Neutral Citation Number: [2019] EWCA Civ 1644

Case No: A3/2018/1648

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES,
BUSINESS LIST (ChD)
Mr Justice Henry Carr
HC-2016-00763

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/10/2019

Before:

LORD JUSTICE McCOMBE
LORD JUSTICE SIMON
and
LORD JUSTICE DAVID RICHARDS

- -

In the Matter of PARAMOUNT POWDERS (UK) LIMITED

And

In the Matters of the COMPANIES ACT 2006 and the INSOLVENCY ACT 1986

Between:

TARLOCHAN SINGH BADYAL	**Appellant**
- and -	
MALKIAT SINGH BADYAL	
SANTKH SINGH BADYAL	
PARAMOUNT POWDERS (UK) LIMITED	**Respondents**

- -
- -

Thomas Roe QC and Richard Ascroft (instructed by Kapoor & Co.) for the Appellant
Stuart Hornett and Sarah Walker (instructed by Shergill & Co.) for the First and Second Respondents
The Third Respondent was not represented

Hearing date: 11 July 2019

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Approved Judgment

Lord Justice McCombe:

Introduction

1. This is the appeal of Mr Tarlochan Badyal (who throughout the proceedings has been called "TSB", an abbreviation which – without any discourtesy being intended - I will adopt in this judgment). He appeals from part of the order of 19 January 2018 of the late Henry Carr J in the present proceedings relating to the Third Respondent, Paramount Powders (UK) Limited ("the Company").

2. By the material parts of his order the judge declared that TSB had been validly removed as a director of the Company and he dismissed TSB's petition for the winding up of the Company, alternatively for relief under sections 994 to 996 of the Companies Act 2006. There were also partnership proceedings between the brothers which came before the judge at the same trial. Those proceedings have relevance to the matters before us but there is no outstanding appeal in respect of any of the judge's orders in that action. The judge further ordered that TSB should pay 95% of respondents' costs of each set of proceedings on the indemnity basis.

3. The detailed facts of the case are set out in the learned judge's very full and careful judgment to which the reference is [2018] EWHC 68 (Ch). It is unnecessary to rehearse very much of that detail again since, in my judgment, the important features of the proceedings are the manner in which the rival claims were formulated, the judge's overall findings on the principal factual issues in the case and his evaluation of those findings in the context of the claims made by the rival parties. I will, therefore, confine myself to a very brief summary of the background.

Background

4. TSB is the eldest of three brothers. His younger brothers are the First and Second Respondents to whom (like the judge – again, I hope without discourtesy) I shall refer as "MSB" and "SSB" respectively. The brothers came from India to the United Kingdom to join their father in 1976. In 1981 they began a business together trading in partnership. The first partnership was called Slough Plastics Company ("SPC"). The brothers were equal partners. The business was the manufacture of powder coating. (This is a material, as I understand it, which is applied to metal surfaces in dry powder state and forms a hard coating which is tougher, when applied to such surfaces, than conventional painted finishes.)

5. Also in 1981 the Company was incorporated. It too has carried on a business manufacturing powder coating. It seems that there was no evidence before the judge as to why the Company was formed to run in parallel with SPC. However, nothing turns on that. Each of the brothers held 25% of the shares, with the other 25% being reserved for their father as a token of respect. SSB and MSB became the directors. It was common ground, however, that the Company was treated as a quasi-partnership, to use the convenient (if not wholly accurate) phrase between them.

6. In 1990 the father moved to India. A farmhouse was acquired there for his occupation. In 1993/4 TSB also moved to India with a view to setting up and running a powder coating business. He lived at the farmhouse with his father but visited the UK

regularly to be involved in the UK businesses. In his absence, MSB and SSB ran those businesses.

7. By 1996 or 1997 the Indian business had been incorporated, under the name Paramount Powders Private Limited ("Paramount India"). As the judge summarised it, other companies were established in India and other assets were acquired there. In the UK there were further acquisitions by the family, including a hotel, a public house and a number of residential properties. These properties were subsumed into the family partnership(s). The ownership of the Indian businesses and of some of the properties was in issue in the partnership proceedings.

8. Relations between the brothers became gradually more and more strained. The judge took the view that TSB, as the elder brother, regarded himself as the senior partner. The judge took a highly unfavourable view of the quality and veracity of his evidence. At paragraph 9 of the judgment, the judge said this:

> "9. TSB is an imposing man with a very strong will. He holds a genuine (albeit misplaced) belief that, as eldest brother, he is entitled to more of the partnership and company assets than his younger brothers. He also believes that he was primarily responsible for the success of the family business. In my judgment, TSB exaggerated his contribution and minimised that of his brothers. When assessing his evidence, I bear in mind his limited English, and the poor state of his health during his cross-examination. Unfortunately, I have concluded that both in his written evidence and his oral evidence, he did not tell the truth about key issues in dispute."

