

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANGUILLA

AXAHCVP2021/0003

BETWEEN:

PALMAVON J. WEBSTER

Appellant

and

**[1] SEA ISLAND REALTIES LIMITED
[2] JOHN O. DYRUD ((as a shareholder and
director
of Sea Island Realities Limited)**

Respondents

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Sydney A, Bennett, KC.	Justice of Appeal [Ag.]

Appearances:

Ms. Tana'ania Small Davis KC instructed by Webster LP for the Appellant
Ms. Jean Dyer and Ms. Liska Hutchinson for the 2nd Respondent
No appearance by or on behalf of the 1st Respondent

2022: February 8
2023: March 22.

Civil Appeal – Winding up proceedings – Application by shareholder to wind up company on just and equitable ground – Section 217 (1) (a) (ii) of the Companies Act of Anguilla– Arbitration Award – Whether the learned judge misunderstood and misinterpreted the Arbitration Award between the parties – Breakdown of trust and confidence – Quasi Partnership – Deadlock in management of company – Whether the learned judge erred in fact and/or law in finding that there is a

functional deadlock of the parties – Whether the learned judge erred in finding that the substratum of SIRL was gone – Alternative remedies to a winding up order – Exercise of Judicial discretion – Whether learned judge erred in the exercise of his discretion – Approach of appellate court to evaluations of fact

The appellant Ms. Palmavon J. Webster (“Ms. Webster”) and the second-named respondent Mr. John O. Dyrud (“Mr. Dyrud”) each own fifty percent of the shareholding of the respondent company Sea Island Realities Limited (“SIRL”). Ms. Webster and Mr. Dyrud were married in 1986 but their marriage broke down in about 1991. This breakdown notwithstanding, they continued to enjoy a cordial relationship and in 1992 Mr. Dyrud joined Ms. Webster’s law practice in Anguilla.

On 18th January 1993 Ms. Webster and Mr. Dyrud executed a Partnership Agreement by which they established the law firm of Webster and Dyrud (later renamed Webster Dyrud Mitchell “WDM”). The fixed term of the WDM partnership expired in 2002 but thereafter and for several years it continued harmoniously as a partnership at will. Ms. Webster and Mr. Dyrud organized their business affairs as joint ventures during the continuance of the partnership and used corporate vehicles to transact their business. Their professional business was carried out by means of the First Anguilla Trust Company Limited (“FATCL”) and the law firm WDM. Two such vehicles were the respondent company SIRL and WDM Limited.

SIRL was incorporated by Ms. Webster in 1988 with only one issued share held by her. The sole asset of the company is a parcel of land of land in Anguilla which is 1.47 acres in extent and is more particularly described as Registration Section East Central Block 89319 Parcel 109 (“Parcel 109”). That land was acquired in 2002 the year before the commencement of the partnership arrangements between Mr. Dyrud and Ms. Webster and prior to Mr. Dyrud’s acquisition of an interest in the Company. The business relationship between Ms. Webster and Mr. Dyrud began to deteriorate in or about late 2006. The disputes were in relation to the WDM Partnership, FATCL, and related entities such as WDM Limited and SIRL.

In or about May 2007 Mr. Dyrud withdrew from the WDM practice. Ultimately, the matters in dispute were resolved by binding arbitration between them. The Arbitration Award was published by the arbitrator on 2nd November 2016 (amended on the 9th May 2017). Mr. Dyrud then sought an order for the winding up of SIRL pursuant to Section 217 (1) (a) (ii) of the Companies Act. Mr. Dyrud pursued a winding up of the Company on the basis of just and equitable grounds, claiming that the disputes and differences between Ms. Webster and himself as well as

the ensuing litigation has caused the relationship between them to deteriorate to a point where there was an irreversible breakdown of mutual trust and confidence between them. Ms. Webster opposed the petition. Her position was that SIRL was not a quasi-partnership company. It had been incorporated prior to the commencement of any quasi-partnership between Mr. Dyrud and herself and had been incorporated by her primarily for the purpose of transacting real estate business and thereafter for holding her personal and family assets.

