

**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**CAUSE NO FSD 200 of 2015 (IMJ)**

**IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)**

**AND IN THE MATTER OF STERLING MACRO FUND**

**IN CHAMBERS**

**Appearances:** Mr. P Jones Q.C., instructed by Mr. B Gowrie and Mr. P Kendall of Walkers for the Petitioner  
Mr. T Lowe Q.C., instructed by Mr. J Harris of Higgs & Johnson for the Respondent

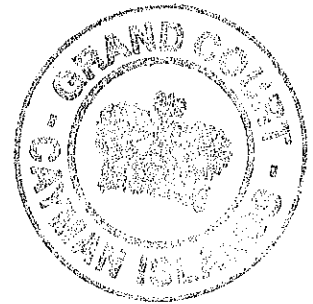
**Before:** The Hon. Justice Ingrid Mangatal

**Heard:** 24 and 26 May 2016

**Draft Judgment Circulated:** 20 July 2016

**Judgment (No.1) Delivered to Counsel and parties only:** 26 July 2016

**Released for Publication:** 6 April 2017

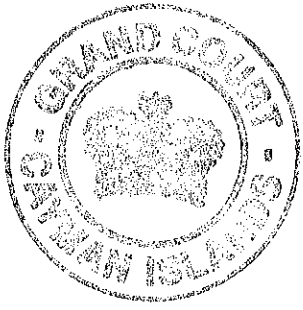


**HEADNOTE**

*Winding Up Petition by Contributory on Just and Equitable Ground - Summary Judgment Application*

**JUDGMENT**

1. This is a summary judgment application in respect of a winding up petition filed by the Petitioner, Worthing Properties Limited (“Worthing”), presented on 14 December 2015. The petition seeks to wind up Sterling Macro Fund (“Sterling”) on the “just and equitable” ground contained in Section 92(e) of the Companies Law (2013 Revision).
2. The Court made an ex parte Order on 16 December 2015 for the appointment of provisional liquidators (“the JPL Order”) which included the following amongst a number of orders made:-



- a. The JPLs were given authority to pay their remuneration out of the assets of the Company.
  - b. The JPL order awarded costs of the JPL application as an expense of the JPL application.
3. The matter came before the Court for directions on 22 January 2016. Directions were largely the subject of consent and an Order was made and a trial date fixed for 9 May 2016. That trial date was, at the request of the parties, moved to 23 May 2016 for six days.
  4. On 29 April 2016 the matter was due to come before the Court for a Pre-Trial Review ("PTR"). Prior to the hearing, Worthing had applied for the hearing of a preliminary issue.
  5. After exchange of skeleton arguments clarifying the parties' respective cases and positions, the Petitioner informed the Court that instead of a preliminary issue as formulated, it would seek summary judgment at the hearing, by then re-scheduled for the 23<sup>rd</sup> May 2016. An important distinction between the hearing of the preliminary issue and a summary judgment application is that the Court would be able, indeed required, to have regard to the evidence filed. A new trial date was also fixed commencing on 12 September 2016, with a time estimate of 10 days.
  6. The summons issued by Worthing seeking this hearing was issued on 13 May 2016 and sets out the following applications:-  

"....

    1. *The Petitioner be granted summary judgment against the Company on the basis that the Company has no prospect of defending the Petition and there is no other reason for the Petition to be disposed of at trial;*
    2. *The Company be wound up in accordance with the Companies Law;*  
*and*



3. *Such further order or relief as the Court may deem appropriate, including the orders sought at paragraphs 2 to 12 in the prayer for relief in the Petition.*

7. In effect, Worthing asked the Court to set aside 1 or 2 days to determine as a preliminary issue whether the Unlawful Transfer and the conduct of the Company in opposing the Information Application were so egregious that the Company should be wound up irrespective of the dispute as to the beneficial ownership of the shares in Worthing. Learned Queen's Counsel Mr. Jones, leading Counsel for Worthing, contends that the dispute in relation to the shares is irrelevant and is not something this court should embark on. It is a dispute which should be resolved subsequently in the Netherlands (where Mr. Katz had brought proceedings against Mr. Keilman) or in the BVI where the registered shares were situated and where Worthing is incorporated. This proposal would, he submitted also save considerable time and costs and it would obviate the need for BVI law evidence and expert evidence in relation to the authenticity of various documents, if the application for summary judgment is granted.
8. The Court agreed to hear the application and made directions accordingly, including a direction that Worthing file and serve a summons and verifying affidavit in respect of the proposed summary judgment.

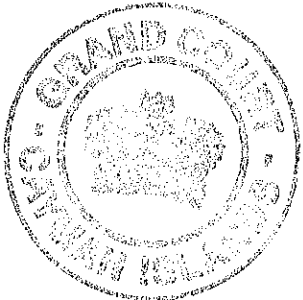
#### **THE TEST FOR SUMMARY JUDGMENT**

9. Worthing relies upon Order 14 r.1 of the GCR which provides that summary judgment can be entered on the ground that the defendant has no defence to a claim, and the fact that a question of law arises in the course of such an application does not prevent the Court determining it summarily: GCR Order 14A.
10. The equivalent English rule, now found in the Civil Procedure Rules 24.2 provides that summary judgment may be given if the Court considers that "*the defendant has no real prospect of successfully defending the claim*" and that "*there is no other compelling reason why the case or issue should be disposed of at a trial*".

11. Worthing invited the Court to consider the relevant passage in the judgment of Lewison J. in *Easyair Ltd v Opal Telecom Ltd* (2009) EWHC 339 (Ch) at (15). The principles were set out by Lewison J. in the context of an application by a defendant for summary judgment dismissing a claim. These principles were subsequently approved by the English Court of Appeal in *AC Ward & Son v Catlin (Five) Ltd* (2009) EWCA Civ 1098, [2010] Lloyd's Rep IR 301 at [24] on a case by a plaintiff for summary judgment. The principles are as follows:-

“... ”

- i. The court must consider whether the claimant has a “realistic” as opposed to a “fanciful” prospect of success: *Swain v Hillman* [2001] 1All ER 91
- ii. A “realistic” claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: *ED & F Man Liquid Products v Patel* [2003] EWCA Civ 472 at [8].
- iii. In reaching its conclusion the court must not conduct a “mini-trial”: *Swain v Hillman*.
- iv. This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: *ED & F Man Liquid Products v Patel* at {10}.
- v. However, in reaching its conclusions the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: *Royal Brompton Hospital NHS Trust v Hammond* (No 5) [2001] EWCA Civ 550.
- vi. Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on





summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict on the facts at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: *Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd* [2007] FSR 63.

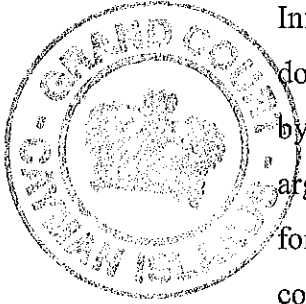
- vii. On the other hand it is not uncommon for an application under Rule 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expect to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: *ICI Chemicals & Polymers Ltd v TTE Training Ltd* [2007] EWCA Civ 725.”