It should be noted that the reference to TSB's poor health is of some significance in the proceedings, since his health was such that he was unable to complete his evidence in court. It seems that he suffered a stroke outside court, at a time when his cross-examination was nearly complete. He remained in hospital for the residue of the trial.

9. Before litigation loomed, there were discussions between the brothers about splitting the business assets. The first "hostile" act, however, was taken by TSB by way of a letter before action from solicitors on 5 November 2014. In that letter TSB's solicitors asserted their client's entitlement to dissolve the partnerships and to have accounts taken and to achieve a distribution of assets. Regarding the Company, the solicitors complained about the incorporation of a further company called Paramount Powder Limited ("PPL"), with SSB as sole director, allegedly competing with the business of the Company in breach of fiduciary duties owed to the Company. The letter demanded that steps be taken against PPL, in default of which TSB would be entitled to bring derivative proceedings for passing off and for breaches of fiduciary duty. It was contended further that TSB was entitled to seek relief against unfair prejudice in the conduct of the Company's affairs. Absent a satisfactory answer, it was said, proceedings would be commenced.

10. MSB and SSB acknowledged the setting up of the new business which dealt in the raw materials/chemicals required in the Company's business. However, they denied that there was any breach of duty on SSB's part. Their case was that TSB was fully

aware of the setting up of the PPL business and that he had agreed to it. In due course, after a careful factual review, the judge accepted that case advanced by MSB and SSB and he rejected that of TSB. In the meantime, however, before the inception of proceedings, to avoid confusion with the Company, the name of PPL was changed to AMJ Paint Limited ("AMJ").

11. In about March 2015 MSB and SSB discovered that TSB's son, Sandeep Badyal, was involved in a business which was thought by them to be directly competing with that of the Company. The rival company was called Trident Powders Limited ("Trident"). MSB and SSB suspected that TSB was also involved in Trident's business. TSB denied involvement. This led to further enquiries by his brothers as to whether the denial was true. Gradually, as MSB and SSB were to maintain, certain matters emerged which suggested that TSB was indeed directly involved with Trident and was actively assisting his son in that business. At trial, the evidence included: (i) the supply of raw materials by Paramount India to Trident; (ii) the use of common professional advisers by TSB and Trident; (iii) the funding of Trident by TSB; (iv) his attendance at Trident's business premises; (v) his placing of orders for Trident at a Mitsubishi dealership; (vi) approaches made by TSB on Trident's behalf to machinery manufacturers; (vii) the engagement by Trident of two senior staff members of the Company.

12. While the judge rejected some other factors said to link TSB to Trident, he did accept that the evidence established TSB's connection with Trident in breach of his fiduciary duty to the Company.

13. I will return later to say a little more about the judge's conclusions on these matters after summarising the course of the two sets of proceedings up to judgment.

14. On 4 March 2016, TSB presented the petition in the proceedings relating to the Company, limiting the claim at that stage to relief under sections 994 to 996 of the Companies Act 2006. There was no claim for a winding-up order. In the petition, TSB alleged breach of fiduciary duty by his brothers in respect of the conduct of the PPL/AMJ business. He further alleged that, in 2010, SSB had used £20,000 of the Company's money to invest in a company called Jay Tees Limited and that his shares in that company had been sold for £40,000. It was said that SSB had failed to return either the £20,000 or to account for the profit made on the share sale. (This claim was later abandoned.) The petition also complained about alleged manipulation of the Company's payroll by SSB by altering the records to show payment of inflated salaries with the excess being misappropriated for SSB's personal benefit. In one further case it was said that a false salary had been recorded to assist the relevant employee to obtain fraudulently a mortgage advance from a bank.

15. On 4 March 2016, solicitors for TSB, as well as presenting the petition in the company proceedings, served notice on the solicitors for MSB/SSB to dissolve the SPC partnership and the other partnerships that TSB asserted existed between them. On 7 March 2016 TSB issued the partnership proceedings. The claim was for a declaration that the partnership(s) had been dissolved by the notice (or an order for dissolution). TSB also complained about the following: (a) his brothers having changed the bank mandates to require two partners to sign cheques; (b) MSB's directorship from 2008 in a further business competing with SPC (DPS Industrial Finishers Limited) – a point also abandoned later in the proceedings; (c) an alleged

failure by SSB to account for certain rental income on a freehold property; and (d) TSB's alleged exclusion from the partnership premises.