Ms. Webster further claimed that Mr. Dyrud, by virtue of his membership as a partner in WDM (the law firm) and other related entities, derived a benefit from the loans for which Parcel 109 stood as security.

The matter was heard on 4th June 2020. In those proceedings Mr. Dyrud urged that SIRL was one of the corporate vehicles through which Ms. Webster and himself had conducted their business affairs in quasi partnership with each other. He further argued that the Partnership Withdrawal Agreement and the arbitration proceedings that foreshadowed the Arbitration Award had eroded the underlying basis upon which the parties had come together for a common purpose, and which utilised a corporate structure that employed several corporate vehicles to realise the purpose of their quasi-partnership.

The learned judge in a decision dated 5th January 2021 granted the petition for the winding up of the Company and ordered that a liquidator be appointed for the purpose of dissolving the Company in accordance with the provisions of the Companies Act. Ms. Webster being dissatisfied with the decision in the court below, appealed.

The main issues that arise for determination on this appeal are: (i) Whether the substratum of SIRL was gone and there was a frustration of purpose in the circumstances; (ii) Whether Mr. Dyrud derived any benefit from the use of SIRL's property as security for loans; (iii) Whether there was a state of deadlock in the management and affairs of SIRL; and (iv) Whether the learned judge erred in the exercise of his direction in ordering the winding up of SIRL.

Held: dismissing the appeal and ordering the appellant to pay the second respondent's costs, such costs to be assessed by a Judge or Master of the High Court if not agreed within 28 days of the date of this judgment that:

1. The fact that the company is not presently carrying out the main activity for which it was originally incorporated is not determinative of whether it has lost its substratum. However, where the common intention and understanding of the parties, upon which they both agreed, to carry on the business is no

longer possible and it can no longer serve the principal purpose for which it was agreed, the substratum will be frustrated.

Eric Duneau v Klimt Invest SA and others [2022] EWHC 596 (Ch) considered.

2. An examination of the Arbitral Award shows that the issue which the arbitrator had been called upon to resolve was whether and to what extent Mr. Dyrud had any liability for indebtedness incurred by the WDM partnership and secured by charges placed on the property of related entities such as WDM Limited or SIRL following his retirement. The arbitrator found that any liability that Mr. Dyrud might have had for any indebtedness of the partnership was proscribed by virtue of Clause 1.3 of the Partnership Withdrawal Agreement. Therefore, the submission made on behalf of the appellant that in arriving at his decision, the learned Judge had misinterpreted or had failed to properly consider the Arbitration Award is rejected.
3. When determining whether or not a company could be characterised as a quasi-partnership company or whether a petitioner was or had become a quasi-partner, the court looks through the various legal entities used by the parties to structure their dealings, to the core elements of the underlying business relationship. One of the elements required is that there be an association formed or continued on the basis of a personal relationship, involving mutual confidence. It is the existence of a personal relationship with the necessary character of confidence that is the foundation for equitable obligations. In evaluating the evidence relied upon to demonstrate a personal relationship of mutual confidence, the court should focus on the substance, not the form, of the parties' relationship. SIRL was clearly a quasi-partnership company because it was an association continued on the basis of a personal relationship, involving mutual confidence or understanding. The learned judge did not err and was right in his determination that SIRL was and had been operated by the parties as a quasi-partnership company.

Lau v Chu [2020] 1 W.L.R. 4656 applied; **Re Edwardian Group Limited** [2018] EWHC 1715 applied; **Croly v Good and others** [2011] BCC 105 applied.