12. As set out in Sterling's skeleton argument, the principles and relevant case law in this jurisdiction were reviewed in *Rankine v Scott, Martin and Ebanks* (2008) CILR Note 9 and summarized recently in *Rochester v Glasgow* (24 November 2015) McMillan J. as follows:-



- 1) The test is that used in England in cases such as *Swain v Hillman* (2001) 1All ER 91. The question is whether there is a real as opposed to fanciful prospect of defending the case.
  - 2) The Court must test this question by reference to what might or could happen if the case were allowed to proceed to trial.
  - 3) The Court should not generally grant summary judgment where there are disputed questions of fact or where there should be a trial for some other reason.
  - 4) Where there are disputed questions the Court should only grant summary judgment if it can determine with confidence that there is no answer to the claim.
13. The court needs to be very careful, Mr. Lowe suggests, to satisfy itself that the Defendant is unable to establish a bona fide defence. Reference was made to *ABC Molson Coors Brewing v ABC International*. This is also illustrated, it was submitted by Mr. Lowe, by *Three Rivers v Governor of Bank of England No 3* (2001). Indeed, Mr. Lowe went so far as to submit that summary judgment is rarely granted in this jurisdiction.
14. It is common ground that a summary judgment application should not involve a minute and protracted examination of evidence as to do this is to usurp the function of the trial judge and to produce a trial of the case without oral evidence.
15. Sterling maintains that it has a substantial case of unclean hands, and illegality and that this case is therefore about as far removed from a summary judgment scenario as it can be. The Petitioner's case on egregious conduct is also wrong if Sterling's evidence is accepted, Mr. Lowe QC submitted, and wholly exaggerated in any event.

## THE APPLICATION FOR SUMMARY JUDGMENT



16. The background relied upon in respect of the Unlawful Transfer and the conduct of the Information Application is largely not in dispute, Mr. Jones argues. All the Court has to do is to assess the validity of the excuses and reasons put forward in the affidavits filed by Sterling. When one examines the limited evidence put forward by Sterling, the argument continues, it is abundantly apparent that there is no legitimate excuse put forward. It is clear, says Learned Counsel, that there is a justifiable loss of trust and confidence in the management of Sterling and that a winding up order should be made in accordance with the settled authorities.

17. It is Worthing's position that Sterling has sought to confuse and obscure the case by seeking to rely on defences such as unclean hands, abuse of process and illegality. In reality it is doing nothing other than illegitimately fighting Mr. Katz' case, it was said, which is exactly what is behind the complaint in relation to the Unlawful Transfer and the Information Application. It is simply a continuation by the management of Sterling's improper conduct and is itself a ground on which Sterling should be wound up.

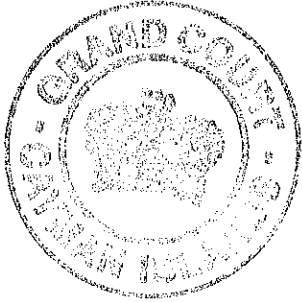
18. A cursory examination of the principles underlying these defences, Mr. Jones contends, will demonstrate that they have no application to the present case. The Court has before it all the evidence necessary to be able to come to this conclusion and it should grasp the nettle and rule accordingly. The court will be in no better position after a 2 week trial in September, even if it finds for Sterling in relation to the underlying facts concerning what Sterling alleges is Mr. Keilman's fraudulent conduct.

19. Sensible case management, Learned Counsel argues, dictates that the Court can and should wind up Sterling now and avoid the September trial which cannot result in any different outcome.

#### **JUST AND EQUITABLE WINDING UP**

20. Where there is a justifiable lack of confidence in those managing a company's affairs, the Court has power to wind up the Company on the just and equitable ground. Reference

was made to the dicta of Lord Shaw of Dunfermline sitting in the Judicial Committee of the Privy Council in *Loch v John Blackwood Ltd* [1924] AC 783 at page 788, where Lord Shaw stated that:



*"...at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But 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 which is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a 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."*

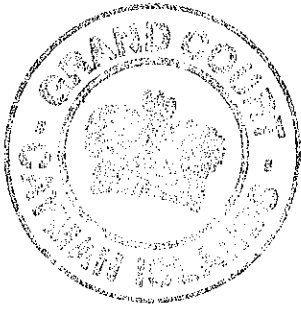
21. Reference was also made to *Ex parte Spackman* (1849) 1 Mac & G 170 at 174, 41 ER 1228 (with note) where Lord Cottenham LC stated:

*"There must be something in the management and conduct of the company which shows the Court that it should be no longer allowed to continue, and that the concern ought to be wound up"*

22. Mr. Jones Q.C. cited the fairly recent Scottish case of *Todd v Todd* 2008 SLT (Sh Ct) 26 and referred to the dicta of Lord Clyde in the Court of Session in *Baird v Lees* (1924) SC 83 at 92 where the position was summed up as follows:

*"I have no intention of attempting a definition of the circumstances which amount to a 'just and equitable' cause. But I think I may say this. A shareholder puts his money into a company on certain conditions. The first of them is that the business in which he invests shall be limited to*





*certain definite objects. The second is that it shall be carried on by certain persons elected in a specified way. And third is that the business shall be conducted in accordance with certain principles of commercial administration defined in the statute, which provide some guarantee of commercial probity and efficiency. If shareholders find that some of them are deliberately and consistently violated and set aside by the action of a member and official of the company who wields an overwhelming voting power, and if the result of that is that, for the extrication of their rights of shareholders, they are deprived of the ordinary facilities which compliance with the Companies Acts would provide them with, then there does arise, in my opinion, a situation in which it may be just and equitable for the Court to wind up the company.”*

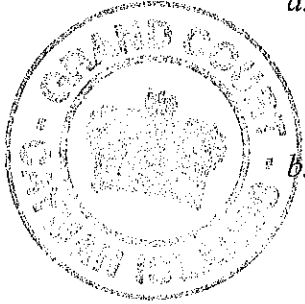
23. It was submitted that these principles are equally applicable in the Cayman Islands, and reference was made to the decision of Jones J in *Re Acorn International Inc.* [Grand Court unreported Jones J, 6 March 2015].

#### **THE GROUNDS AND ARGUMENTS RELIED UPON BY WORTHING FOR THE WINDING UP OF STERLING – THE JUST AND EQUITABLE CAUSE**

24. The Petitioner relies on three grounds:-
- a) The unlawful transfer
  - b) The conduct of Sterling in response to the Information Application; and
  - c) The findings in the FTI Review
25. However, Learned Counsel accepted that the findings in the FTI Review are not suitable for summary determination and Worthing would not be pursuing this ground at this stage of the proceedings. Nor is Worthing seeking to rely on Sterling’s conduct subsequent to the Inspection Application set out in the Petition. It is conceded that neither is suitable for summary determination.

#### **The Unlawful Transfer**

26. The Joint Provisional Liquidators were provided with the following documents that Worthing relies on in support of this application for summary judgment:-



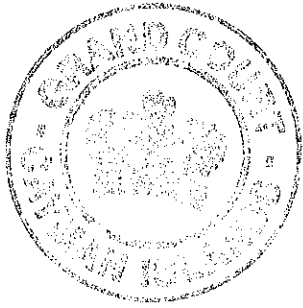
- a. A letter dated 19 June 2012 from Mr. Shibolet to Mr. Weinstock stating *"Here are the instructions of David Katz which were executed some two weeks ago in Tel Aviv...."*
- b. An undated document which purports to be an "Instruction to Transfer" addressed to the Company and signed by Mr. Katz stating *"I hereby instruct you to transfer and assign all the rights of Worthing Properties Ltd in the deposit with you to Victory Hill SA Panama. I further hereby declare that both entities are controlled by me"*
- c. A copy of a document entitled "share summary" dated 31 December 2012 which showed the only participating shareholders in the company at that date were Victory Hill SA ("Victory Hill") and Stillwater Market Neutral Fund Ltd. II ("Stillwater"). (It is common ground that Stillwater is no longer a shareholder)

27. It is common ground that Mr. Katz had no authority to instruct Sterling to transfer Worthing's rights to Victory Hill and that Sterling had no legitimate grounds to transfer Worthing's interest to Victory Hill.