16. In their Defence and Counterclaim, MSB and SSB denied any wrongdoing but agreed that trust and confidence had broken down between the partners. They asserted that TSB had been the cause of the breach, in particular because of his surreptitious involvement with Trident. They also claimed declarations that certain additional businesses (including Paramount India) and other properties were partnership assets.

17. In May 2016, principally on the grounds of what they saw to be TSB's wrongful involvement with the competing Trident business, MSB and SSB took steps to remove TSB as a director of the Company and convened an extraordinary general meeting of the Company to pass a resolution to that effect. TSB contended that such removal was unjustified. By amendment to the petition allowed by order of Ms Registrar Barber of 17 June 2016, TSB added this matter to the complaints made with regard to the conduct of the Company's business and sought for the first time (as the primary relief) an order for the winding-up of the Company under section 122(1)(g) of the Insolvency Act 1986 – the "just and equitable" ground.

18. MSB and TSB contended that they were fully justified in excluding TSB from the Company's business, principally because of his involvement with the Trident business.

The Judgment of Henry Carr J

19. The judge found in favour of MSB and SSB in respect of virtually all the important points in issue in the partnership proceedings. He made declarations that "The Indian Assets" (including Paramount India) and "The Disputed [UK] Assets", listed in the Schedule to his order, which had been claimed by TSB to be owned by him personally, were either partnership assets or otherwise joint assets of the three brothers, in one case subject to potential rights of TSB's wife to whom he granted liberty to apply.

20. While the judge dealt in detail in his judgment with each of the assets in dispute, it is not necessary to rehearse that detail here. Importantly, TSB's case was (primarily) that the assets in dispute, in India and in this country, were acquired by him out of drawings or dividends from the businesses to which he was personally entitled. The judge's conclusion on this argument is stated in paragraphs 26 to 29 of the judgment as follows:

> "26. It is convenient at this stage to deal with an assertion that was a consistent theme of TSB's evidence. SPC and/or PPUK funded numerous of the assets in dispute. TSB claimed that these funds were drawings or dividends to which he was personally entitled. He claimed that the assets were not paid for by SPC or PPUK, but rather by TSB in his personal capacity. I do not accept this….
>
> 27. …The accounts do not support TSB's contention that funds used to purchase specific assets were from his drawings,

> because the brothers' drawings were equalised at the end of the year and shared between them.
>
> 28. This was consistent with Mr Bij's explanation of the accounting system that he operated. He did not make any attempt to allocate expenditure to any particular partner, and a similar approach was taken to the treatment of dividends in PPUK, regardless of how much had been taken by each of the brothers. This does not support TSB's claim that the large sums of money required to purchase the assets in dispute were from his personal drawings or his personal dividends.
>
> 29. Furthermore, I do not accept that MSB and SSB agreed that TSB was entitled to take disproportionate sums from the business and use such sums to acquire assets for himself alone."

21. Apart from resolving the disputes about specific assets in the manner that I have indicated, the judge also found against TSB and in favour of his brothers on the additional disputes about the partnership bank mandates and bank statements and about the limits that MSB and SSB sought to impose on all partners' drawings and expenses payments. The judge said at (paragraph 104) that since the parties were agreed that the partnership should be wound up, he would deal with the issues briefly. For present purposes, it suffices to record his summary conclusions on these points. He said this (at paragraphs 107-109):

> "107. In my judgment, changing the bank mandate and limiting partnership expenditure was justified and in keeping with MSB and SSB's duties to safeguard the interests of the SPC partnership. In so far as there are complaints about unjustified withdrawals by each of the brothers, they shall be determined when the account is taken.
>
> 108. The allegation that TSB was prevented from having access to the partnership's records is denied by MSB and SSB, and I accept their evidence. MSB denies instructing Mrs Mohindra to limit TSB's access in December 2015 but accepts that he may have instructed her to prevent him from taking the hotel cheque book. Given TSB's unauthorised withdrawal of £60,000, this, in my view, was justified.
>
> 109. MSB accepts that his discussion with TSB on 18 February 2016 became heated, but denies that it was threatening. I accept his evidence about this. MSB also agrees that he called TSB's wife in an attempt to discuss how best to resolve the differences. TSB's wife did not give evidence about this incident and I accept MSB's evidence that he was not abusive. At paragraph [68] of his second witness statement MSB states that he was exasperated by the pointlessness of the dispute and in frustration he said that he felt like burning the factory down and jumping into a river, but that he did not threaten to do this.

> In the absence of evidence to the contrary from TSB's wife, I accept what MSB has said."

22. So far as the Company proceedings were concerned, the judge also found in favour of MSB and SSB in respect of most of the factual matters in issue (and all those of primary importance).

