purposes such as the present, the distinctions are of no practical importance. If, as in our opinion is the case, the proper interpretation of s.408 would include the person beneficially interested in a share or shares held for him in the name of a nominee, the circumstances of Mr Markovic, albeit more extenuated, are more than sufficient to clothe him with the quality of interest to be expected of someone entitled to make the statutory application.
64. In our opinion, however, it is the combination of the Synergy structure and the fact that there is no indication other than that it was almost completely funded by payments from Mr Markovic which place Mr Markovic in a position which fully entitled the learned Deputy Bailiff to reach the view that he could properly be considered an "*interested party*" under Section 408 of the law.
65. So analysed it seems to us that no question arises as to there being any piercing of the corporate veil of Synergy. The existence of the corporate body is respected; but the statute permits consideration of the interests of other persons. If those interests in the company in question arise by virtue of an interest in a shareholding company, it is important to remember that the importance of the power of the court to pierce the veil of incorporation is, generally, to enable a litigant to have a private law remedy against someone other than the individual upon whom the obligation lies as a matter of law. There are cogent reasons for such a power to be available only in restricted circumstances. Here it is the statute which has determined that an interest other than those of the defined parties may be sufficient to entitle an application to be made. Where consideration of the whole circumstances is at large for the court required to determine the issue of adequate interest, the fact that the interest claimed moves through one or more corporations or vehicles is merely another factor to be taken into account.
66. For all these reasons we are of the opinion that the appeal should be dismissed.