28. The Directors of Sterling are Mr. and Mrs. Dabah. Worthing says that Mrs Dabah has sworn no evidence and although Mr. Dabah has, he does not deal with the Unlawful Transfer. The Chief Operating Officer of Sterling is Mr. Weinstock who has sworn an affidavit but does not seek to explain or to excuse Sterling's conduct.

29. The only evidence filed, Mr. Jones highlights, which deals with this issue is that of Mr. Katz and his lawyer, Mr. Shibolet. Mr. Katz's evidence can be found in paragraph 29 of his Affidavit which states:

*"I understand that the Petitioner in this action – who purports to be Worthing - is seeking a liquidation of Sterling on the basis that my*

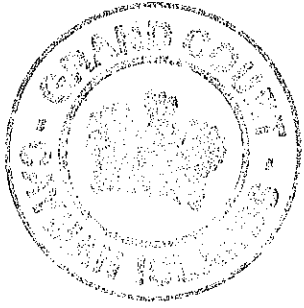


*investment in Worthing was transferred to another company beneficially owned by me, Victory Hill, S.A. I approved the decision to transfer Worthing's investment to Victory Hill in 2012. I made this decision after having learned that Keilman had stolen millions of dollars from other trust clients which were under his control in response to financial difficulties he was admittedly experiencing. To protect my investment from an attempted theft by Keilman, which is now occurring, I transferred my investment to Victory Hill. I undertook to Mr. Dabah that I would not transfer my assets out of Sterling until a determination of ownership by a Dutch court, and no steps have been made to transfer any assets out of Sterling. I also undertook to return my assets into the name of Worthing if Mr. Dabah personally requested. The sole purpose of my transfer to Victory Hill was to remove my assets from the control of Keilman, an admitted embezzler."*

30. Mr. Shibolet's evidence in relation to the Unlawful Transfer can be found at paragraph 47 of his Affidavit as follows:-

" ...

*.....by this stage (i.e. July 2012) I was convinced that Mr. Keilman would seek to steal from all of the clients whom I had referred. I decided that I needed to take whatever steps I could to protect the assets of my clients who had dealt with Mr. Keilman from any further steps he might take to try and defraud them. Although I had no specific knowledge of how he was proposing to misappropriate Mr. Katz's investment in Sterling, I was concerned about Worthing, since he had effective control of that company through the various fiduciary businesses controlled by him. The only step I could conceive and execute quickly at the time was to transfer Worthing's shareholding in Sterling to another company controlled by Mr. Katz. I caused Victory Hill.....to be incorporated in Panama for that purpose. It is important to note that Mr. Katz could as easily have removed the assets from Sterling completely or partially, had*



*he chosen to do so. The assets were not moved. Sterling has not depleted its balance sheet. Mr. Katz's and my only concern however was to protect and preserve those assets from the depredations of Mr. Keilman. On 19 July 2012 (less than a week before Mr Keilman's letter - admission to attorney Wachtel) I sent Itzhak Weinstock, an executive of Sterling, instructions to transfer and assign all rights of Worthing in the investment in Sterling to Victory Hill SA."*

31. In paragraph 51 of his affidavit Mr. Shiboletth accepts that he had no authority on behalf of Worthing to give this instruction.
32. The suggestion by Mr. Shiboletth that he could not 'conceive' of any step to protect what he considered to be Mr. Katz' beneficial ownership other than to procure the transfer of Worthing's shareholding to Victory Hill SA is, Mr. Jones submitted, ridiculous. The legitimate way to protect Mr. Katz' interest would be for Mr. Katz, it was suggested, to take appropriate proceedings against Mr. Keilman and/or Worthing. The illegitimate and unlawful means adopted obviously cannot be justified, nor should it be accepted, it is submitted, even on a summary judgment application, that he genuinely thought this was the only means to protect Mr. Katz' beneficial interest.
33. It would have been known by all concerned that Worthing had no steps it could have taken which would result in the immediate realization of its investment in Sterling, or whereby it could obtain control of Sterling. The Participating Shares would have no voting rights, so Worthing, Learned Counsel argues, could not remove and appoint the directors of its choice, and the participating shares could not be transferred without consent of the directors of Sterling as per Article 22 of Sterling's Articles of Association. Mr. Jones says that the most Worthing could have done would have been to give a redemption request 10 days prior to a Redemption Date (which was the first business day of each calendar quarter). Sterling would then be under an obligation to apply at least 90% of the value of the shares within 30 days thereafter (see the definitions of redemptions at page 3 of the offering memorandum). Thus as at 12th July 2012 when Mr.



Shiboleth wrote to Sterling, the next Redemption Date was 1 October 2012. Worthing could achieve nothing prior to that date. There was ample time, the argument continued, for legitimate proceedings to be brought to preserve the position. In any event, if the unlawful transfer had been merely a temporary expedient as a substitute for an injunction, one would have expected Mr. Katz, Mr. Shiboleth and Sterling immediately to have notified Worthing or Mr. Keilman of what they had done, explained why they had done what they had done and to have immediately commenced legal proceedings seeking a declaration that Mr. Katz beneficially owned the shares in Worthing, with the appointment of a receiver if there was a well-founded fear of dissipation. There was no notification at all, Mr. Jones concludes on this aspect, and their actions were not discovered until 2015.

34. A transfer of shares must be in the form of the instrument of transfer set out in article 24, and Worthing say that no director or officer of Sterling has sought to explain why they permitted a transfer to Victory Hill without the required instrument of transfer.
  
35. Mr. Katz says he undertook to Mr. Dabah that he would not transfer any assets out of Sterling until a determination of ownership by a Dutch court. He says he also undertook to return the assets into the name of Worthing if Mr. Dabah personally requested it. This is unbelievable, Learned Counsel submits, even on the face of the affidavit. There is nothing in writing to this effect. It undoubtedly would have been in writing if there had been such an undertaking and in any event, any responsible directors of Sterling would have insisted it was put before lawyers and drafted in a legally enforceable manner. Furthermore, the Dutch proceedings were not commenced until March 2015. There were plainly no such proceedings in contemplation in 2012. The Dutch proceedings were only commenced following a request by Worthing, Mr. Jones suggests, on 15 December 2014 for information as to how the investment was performing, and Mr. Katz and Mr. Shiboleth would have known that their attempt to appropriate Worthing's shares would be likely to be found out and it would have been for this reason that they knew that they had to adopt a legitimate strategy and commence legal proceedings.



36.

It is noticeable in the Points of Defence, Mr. Jones says, that Sterling does not seek to advance a case that there was any agreement between Mr. Katz and Mr. Dabah to the effect that Mr. Katz would not transfer any assets out of Sterling until a determination of ownership by a Dutch court, nor any undertaking to return the assets into the name of Worthing if Mr. Dabah personally requested.