23. The judge rejected TSB's complaint about the PPL/AMJ business. At paragraph 132 of the judgment, he said:

> "132. I conclude that TSB was aware, shortly after its incorporation, that SSB and Manpreet had set up PPL/AMJ and that he consented to or acquiesced in this business. In common with MSB, TSB did not want PPUK to continue to trade in chemicals, and therefore it is unsurprising that he had no objection. I reject TSB's complaint that SSB has breached his fiduciary duties to PPUK by setting up and trading through PPL/AMJ, to the unfair prejudice of TSB."

24. With regard to the alleged payroll irregularities levelled against MSB/SSB, the judge commented upon the seriousness of the allegations and noted that, although they were said to have occurred between 2012 and 2015, they had not been raised in the pre-action correspondence and emerged for the first time in March 2016 in the petition presented to the court. It emerged in cross-examination of the Company's former accountant (Mr Bij), who had been solicited to work for Trident, that he was the source of these allegations so far as they related to SSB. However, he disavowed them in evidence, the relevant passage from the transcript being quoted by the judge in paragraph 140 of the judgment. The judge also examined the allegations in detail and rejected them.

25. As for Trident, the judge found that the substance of the allegations of impropriety made against TSB by his brothers was well-founded and that, notwithstanding his denials, TSB had been directly involved in the setting up of the Trident business, unbeknown to his partners/co-directors. At paragraph 200 of his judgment, the judge said:

> "200. Although I have not accepted all of the arguments advanced by MSB and SSB, I am satisfied that TSB has been involved in Trident's business from the outset, has funded it, and has encouraged Dr Manro and Mr Bij to leave PPUK and join Trident. In my judgment, it was not unfair for MSB and SSB to remove TSB as a director of PPUK in these circumstances."

Overall, his conclusion, at paragraph 201, was this:

> "201. MSB and SSB claim that they have offered to buy TSB's shares at a fair (undiscounted) independent valuation, but TSB denies that the offer was fair. In the light of my conclusions concerning Trident, MSB and SSB were not obliged to buy TSB's shares. In all the circumstances, I do not consider that

> TSB has been unfairly prejudiced and I shall refuse relief under section 994. I do not consider that it would be just or equitable to wind the company up. There is no justification for doing so, and the effect would be to leave the field clear for Trident, a result which I believe would be unjust and inequitable."

The Appeal and my Conclusions

26. The grounds of appeal advanced by Mr Roe QC and Mr Ascroft for TSB are quite short. They are stated as follows:

> "1. The Judge was wrong not to order that Paramount Powders UK Limited ('PPUK') be wound up. In particular,
>
> (a) He wrongly discerned a principle of law that a breakdown of mutual trust and confidence between the shareholders in a quasi-partnership company cannot found a winding-up order without something more.
>
> (b) He wrongly held that s.125(2) of the Insolvency Act 1986 means that winding up on the 'just and equitable' ground is 'an exceptional remedy' and a 'last resort'.
>
> (c) He did not properly exercise his discretion to consider whether in all the circumstances it was 'just and equitable' to make a winding-up order.
>
> (d) The only positive reason he gave for not making a winding-up order was not a good one.
>
> (e) He did not make the winding-up order which, in all the circumstances, it was just and equitable to make so as to enable the brothers to go their own ways as regards PPUK, just as they agree they must do as regards all their other dealings."

27. The only other ground originally advanced (Ground 2) related to an aspect of the partnership proceedings and has not been pursued. Nor is there any appeal against the judge's dismissal of TSB's claim for relief under sections 994-996 of the 2006 Act. The only point now arising is whether the judge was wrong to refuse to wind up the Company on the "just and equitable" ground.

28. It can be seen that the primary argument on the appeal, as it was at a late stage before the judge, was that to secure an order for the winding-up of a "quasi-partnership" company on the "just and equitable" ground it is necessary only to show that mutual trust and confidence between the shareholders/quasi-partners has broken down. Such was the submission of Mr Mann QC, then appearing for TSB, to which the judge referred at paragraph 113 of his judgment. Ground 1(a) is a straightforward repetition

of that submission. Much of what the judge said was directed to his rejection of that submission and his remarks need to be seen in that context.

29. Grounds 1(a) and (b) derive from statements by the judge made in the context of citations by him from the judgment of Patten LJ in *Fulham Football Club (1987) Ltd. v Richards* [2012] Ch. 333. The first passage cited was a summary of sections 994-996 of the 2006 Act, dealing with the jurisdiction to relieve against unfair prejudice. The judge prefaced his next citation with this remark (at paragraph 112):

> "112. The flexible approach of section 994 is to be contrasted with just and equitable winding up in a dispute between shareholders, which should only be used as a last resort. It is an exceptional remedy and section 994 will normally provide a more appropriate alternative, as Patten LJ explained at [54] – [56] of Fulham Football Club:"

Mr Roe submitted that the judge was wrong to say that the "just and equitable" winding-up remedy was exceptional or a last resort.

30. The passage from the judgment of Patten LJ then cited was this:

> "54. The power of the court to wind up on the just and equitable ground is also contained in section 122 of the 1986 Act but, in relation to a contributory's petition, the conditions for its exercise are very different. As a general rule, the shareholder seeking the winding up order must be able to establish that the company is solvent and that there will be a surplus remaining for distribution after the payment of the company's debts and the costs and expenses of the liquidation: see In re Rica Gold Washing Co Ltd (1879) 11 Ch D 36.
>
> 55. A shareholder will not therefore be permitted to petition under section 122(1)(g) for the winding up of an insolvent company and, in the case of a solvent company, the court's power will only be exercised in his favour with a view to dividing the net assets of the company where no other means can be found of resolving the dispute between shareholders in relation to their rights and interests as members. To this end, section 125(2) of the Insolvency Act 1986 provides:
>
> > "If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the court, if it is of opinion— (a) that the petitioners are entitled to relief either by winding up the company or by some other means, and (b) that in the absence of any other remedy it would be just and equitable that the company should be wound up, shall make a winding up order; but this does not apply if the court is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in

> seeking to have the company wound up instead of pursuing that other remedy."
>
> 56. Section 994 will usually provide the source of a satisfactory alternative remedy such as a buy-out order so that winding up under section 122(1)(g) is therefore a last resort and, in my experience, an exceptional remedy to grant in the context of disputes between shareholders. This is confirmed by the terms of the current Practice Direction 49B (Order under section 127 of the Insolvency Act 1986) which draws attention to the undesirability of asking, as a matter of course, for a winding up order as an alternative to an order under section 994."

In my judgment, the judge's statement in paragraph 112 criticised by Mr Roe, is no more than a paraphrase of Patten LJ's judgment in the *Fulham Football Club* case and of the effect of section 125(2) of the 1986 Act and I would reject Ground 1(b) on that basis, if for no other reason. I return to Ground 1(a) below.

31. Ground 1(c) does not appear to require separate treatment from the other grounds.

32. Mr Roe's submission on Ground 1(d) was based upon paragraph 201 of the judgment (already quoted) where the judge said that, in the circumstances, there was no justification for ordering a winding-up and "…the effect would be to leave the field open for Trident, a result which I believe would be unjust and inequitable".

33. Ground 1(e) was advanced by Mr Roe on the basis that the brothers appeared to assume in the proceedings that all the partnership assets and quasi-partnership assets in the Company should be distributed, given the breakdown of the relationship between them.

34. For my part, I do not accept these criticisms of the judge's judgment which I consider has to be assessed in the light of the core submission advanced to him, as it is to us in Ground 1(a), that a breakdown in mutual trust and confidence between these quasi-partnership corporators, without more, should lead to an order for the winding-up of the Company. It may be that, in some cases, where there is <u>not</u>, as here, egregious misconduct on the part of the corporator seeking relief, but there <u>is</u> a complete loss of confidence and/or deadlock, winding-up is the only appropriate course. However, in my judgment, the seminal authorities on the "just and equitable" jurisdiction demonstrate that in general equity intervenes to enable the court to subject the exercise of legal rights under a company's constitution to equitable considerations. One factor, among a number, which is relevant in that context is a breakdown of mutual trust and confidence, but it is only one.

35. I found it helpful and instructive in this case to see the original analogy drawn in company proceedings from the partnership cases, supported by Lord Lindley in his own edition of his work on Partnership which was quoted by Lord Cozens-Hardy MR in *Re Yenidje Tobacco Co. Ltd.* [1916] 2 Ch. 426 at 430. Lord Lindley wrote:

> "…Refusal to meet on matters of business, continued quarrelling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly co-operation

> have been held sufficient to justify a dissolution. It is not necessary, in order to induce the Court to interfere, to show personal rudeness on the part of one partner to the other, or even any gross misconduct as a partner. All that is necessary is to satisfy the Court that it is impossible for the partners to place that confidence in each other which each has a right to expect, and that such impossibility has not been caused by the person seeking to take advantage of it."

36. In *Re Westbourne Galleries* [1973] AC 360 at 379 C - E, Lord Wilberforce said:

> "…The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."

After summarising the factors that may bring the equitable jurisdiction into play, Lord Wilberforce said this:

> "It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to "quasi-partnerships" or "in substance partnerships" may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words "just and equitable" sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in."