37. If there was a dispute as to the beneficial ownership of the shares in Worthing, or as to the conduct of Worthing through its properly authorized officers, it was inappropriate for Sterling to transfer Worthing's shareholding in the Company without the proper authority of Worthing. Sterling's directors (one of whom was Mr. Dabah) and officers (one of whom was Mr. Weinstock) were plainly not qualified to resolve an issue as to the true beneficial ownership of shares in Worthing. Their duty was to act in the best interest of the Sterling Shareholders, namely Worthing. For the directors and officers of the Company to seek to misappropriate Worthing's shares in support of a person who claimed to be the beneficial owner of Worthing demonstrates, Learned Queen's Counsel argues, a blatant lack of probity and impartiality on the part of Sterling, especially in view of the fact that the investment by Worthing in Sterling and the validity of Worthing's shareholding in Sterling, was not in dispute. On no basis could this be in the best interest of Sterling's shareholders, even if Mr. Katz was its beneficial owner.
38. It is no answer for Sterling now to say, Mr. Jones Q.C. argues, that there was as a matter of law no transfer because the purported transfer was invalid. Sterling plainly recognized the transfer as valid (see share summary) and Sterling treated Victory Hill as the shareholder.
39. It is Worthing's case that it does not need to go any further or rely on any matter other than the Unlawful Transfer. Mr. Jones submits that it is plain, that on the evidence filed before the Court these steps alone result in a justifiable lack of confidence in the management of Sterling which justifies a winding up order.

**Worthing's Information Application – Sterling's Response Thereto as Grounds**

40. If the court were not satisfied that the Unlawful Transfer was not in itself sufficient to wind up Sterling, the conduct of Sterling, Mr. Jones posits, in relation to the Information Application renders the case irrefutable.
41. The important point to note for the present purposes is that in respect of this allegation, Worthing does not rely on the truth of Mr. Keilman's case in his dispute with Mr. Katz; Worthing's complaint is that the introduction of these matters by Sterling in its defence of the Information Application was entirely irrelevant to the Information Application and designed solely to avoid Sterling complying with its legal obligations to Worthing. The only part of Sterling's evidence that deals with the Information Application is paragraphs 51 and 53 of Mr. Shibolet's evidence:



*“51. I note that the Petitioner complains that in evidence filed in the Cayman Islands it was not revealed that Worthing's interest in Sterling was held by Victory Hill. In fact I am advised and believe that Victory Hill did not in law hold Worthing's interest in Sterling. I had no authority to give an instruction to transfer its interest. I have already explained why I did this.*

*52. I appreciate that I made no mention of the attempted transfer in the evidence filed and that the same is true of Mr. Weinstock. I humbly and unreservedly apologise to this Honourable Court for this. I recognize that we should have at least disclosed the attempt to transfer Worthing's interest, even if it was ineffective. However, I would like to explain that this was not a deliberate attempt to conceal the existence of Victory Hill.*

*53. Whilst I do accept that we had no desire to disclose information to Mr. Keilman the transfer out of Worthing was not one of the matters we withheld. It will be appreciated that I regard Mr. Keilman as a consummate liar, forger and thief.... I was very concerned that he would find a way to force Sterling to hand over a very substantial portfolio of assets. However, it is not the case that I was seeking to*



*conceal the transfer of Victory Hill in the Cayman Islands. The transfer was not concealed by me or Mr. Katz. In the Dutch proceedings we had already mentioned the transfer out of Worthing, and this fact was specifically addressed by Kreikamp in his Statement of Defence at 22....In fact I note that Mr. Keilman failed to disclose this fact on the ex parte application and it was repeatedly wrongly alleged that this had been concealed from Worthing.”*

42. Mr. Jones submitted that Mr. Shibolet's evidence is incredulous and that it is plain that Mr. Shibolet has no legitimate excuse for what took place.

#### **STERLING'S POINTS IN DEFENCE – OPPOSING SUMMARY JUDGMENT**

##### **The Factual Case according to Sterling**

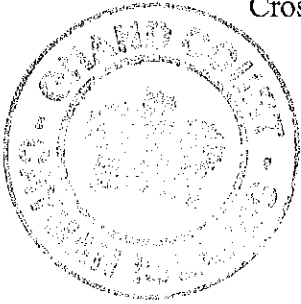
43. Sterling maintains that the Petition is a dishonest attempt by Mr. Keilman to defraud Mr. Katz of his interest in Worthing and hence in the Company. Mr. Lowe Q.C. submits that for this purpose Mr. Keilman has sworn deliberately false and dishonest affidavits in support of the Petition and has done so for the improper purpose of circumventing proceedings before the Courts of the Netherlands which are already seized of the issue of ultimate beneficial ownership. Whether this is a correct description of Worthing's evidence could not be established short of a full trial, it was submitted.
44. There are two completely contradictory stories of how funds came to be invested in the Company and who should now be treated as owning the economic interest. This gives rise to very different explanations of the material events. Sterling's case is that it is obvious when looking at the completely different accounts, that one party is being deceitful. It is submitted on behalf of Sterling that there is ample evidence of Mr. Keilman's deceit and in those circumstances on no conceivable view could there be summary judgment on the facts against Sterling.



45. The principles relied upon by Sterling that this case cannot be decided upon by way of summary judgment are therefore;
- a. Worthing comes to Court with ‘unclean hands’
  - b. The Petition is founded on illegality.

### **The Just and Equitable Grounds and Unclean Hands**

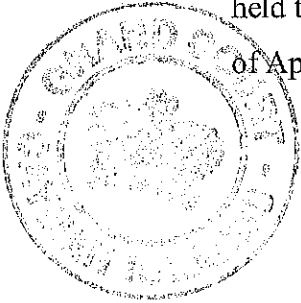
46. The just and equitable jurisdiction is doctrinally derived from the equitable principles as Lord Wilberforce said *in Re Westbourne Galleries Ltd* [1972] AC 360 at 379. Lord Cross of Chelsea observed at p387G that:



*“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.”*

47. The existence of the clean hands doctrine as applied to winding up was recognized by Jones J in *Re Heriot* [2011] CILR 1.
48. If Sterling’s case is accepted, Queen’s Counsel argued, it will result in a conclusion that the Petition is motivated by the need to consummate and complete the fraud which Mr. Keilman has practiced on Mr. Katz by taking over the share of the Petitioner and its interest in the Company. It is difficult to imagine, Learned Counsel posits anything more serious by way of unclean hands. It is submitted that the alleged conduct - the situation with Victory Hill - was a reaction to the correctly anticipated looting by Mr. Keilman.
49. If the Company’s evidence is accepted, it would follow that the Petitioner would have relied on Mr. Keilman’s deliberately false evidence. The giving of manifestly false evidence in connection with a case is classic conduct which would disentitle a party to relief in equity. Reference was made to the decision in *Willis & Sons v Willis* [1982] 1 EGLR 62, where the defendants had sought to set up a proprietary estoppel case as a

defence to a claim for possession. In support of their claim to have incurred expenditure in reliance on the alleged representation, the Defendants put forward a forged letter apparently from a contractor summarizing work and expenses. The judge in that case held that this conduct disentitled the defendants from the assistance of equity. The Court of Appeal agreed, with Donaldson MR at page 63m stating:-