I would note the reference to the conceptions of "probity, good faith and mutual confidence". Mutual confidence is there stated as only one of a trio of material factors: "probity" and "good faith" are relevant too. As I remarked to Mr Roe in argument, on the judge's findings of fact in this case (against which there is no

appeal), TSB's locker was decidedly empty of the elements of "good faith" and "probity".

37. In *Westbourne Galleries*, after short assenting speeches of Viscount Dilhorne and Lord Pearson, Lord Cross of Chelsea said in the course of his speech (at pp. 383H-384A/B):

> "…People do not become partners unless they have confidence in one another and it is of the essence of the relationship that mutual confidence is maintained. If neither has any longer confidence in the other so that they cannot work together in the way originally contemplated then the relationship should be ended—unless, indeed, the party who wishes to end it has been solely responsible for the situation which has arisen."

At 385H-386A, Lord Cross said:

> "…But the jurisdiction to wind up under section 222(f) continues to exist as an independent remedy and I have no doubt that the Court of Appeal was right in rejecting the submission of the respondents to the effect that a petitioner cannot obtain an order under that subsection any more than section 210 unless he can show that his position as a shareholder has been worsened by the action of which he complains."

Finally, for present purposes, I would add what Lord Cross said at p. 387F-G/H (by way of comment on the earlier case of *Re Leadenhall Garden Hardware Stores*, 4.2.1971):

> "…If the respondents were telling the truth—and the judge held that they were—the almost inevitable inference was that the petitioner had been stealing the company's money. A petitioner who relies on the "just and equitable" clause must come to court with clean hands, and if the breakdown in confidence between him and the other parties to the dispute appears to have been due to his misconduct he cannot insist on the company being wound up if they wish it to continue."

38. Lord Salmon agreed with all four speeches previously delivered.

39. It seems to me, therefore, that a petitioner may well not qualify for relief if he is "solely responsible for the situation which has arisen" (Lord Cross at pp. 383-4). If the breakdown in confidence has been due to his misconduct, he may not be able to insist on a winding-up of the company (Lord Cross at p.387).

40. Here, as it seems to me, the judge found that TSB was solely responsible for the situation that had arisen. The matters of which he complained were rejected and the breakdown in confidence was due to his own misconduct.

41. Having noted the passages from Lord Cross's speech (quoted above), one must be careful to avoid creating the impression that every breach of fiduciary duty by one corporator in a quasi-partnership company will automatically render his exclusion from management fair. That is not the case, as was said in this court recently in the context of an "unfair prejudice" claim in *Re Sprintroom Ltd.* [2019] EWCA Civ 932 at paragraphs 82-83. However, relief (in some unfair prejudice cases) has been refused where the excluded party has been found to have been justifiably excluded: see the examples quoted in paragraph 82 of the *Sprintroom* judgment.

42. As was also said in that case, in assessing the fairness or otherwise of an exclusion from management, this court is reviewing the trial judge's evaluation of the primary facts as found: Loc. Cit. paragraph 71. In such cases, the court asks whether the evaluation was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided "such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion": Loc. Cit. paragraph 76, quoting Lord Carnwath in *R (on the application of AR) v Chief Constable of Manchester Police & Anor.* [2018] UKSC 47.

43. For my part, I cannot find any factor in the evaluation of the facts made by the judge in the present case which indicates any identifiable flaw in his ultimate conclusion that it was not just and equitable to wind up this company.

44. Mr Roe, in his helpful argument, criticised the judge for what he said was a confusion in his mind between the relief for "unfair prejudice" and on the "just and equitable" winding-up ground. He said that this was illustrated by the judge's reference to *O'Neill v Phillips* [1999] 1 WLR 1092, a case of alleged "unfair prejudice". Again, however, the judge was addressing the primary submission for TSB that a breakdown of mutual trust and confidence alone would justify a winding-up order. Thus, he said (at paragraph 116):

> "116. This issue was specifically addressed by Lord Hoffmann in the leading case *O'Neill v Phillips* [1999] 1 WLR 1092 1104B – 1105C. When considering a claim of unfair prejudice under section 459(1) (as amended) of the Companies Act 1985 he rejected the submission that because trust and confidence between the parties had broken down, it was obvious there ought to be a parting of the ways. He characterised the submission as saying that in a "quasi-partnership" company, one partner ought to be entitled at will to require the other partner or partners to buy his shares at a fair value, and that all he need do is to declare that trust and confidence has broken down. At 1104F Lord Hoffmann concluded that there was no support in the authorities for such a stark right of unilateral withdrawal. He rejected the proposition that a member who has not been dismissed or excluded can demand that his shares be purchased simply because he feels that he has lost trust and confidence in the others and he noted that in *In re Westbourne Galleries* at 380, it was made clear that one should not press the quasi-partnership analogy too far: "*A company, however small, however domestic, is a company not a partnership or even a quasi-partnership …*"."

45. The passage from Lord Hoffmann's speech to which the judge was referring was the one at pp. 1104B-1105C. Lord Hoffmann drew upon the analogy of partnership law and (significantly) upon the speech of Lord Wilberforce in *Westbourne Galleries*. In the relevant part of his speech, for present purposes, in *O'Neill*, Lord Hoffmann said:

> "Mr. Hollington's submission comes to saying that, in a "quasi-partnership" company, one partner ought to be entitled at will to require the other partner or partners to buy his shares at a fair value. All he need do is to declare that trust and confidence has broken down. …
>
> I do not think that there is any support in the authorities for such a stark right of unilateral withdrawal. There are cases, such as *In re A Company (No. 006834 of 1988), Ex parte Kremer* [1989] B.C.L.C. 365, in which it has been said that if a breakdown in relations has caused the majority to remove a shareholder from participation in the management, it is usually a waste of time to try to investigate who caused the breakdown. Such breakdowns often occur (as in this case) without either side having done anything seriously wrong or unfair. It is not fair to the excluded member, who will usually have lost his employment, to keep his assets locked in the company. But that does not mean that a member who has not been dismissed or excluded can demand that his shares be purchased simply because he feels that he has lost trust and confidence in the others. I rather doubt whether even in partnership law a dissolution would be granted on this ground in a case in which it was still possible under the articles for the business of the partnership to be continued. And as Lord Wilberforce observed in *In re Westbourne Galleries Ltd.* [1973] A.C. 360, 380, one should not press the quasi-partnership analogy too far: "A company, however small, however domestic, is a company not a partnership or even a quasi-partnership …"
>
> The Law Commission Report on Shareholder Remedies to which I have already referred considered whether to recommend the introduction of a statutory remedy "in situations where there is no fault" 1105(paragraph 3.65) so that members of a quasi-partnership could exit at will. They said, at p. 39, para. 3.66:
>
> > "In our view there are strong economic arguments against allowing shareholders to exit at will. Also, as a matter of principle, such a right would fundamentally contravene the sanctity of the contract binding the members and the company which we considered should guide our approach to shareholder remedies."
>
> The Law Commission plainly did not consider that section 459 already provided a right to exit at will and I do not think so either."

Lord Hoffmann was rejecting a submission like that advanced in Ground 1(a), albeit in an unfair prejudice case, but with reference to partnership and "just and equitable" winding-up principles.

46. I do not find that the judge was confusing the two separate jurisdictions under the 2006 Act (ss.994-996) and under the 1986 Act (s.122) respectively. He was merely extracting from cases under parallel jurisdictions principles bearing upon the primary submission for TSB that a breakdown of trust and confidence, without more, would normally justify the making of a winding-up order.

47. Mr Hornett, for MSB and SSB, informed us that the judge was referred to the judgment of Hildyard J in *Re FI Call Ltd, Apex Global Management & Anor. v. FI Call Ltd. & Ors.* [2015] EWHC 3269 (Ch). In that case Hildyard J said (at paragraph 55):

> "… [t]he two statutory remedies relied upon by Global Torch (section 994 and section 122) run in parallel; but (contrary to Global Torch's initial submissions) they are not coterminous. As Stanley Burnton LJ explained in *Hawkes v Cuddy* [2009] 2 BCLC 427:
>
> > "[104] It is to be noted that Lord Hoffmann did not say that the facts giving rise to the jurisdiction to wind up under the 'just and equitable' jurisdiction were the same as those giving rise to the exercise of the jurisdiction under s 994: he used the word 'parallel'. To the contrary, he expressly approved the statement of Mummery J in Ex p. Estate Acquisition and Development Ltd that the grant of one remedy will not necessarily require proof of conduct which would justify a different remedy. In many, if not most, cases the conduct of the respondent may give rise both to the jurisdiction under s 994 and to that under s 122(1)(g); but there may be cases which satisfy the requirements of one jurisdiction but not the other. In addition, it should be borne in mind that a winding-up may be ordered on the 'just and equitable' ground where no unfair conduct is alleged, as in the cases in which the so-called substratum has gone, as in *Re German Date Coffee Co* (1882) 20 Ch. D 189 and *Re Baku Consolidated Oilfields Ltd* [1944] 1 All ER 24"."

To my mind, the judge said nothing in his judgment to indicate that he was treating the two statutory jurisdictions as "coterminous".