*“The conduct of the appellants which has been disclosed in this case was such that no court could, in my judgment, possibly grant equitable relief.”*

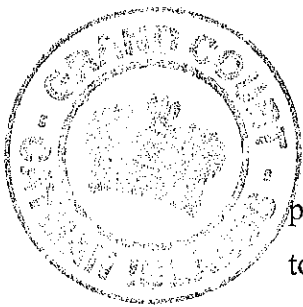
Parker LJ:

*“When a person seeks the aid of the Court to obtain the Court’s assistance, via the principles of equity, to override somebody’s strict legal rights, it is clearly a case for the application of the maxim, as indeed is accepted by the appellants, “that he who comes to equity must come with clean hands”.”*

50. Reference was also made to the decision in ***Gonthier v Orange Scaffolding*** [2003] EWCA Civ 873.
51. It would not matter whether the Petitioner can make out the just and equitable ground by reference to the disclosure application and the attempted Victory Hill transfer, Mr. Lowe submitted. If it is established that the Petitioner does not have ‘clean hands’, it will be debarred from equitable relief notwithstanding that the grounds for his relief are otherwise made out. In Lord Cross’ analysis in ***Westbourne Galleries, Willis*** and ***Snell’s Principles of Equity*** 33<sup>rd</sup> Ed. pp5-010, Counsel suggests it can be seen that the clean hands doctrine does not permit a balancing exercise.

### **Bad Faith**

52. In its written submissions Sterling argues that Worthing has produced false evidence to the Court by presenting the affidavits of Mr. Keilman. Sterling must, Mr. Lowe submits, be entitled to demonstrate that the affidavits are false and maintains that these winding up

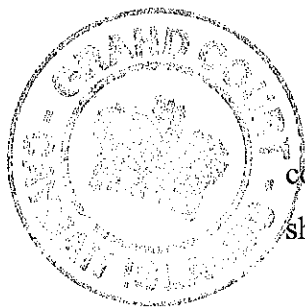


proceedings are brought in bad faith for an improper or collateral purpose. Sterling needs to be able to rely on its evidence in an effort to demonstrate that Mr. Keilman is engaged in a fraudulent attempt to wrest from Mr. Katz the value of the investment.

53. Proceedings brought by Mr. Katz are currently underway in Holland to establish the beneficial ownership of the shares in Worthing. The only purpose of those proceedings is, Learned Queen's Counsel submits, to ensure that Mr. Keilman does not use the fact that he can exercise the powers of registered shareholder to run away with the Company's assets.
54. Proceedings were commenced in Holland for declaratory relief. Given Mr. Keilman is subject to the Dutch Bankruptcy regime (and cannot travel) that makes perfect sense, Learned Counsel declared. Mr. Keilman is domiciled there so the Dutch court plainly has personal jurisdiction against him. Since those proceedings started Mr. Keilman purported to issue 49,995 shares to Niaga. Accordingly, very recently, Mr. Katz has applied to the Dutch Court for permission to implead the other shareholders (Niaga and Mr. Renders) as well as Worthing. Mr. Keilman has opposed that application and the decision of the Dutch Court is awaited.
55. If the instant proceedings allow a winding up and distribution to Worthing without reference to the fraud that Sterling says is being practiced on Mr. Katz, these proceedings will have secured access to the Company's assets and avoided any investigation into Mr. Keilman's actions. It could be inferred that this is the principal purpose of these proceedings which Mr. Keilman has caused the Petitioner to bring, Learned Counsel continues. Sterling should be allowed to show that the motive behind these proceedings is improper and that they represent an abuse of process.

### **Illegality**

56. Sterling wishes to be able to show that the winding up petition is founded upon the fraud of Mr. Keilman in that the purpose of the proceedings is the penultimate step in



consummating and completing the fraud by which Mr. Keilman deprived Mr. Katz of his shares.

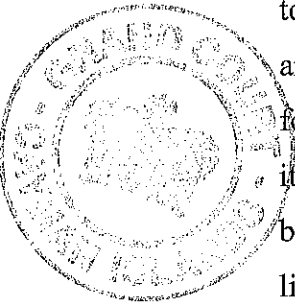
57. Sterling seeks to demonstrate by its evidence that these proceedings are an essential part of Mr. Keilman's fraud and if granted relief, the court would allow him to profit from this conduct. See *Hall v Herbert* [1993] 2 SCR 159 at 169. Dishonesty is a sufficient form of unlawfulness for these purposes. Reference was made to *Les Laboratoires Servier v Apotex Inc* [2015] AC 430.
58. Mr. Lowe QC, at the hearing in May 2016, submitted that there is an unsettled debate as to whether the test is that set out by the majority of the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340 as suggested by Lord Sumption in *Laboratoires Servier* and *Bilta (UK Ltd) v Nazir* [2015] 2WLK 1168, or the broader test set out by the Court of Appeal in *Tinsley* and by Lord Wilson in *Hounga v Allen* [2014] 1 WLR 2 889. He had indicated that the matter was currently before the Supreme Court in an appeal from the English Court of Appeal in *Patel v Mirza*. In this jurisdiction the company is free to argue for the test used by the Supreme Court of Canada and Lord Wilson in *Hounga*, Mr. Lowe submitted. Summary judgment ought not, therefore, to be given in that unsettled state of the law. Worthing's instructing Counsel, after Judgment had been prepared and circulated in draft, kindly and efficiently brought to my attention that the Supreme Court has now (in fact on 20 July 2016), delivered its Judgment in *Patel v Mirza*. I have not had a chance to examine the Judgment in any detail, but the case summary indicates that the Supreme Court has held that the rule in *Tinsley v Milligan* [1994] is no longer to be followed.

## **WORTHING'S RESPONSE TO STERLING'S DEFENCES**

### **'Unclean Hands'**

Mr. Jones referred to the recent consideration of the ‘unclean hands’ principle by the Court of Appeal in England in *Royal Bank of Scotland v Highland Financial Partners* [2013] EWCA Civ 328, [2013] 1 CLC 596.

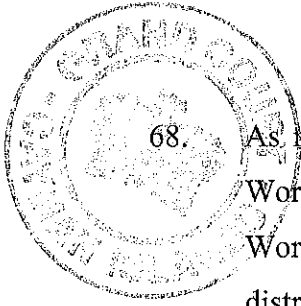
60. Mr. Jones, in response also indicates that although the Petition set out by Worthing includes what it understood was the source of the monies which it invested in Sterling, this was incorporated by way of background only. It is not relevant to the grounds relied upon. Sterling has challenged that evidence and has said Mr. Keilman is being dishonest in giving it, but its resolution is irrelevant to the grounds relied upon by Worthing to wind up Sterling.
61. Further, it was argued that the alleged fraudulent misappropriation by Mr. Keilman of Mr. Katz’ interest in Worthing does not have either an ‘immediate’ or a ‘necessary’ relation to the equity sued for. Worthing is relying on its contractual and statutory rights as a shareholder of Sterling and is not seeking to ‘*derive advantage from {its} dishonest conduct in so direct a manner that it is considered to be unjust to grant {it} relief.*’” to quote the words of Spry’s Principles of Equity - referred to by Aikens LJ in *RBS v Highland Financial Partners* as previously referred to.
62. It is not sufficient, posits Mr. Jones, to say that Mr. Keilman’s conduct as past controller of Worthing shows he does not have ‘clean hands’ vis a vis Mr. Katz when the relief Worthing seeks is not based on what it is alleged Mr. Keilman has allegedly obtained fraudulently from Mr. Katz, but is based on the legitimate contractual and statutory rights which Worthing has against Sterling, as the sole participating shareholder in Sterling. These rights exist quite independently of the fact that Mr. Keilman might (allegedly) have fraudulently misappropriated Mr. Katz’ interest in Worthing.
63. Mr. Jones submitted that the Proceedings are being used precisely for the purpose for which they were properly designed, namely, a complaint that the directors of Sterling have misused the powers vested in them such that there is no confidence in their management of Sterling, that Sterling should be wound up, its assets sold and the net



proceeds after expenses distributed to Worthing. The fact that if the assets are distributed to Worthing they might then be distributed by Worthing to the registered shareholders and not Mr. Katz does not, he submits, amount to Worthing using the present proceedings for some purpose collateral to obtaining the winding up of Sterling and the distribution of its assets. That is plainly the only purpose for which these proceedings are being brought. Worthing is not pursuing any purpose unrelated to the subject matter of the litigation. Worthing's purpose is directly related to the subject matter of the litigation, namely, to obtain the liquidation of Sterling and the distribution of its assets.

### **Illegality**

64. The short answer to this point, Mr. Jones submits, is that Worthing is not seeking to sue on, and its claim is not founded on, an illegal agreement or transaction, or an agreement or transaction entered into for an illegal purpose. It is common ground that the acquisition of the shares by Worthing in Sterling was perfectly legal.
65. It was further submitted that Sterling's attempt to show that the winding up Petition is founded upon the alleged fraud of Mr. Keilman, in that the purpose of the proceedings is the penultimate step in consummating and completing the fraud in depriving Mr. Katz of his shares, effectively seeks to pierce the corporate veil of Worthing and to conflate the perfectly legitimate rights that Worthing has as shareholder with the separate dispute between Mr. Keilman and Mr. Katz as to the shares in Worthing.
66. Reference was made to the UK Supreme Court's decision in in *Prest v Petrodel* [2013] UKSC 34, [2013] 2 AC 413 where the limited circumstances in which the Court may pierce the corporal veil are described.
67. Worthing, Learned Counsel maintains, has not been used to evade the law or to frustrate its enforcement. The corporate veil cannot be pierced. It is separate from its shareholders and the dispute that presently exists is as to the ownership of the shares in Worthing.



68.

As regards illegality, it was submitted this is not relevant in the present case because Worthing's claim is not founded on anything illegal. It is vindicating its legal rights. Worthing has not acted dishonestly against Sterling. The receipt by Worthing of a distribution from Sterling will not result in Mr. Keilman receiving anything at all. This would only occur if Worthing made a subsequent distribution to Mr. Keilman. This is an issue for another case and another court or tribunal, it was submitted.

69. Reference was made to paragraphs 82 to 84 of Sterling's April skeleton argument, where Sterling refers to a number of controversial issues relating to the policy of illegality that presently exist. None of these controversies is relevant, Learned Counsel submitted, and Sterling is simply seeking to complicate what is a simple case. Mr. Jones Q.C. submitted that there is no realistic prospect of a trial judge coming to the conclusion that he or she is prevented by the policy of illegality from adjudicating on Worthing's claim.

## **DISCUSSION AND ANALYSIS**

70. From the outset, I asked Mr. Jones Q.C. whether there was any case in the impressive bundle of authorities cited by Worthing (in excess of 34), or indeed, in Sterling's authorities, involving a case where a Court had given summary judgment on a winding up Petition on the Just and Equitable Grounds. He conceded that there was not, but submitted that the principles underlying summary judgment were nevertheless applicable. Learned Counsel suggested that there were a few discrete issues (the alleged Unlawful Transfer and Sterling's conduct in response to the Information Application), which, if the Court agreed with him on those, that would lead to the conclusion that there is no Defence to the Petition. If not, well then that would simply mean that the matter would have to go to trial.

71. In my view, it is clear that no express provision is made for summary judgment on a winding up Petition, and summary judgment is not technically available under the Grand Court Rules ("the GCR"), Order 14. Neither the Companies Law nor the Companies Winding Up Rules provide for such a procedure. It was nevertheless conceded by Mr.

Lowe Q.C. that, although unorthodox, the summary judgment application could proceed as a preliminary issue if the question was properly formulated as such in the summons and the Court would have regard to the evidence filed. I accept that the application is unorthodox, but permissible on the face of it.

72. It is also important, I think, to refer to sub-sections 104(1) and (2) of the Companies Law, (2013 Revision), as well as Order 4 r. (1) and (2) which provide as follows:



***“Companies Law***

*Appointment and powers of provisional liquidators*

*s. 104(1). Subject to this section and any rules made under section 155, the Court may, at any time after the presentation of a winding up petition but before the making of a winding up order, appoint a liquidator provisionally.....*

*(2) An application for the appointment of a provisional liquidator may be made under subsection (1) by a creditor or contributory of the company ....., on the grounds that-*

*(a) there is a prima facie case for making a winding up order;*

*and-*

*(b) the appointment of a provisional liquidator is necessary in order to-*

*(i) prevent the dissipation or misuse of the company’s assets;*

*(ii) prevent the oppression of minority shareholders; or*

*(iii) prevent mismanagement or misconduct on the part of the company’s directors.*

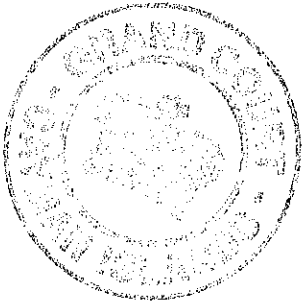
*.....*

***Winding Up Rules***

*Application by Summons (O.4, r.1)*

*1(1) An application by a creditor or contributory for the appointment of a provisional liquidator on one or more of the grounds contained*





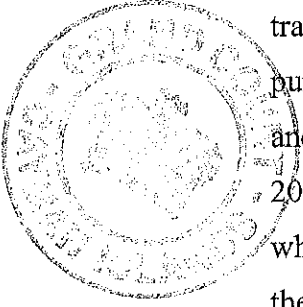
*section 104(2) of the Law shall be made by summons on notice to the company.*

*(2) The company shall be entitled to at least 4 clear days' notice of the application unless the Court is satisfied that there is some exceptional circumstance which justifies the application being made ex parte."*

(My emphasis)

73. I did on 16 December 2015 make *ex parte* the order for appointment of provisional liquidators as sought by Worthing. Thus, I did at that time find that there was a *prima facie* case for making a winding up order. However, it is important to appreciate that at the time when that order was made, no points of defence, and no affidavit evidence had yet been filed by Sterling, nor indeed had further affidavits subsequently filed by Worthing, then been before the Court for consideration. I raise this to say, that therefore, in considering this application for summary judgment, which is made on the basis that Sterling has no real prospect of succeeding in defending, or opposing the Petition, this is a different question, considered at a very different stage of the proceedings and upon a different evidentiary basis. Thus, the appointment of provisional liquidators does not take the application for summary judgment by Worthing any further. Nor was it sought to be so argued.