48. Mr Roe took us to parts of the written evidence in which MSB and SSB spoke of the agreed equality of ownership of the family assets which they understood to be of importance and their expectation that those assets would be divided equally on separation. He also showed us evidence of their recognition of the breakdown of trust and confidence between the brothers which led to the submission on behalf of TSB, in closing argument on his behalf at trial, in these terms (Closing Submissions paragraph 23):

> "23. MSB and SSB seek to resist the winding up on the ground that the breakdown has been caused by TSB's alleged breaches of duty. Given that the brothers have been talking about separation from about 2001, there is little profit to be obtained by trying to isolate who is to blame. This is classic case of relationship that outgrew its original basis. As the brothers grew up and started having families of their own and living more independent lives, and following the death of their father, the original concept of them all working together in same business and living in the same house inevitably came under strain."

49. For my part, however, I accept Mr Hornett's submission that at trial the focus of the cases on both sides was to identify the cause of the breakdown in trust and confidence which all parties accepted had occurred. TSB based his case on the specific allegations in his petition, which I have summarised above. Some of these allegations were very serious indeed; I have in mind the allegation that SSB had manipulated the payroll to enable him to misappropriate company funds. He also alleged that his brothers had set up the PPL/AMJ business to compete with the Company without his knowledge. He made the allegation about the Jay Tees business which was abandoned. As David Richards LJ said in argument, if those allegations had been made out then "consequences would follow"; however, the case was based upon those allegations and not upon a simple mutual loss of confidence alone. The judge dismissed TSB's pleaded allegations.

50. On the other hand, the judge found to be established the case that MSB and SSB advanced about Trident. They had maintained in their evidence that the removal of excessive funds from the Company by TSB, a failure to be forthcoming about what had happened in India, "followed by aggressive correspondence" from TSB's solicitors (i.e. from November 2015 onwards) brought matters to a head, with the uncovering of the Trident connection being "the last straw": SSB's Third Witness Statement (15.8.17), paragraphs 56 and 57.

51. I refer to this passage in SSB's evidence because, by his conclusions on the facts, the judge clearly accepted it. The judge agreed that it was the Trident matter, for which TSB was solely responsible, that brought about the ultimate rift. At paragraph 4 of the judgment, the judge said:

> "4. The relationship between TSB and his brothers became increasingly sour, and in 2015, things came to a head when it was discovered that TSB's son ("Sandeep"), had set up a company, Trident Powders Limited ("Trident") in competition with PPUK."

52. The simple fact is that TSB's pleaded allegations upon which he based his claim for a winding-up order failed. The countervailing allegations made by MSB and SSB in response, to a very large extent succeeded. I consider that Mr Hornett was probably right in his submission that the argument for TSB that a winding-up order should follow simply because of a breakdown in trust and confidence was a skilful fall-back attempt by those then representing TSB to rescue his case when it was becoming clear that his case on the specifically pleaded allegations was likely to fail.

53. For these reasons, I would reject Ground 1(a) of the Grounds of Appeal. I consider that Ground 1(b) fails for the reason already expressed above. It also fails as the judge's remark merely introduced relevant passages from the authorities touching upon the primary issue in the case.

54. Ground 1(d) is in my judgment also mistaken in contending that "the only positive reason [the judge] gave for not making a winding-up order was not a good one". This refers to what I see to be an "add-on" remark by the judge that the effect of an order would be "to leave the field clear for Trident, a result which I believe would be unjust and inequitable". It is quite clear that, in paragraph 201 of the judgment, the judge was saying that (in his own words) "…[i]n all the circumstances" of the case, which he had set out extensively in the earlier parts of the judgment, TSB had not been unfairly prejudiced and that it would not be just and equitable to wind up the Company. "There [was] no justification for doing so **and** the effect would be to leave the field open for Trident…" (my emphasis). His judgment read, as a whole, fully justified the conclusions to which he came. He was entitled to find it unjust and inequitable to allow Trident to benefit from a winding-up order as an additional factor.

55. In the light of his other findings, the judge was also entitled to find that equitable considerations did not operate to exclude the exercise of MSB's and SSB's rights under the articles of the Company, notwithstanding the agreed winding-up of the partnership businesses in the partnership action. I would reject Ground 1(e) also.

56. There is no basis for contending that the judge failed properly to exercise his discretion under section 122 of the 1986 Act, as argued in Ground 1(c). No flaw in his evaluation of the facts has been shown and I find no other error of principle. He found against TSB in respect of the factual allegations which he had relied upon in applying for the winding-up order. Having so found, he was fully entitled to dismiss the petition.

Result

57. I would dismiss the appeal.

Lord Justice Simon:

58. I agree.

Lord Justice David Richards:

59. I also agree.