74. For completeness I should add that Sterling on 15 January 2016 appear to have provided to the JPLs a draft summons seeking to discharge or set aside the appointment of the JPLs. However, although not proceeded with, at the directions hearing, Sterling did reserve its rights to challenge aspects of the JPL Order, if necessary. Sterling by way of an amended summons filed 26 May 2016 has sought revocation and variation of certain aspects of the JPL Order and this application was heard by me on 7 July 2016. This application has to do mainly with the question of which party should bear the JPL's costs, pending the determination of the Petition and also seeks certain undertakings from Niaga and fortification of undertakings. These matters will be the subject of a ruling by me shortly.



75. As discussed earlier, Worthing relies upon the fact that there was a purported transfer of the shares in Worthing to Victory Hill, which has been referred to as the “unlawful transfer” throughout Worthing’s submissions. However, Sterling’s position is that the purported transfer is more appropriately characterized as procedurally wrong, ineffective and unauthorized, but not unlawful. In effect, Sterling says nothing happened between 2002 and 2012 that suggested that there was any dispute with Mr. Keilman. Therefore, when in 2012 Mr. Shibolet, with the approval of Mr. Katz, instructed Sterling to change the Register of Shareholders from having Worthing as shareholder to replacing it with Victory Hill, at that time, all they knew was that they had a director, Mr. Keilman, who, on their case, had allegedly misappropriated funds and assets belonging to Mr. Shibolet’s clients, and was a liar and a cheat. They were worried about his stewardship of Worthing, and Worthing had no assets other than its interest in Sterling. Further, as regards an economic or beneficial interest in Worthing, as far as they were concerned and knew; only Mr. Katz had such an interest and his interest was as the one hundred percent owner of Worthing. It is therefore in that context that Mr. Lowe submitted, firstly, that there wasn’t actually a transfer, and secondly, in terms of conduct, it could not be described as egregious, because all they knew was that Mr. Katz was the beneficial owner of Worthing. On Sterling’s case, at the time of taking this alleged step of self-help, albeit ineffectually, they knew nothing of, and had not yet been informed that Mr. Keilman claimed an interest. As Mr. Jones candidly and correctly stated early in his oral submissions before me, he had to proceed on this summary judgment application on the basis that Sterling’s case is made out, and that the investments were held at the time by Mr. Katz. In my judgment, Sterling does have a real prospect of arguing along the lines discussed above with regard to the alleged transfer, and therefore the purported transfer of the shares from Worthing to Victory Hill was not in my view susceptible to being by itself a ground for winding up the Company.

76. Further, as discussed in *Loch and John Blackwood*, and at paragraph 643 of French’s Work, in order to justify the winding up of a company on the basis of lack of confidence in those in control, the lack of confidence must be justified by their lack of probity, and that lack of probity must be objectively justified. In my view, complicated and somewhat



convoluted as it may be, there is a realistic prospect of Sterling arguing that, since this head of loss of confidence, is determined, not by Mr. Keilman's loss of confidence on a subjective basis, but rather on an objective basis, then if Sterling is right about the circumstances in which the ineffectual transfer occurred and the timing in which it occurred, then Sterling would not have been involved in any lack of probity. The fact that there were no other creditors or shareholders is a factor upon which Sterling could rely at trial. This also is another angle from which I arrived at the conclusion that Sterling's Defence has a realistic prospect of success.

77. As regards Worthing's claim to an entitlement to summary judgment in relation to Sterling's response to the Inspection Application, Mr. Jones did indicate that Worthing is not relying upon any conduct of Sterling after the Order and disclosure made. Worthing relies upon the alleged delay in disclosing the information and further, says that at no time during that application did Sterling disclose to the Petitioner, anything about Victory Hill. The allegation appears to be an allegation of non-disclosure and not misrepresentation.

78. At paragraph 46 of the Petition, Worthing alleges as follows:

*"Victory Hill*

*46. The Petitioner has no knowledge whatsoever of Victory Hill. Until the information packs were received on 3 December 2015 pursuant to the Order of the Court dated 18 November 2015, the representatives of the Petitioner had never heard of Victory Hill and knew nothing of its alleged shares in the Company. Victory Hill was never referred to during the Inspection Application or the Katz Proceedings (which have ostensibly been brought for the purpose of obtaining the Worthing Shares)."*

79. However, in the points of Defence, at paragraph 61 Sterling has pleaded as follows:

*"Victory Hill*



61. Paragraph 46 of the Petition is denied. No admission is made as to whether the Petitioner heard of Victory Hill. However, the Petitioner did know that Mr. Katz (not the Company) had contended that there was a transfer of the Petitioner's shares prior to the disclosures made as a result of the Inspection Application.

(1) On 18 June 2013 Mr. Deckers on behalf of Mr. Katz informed Mr. Kreikamp who was (and remains) the bankruptcy trustee of RIG, that the Petitioner's interest in the Company had been transferred.

(2) The information provided to Mr. Kreikamp was in fact incorrect, because the Petitioner's interest had never changed, (Mr. Deckers was mistaken as to this).

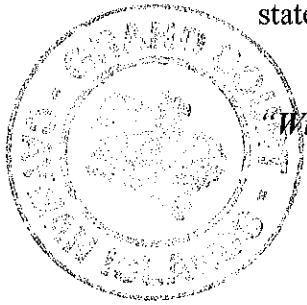
(3) Mr. Kreikamp acknowledged that he had been so informed by Mr. Deckers in paragraph 22 of his statement of defence dated 5 August 2015 filed in the Netherlands proceedings which was served on Mr. Keilman."

80. Therefore the allegation in the Petition in relation to the Inspection Application with regard to Sterling's non-disclosure about Victory Hill does seem to be a matter that has been put in issue. It is an issue that in my view has a realistic prospect of success requiring trial. It is true that in relation to Mr. Shibolet's evidence at paragraphs 51-53, referred to at paragraph 41 (above), it could be said that Mr. Shibolet could have been more straightforward. Also, this point should have been addressed by the Directors of Sterling. However, Mr. Shibolet was candid in saying that he did not want to disclose information to Mr. Keilman, but he says the transfer or purported transfer was not one of those things, and reference was made to the Dutch proceedings. I am not able to say that Sterling's handling of the Inspection Application by itself, or in combination with the attempted transfer, would be such as to entitle the Petitioner to summary judgment.

## **COURT'S DISCRETION TO MAKE WINDING UP ORDER**

81. However, perhaps more fundamentally, I do not think that the Court could say that the conduct was so egregious, that this Court could say that Sterling should be wound up, whatever my discretion may be with regard to the general discretion as to winding up, and whatever the allegation of dishonesty or unclean hands.

82. I wish to make reference to the well-known work of Derek French, *Applications to Wind Up Companies*, Third Edition, paragraphs 5.75, 5.76, 5.79 - 5.83(inclusive), cited by Mr. Lowe Q.C. The learned author there states principles that confirm my own views. He states as follows:



***Winding-up Order: the Court's Discretion Whether to Make an Order or Not***

*Discretion of court*

5.75

*The fact that one or more of the circumstances in which a company may be compulsorily wound up exists does not mean that a winding-up order will be made as a matter of course. The court's power to order the winding up of a company is discretionary, both in relation to registered companies....and in relation to unregistered companies....*

5.76

*For judicial confirmation that the power is discretionary in relation to registered companies, see Langley Mill Steel and Iron Works Co, in which Malins V-C said, at pp 29-30, 'I am of opinion that the court has.... complete discretion in all cases of winding up, and must exercise that discretion with reference to all the surrounding circumstances; Re P and J Macrae Ltd.; Fallis v. United Fuel Investments Ltd.; Re Southard and Co. Ltd per Buckley LJ at p 1203 and Bridge LJ at p 1207; Malayan Plant (Pte)Ltd v Moscow Narodny Bank Ltd, in which Lord Edmund-Davies said that what is now s 122(1) 'serves to vest in the court a wide discretion'; Re Derrygarrif Investments Pty Ltd; Re Bula Ltd, in which McCarthy J said at p448 that it was 'a true discretion which should be exercised in a*

principled manner that is fair and just'; *Re Armour Insurance Co Ltd*; *Pilecon Engineering Bhd*; *Montgomery v Wanda Modes Ltd*.

.....

*Discretion must be exercised judicially*

5.79

*The discretion whether or not to make a winding up order must be exercised judicially, but the very existence of discretion means that no rules can be laid down concerning the exercise of the discretion.*

*In Re P and J Macrae Ltd Upjohn LJ said, at p237:*

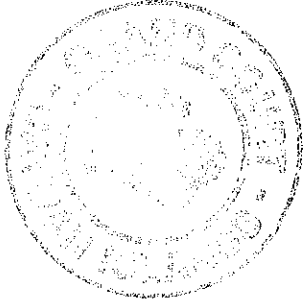
*A judicial or textbook gloss upon the terms of the discretion are apt to mislead if they are treated as a complete statement of the law. Reported cases can only be quoted as examples of the way in which in the past judges have thought fit to exercise the discretion, and judicial decision cannot fetter or limit the discretion conferred by statute or even create a binding rule of practice.*

*Harman LJ concurred with this in Re J D Swain Ltd, and in Re LHF Wools Ltd where he paraphrased Upjohn LJ as having said that other cases about discretion could be 'no more than guides or signposts along the road'.*

*In Re Bayoil SA Ward LJ, speaking of the discretion conferred by IA 1986, S 125(1) said, at p156:*

*Like every wide discretion, this one conferred by the Act must be exercised judicially. It is not unusual, indeed it is salutary and proper, for the court, especially this court, on occasions to give guidance to the judges as to how judicially they will ordinarily be expected to proceed. Consistency of approach leading to certainty in the litigation process is a virtue. That was the concern of Edmund Davies LJ in... *Re LHF Wools Ltd*:*

*...I am a little nervous, accordingly, about any decision which appears to lay down almost as a statement or proposition of law that that discretion has to be exercised in any particular direction.*





*The guidance which may be given serves therefore to establish the principle by which the discretion is generally to be exercised, recognizing, however, that the rule is **always** subject to the exception that, in order not to fetter the discretion, special circumstances, which the judge should explain if his exercise of discretion is to be upheld on appeal, will always justify a departure from the rule.*

*The court must also assess all the material evidence and consider all relevant issues. In relation to petitions under s 122(1)(g) (the just and equitable clause) Nicholls LJ said, in *Re Walter L. Jacob and Co Ltd*:*

*In considering whether or not to make a winding up order under s 122(1)(g), the court has regard to all the circumstances of the case as established by the material before the court at the hearing...The court will consider those matters which constitute reasons why the company should be wound up compulsorily, and those which constitute reasons why it should not. The court will carry out a balancing exercise, giving such weight to the various factors as is appropriate in the particular case.*

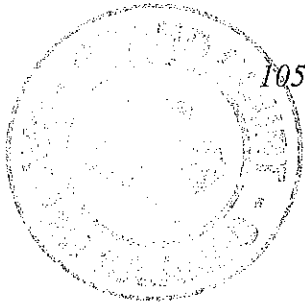
(Underlining emphasis mine)

### **Unclean Hands and Illegality**

83. I next turn to the matters of unclean hands and illegality. It seems to me that I ought not to go into the arguments advanced to me on these matters in any great detail. I have formed the view that I cannot clearly say that as a matter of law, what is raised by Sterling in respect of both of these heads is something that they ought not to be able to rely upon by way of Defence to these winding up proceedings.

84. As regards Sterling's allegation about the dishonest purpose of the bringing of the proceedings, in paragraphs 104 and 105 of the Points of Defence it is pleaded as follows:

*" 104. By these proceedings the Petitioner seeks to recover for its purported/registered shareholders the value of its investment in the Company. The purported*



*/registered shareholders and directors have left Mr. Keilman to initiate and manage these proceedings by granting him a power of attorney.*

105. *These proceedings represent an attempt by Mr. Keilman to complete and consummate the unlawful and fraudulent misappropriation of Mr. Katz's bearer shares so that Mr. Keilman or persons designated by him could obtain the benefit of the Petitioner's interest in the Company."*

85. Mr. Jones Q.C. is correct that Worthing is a separate legal entity from Sterling and from Mr. Keilman, and that it is Worthing that has the shareholding in Sterling. However, for the purposes of the summary judgment application, I have to take note of the fact that the matters that Worthing refers to as being just background, i.e. as to the beneficial ownership of the shares in Worthing, have been responded to by Sterling. Worthing has not sought to strike out from Sterling's Defence or Affidavits, those parts that it says is irrelevant. Instead, it has responded to them by filing evidence and relying upon documents, which Sterling in turn says is forged.

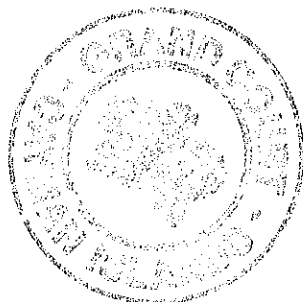
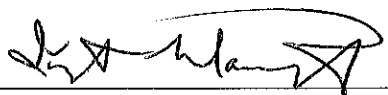
86. Further, it would not be a very complex step to see that if Worthing were to be wound up, the next step would be to distribute monies to Mr. Keilman and Niaga since they are purportedly the owners of Worthing's shares. However, it would appear that Worthing is saying, well, that is a separate matter. That that would require Mr. Katz to apply for injunctive relief, perhaps in the Dutch proceedings and that this Court need not concern itself about that.

87. Whatever may be the strict legal theory, whether it is the penultimate step in the process or the ultimate step by which Mr. Keilman would benefit, in my judgment, for the purposes of the summary judgment application, there is plainly an argument and case for Sterling to argue with a realistic prospect of success that this, particularly in conjunction with other factors, would be relevant to the exercise of my general discretion as to whether to make a winding up order in these proceedings.



88. Whilst Mr. Jones Q.C. made some very powerful submissions as to the irrelevance of Sterling's arguments as to unclean hands, improper purpose for bringing the Petition, and illegality, I am not persuaded at this stage that they are irrelevant or unarguable in themselves. In my view, the points raised are complicated and have a real prospect of success. It is important that I not say anything more than necessary about the facts of the case because the outcome of my ruling is that these issues will now have to proceed to trial before me.

89. The relief sought in summons dated 29 April 2016, filed by the Petitioner, Worthing, is therefore refused. Costs are awarded to the Respondent Company Sterling on the standard basis, to be taxed if not agreed.



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**THE HON. JUSTICE MANGATAL**  
**JUDGE OF THE GRAND COURT**