4. Functional deadlock occurs when because of the inability of members to cooperate, the company is unable to function at board or shareholder level. In assessing whether a quasi-partnership is deadlocked it is however permissible to consider

not only matters concerning aspects of the business operations or assets of the company upon which the parties were already deadlocked, but specific disputes which were likely to arise between the parties relating to important aspects of the company's business or assets and which would likely result in deadlock. A deadlock however is not established merely because the relationship between quasi-partners has deteriorated to such an extent that they may well be unable to agree generally on matters which had not yet arisen and could not be specifically identified. In this case there was no claim that Mr. Dyrud has been excluded from participation in the management of SIRL or that Mr. Dyrud's quasi-partner has otherwise failed to observe equitable obligations owed to him. The learned judge therefore erred when he held that there was a state of functional deadlock in the management and affairs of SIRL.

Ng Eng Hiam v Ng Kee Wei and others 1964] UKPC 53 applied; **Lau v Chu** [2020] 1 W.L.R. 4656 applied.

5. A well-recognised basis for seeking a winding up on the just and equitable ground is the breakdown of trust and confidence between participating members within a quasi-partnership. The court has power to order the winding up of a quasi-partnership company where there has been an irretrievable breakdown in trust and confidence between the participating members whether or not such a breakdown in trust and confidence has resulted in a complete functional deadlock. The learned judge had an abundance of evidence upon which he could find that the relationship between Mr. Dyrud and Ms. Webster has broken down to the point that they can no longer coexist within a business relationship.

Re Yenidje Tobacco Company Limited 1916] 2 Ch. 426 applied.

6. An appellate court may interfere with the exercise of discretion by a trial judge only in circumstances in which the appellate court is satisfied (1) that in exercising his judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations and (2) that, as a result of the error or the degree of the error, in principle the trial judge's

decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. In this case the learned judge considered the relevant issues and did not err in principle in coming to his decision to order the winding up of SIRL. The challenge to the learned judge's exercise of his discretion to order the winding up of SIRL cannot be sustained.

Michel Dufour and others v. Helenair Corporation Ltd. and Others (1996) 52 WIR 188 followed; **Mark Byers and others v Chen Ningning (also known as Diana Chen)** BVIHCVAP 2015/0011 (delivered 12th June 2018, unreported) considered.

JUDGMENT

- [1] **BENNETT JA [AG]**: This is an appeal by Ms. Palmovan J. Webster ("Ms. Webster") against the decision of the learned judge in the court below delivered on 5th January 2021 where he ordered the winding up or liquidation of the first respondent company, Sea Island Realities Limited ("SIRL") or ("the Company") upon the application of the second respondent Mr. John O. Dyrud ("Mr Dyrud") as petitioner.

Factual background

- [2] The appellant Ms. Webster and the second-named respondent Mr. Dyrud each own fifty percent of the shareholding of respondent company SIRL. They are two of the three directors of the Company, the third director being the sister of Ms. Webster. The parties were married in 1986 but their marriage broke down in about 1991. This breakdown notwithstanding, they continued to enjoy a cordial relationship and in 1992 Mr. Dyrud joined Ms. Webster's law practice in Anguilla as a partner. On 18th January 1993 they executed a Partnership Agreement by which they established the law firm of

Webster and Dyrud (later renamed Webster Dyrud Mitchell “WDM”). The fixed term of the WDM partnership expired in 2002 but thereafter and for several years it continued harmoniously as a partnership at will. The parties organised their business affairs as joint ventures during the continuance of the partnership and used corporate vehicles to transact their business. Their professional business was carried out by means of the First Anguilla Trust Company Limited (‘FATCL’) and the law firm WDM. Two such vehicles were the respondent companies SIRL and WDM Limited.

- [3] SIRL was incorporated by Ms. Webster in 1988 with only one issued share held by her. It was continued under the **Companies Act**¹ on 1st January 1997 with a share capital of 50,000 shares. The sole asset of the Company is a parcel of land in Anguilla which is 1.47 acres in extent and is more particularly described as Registration Section East Central Block 89319 Parcel 109 (“Parcel 109”). That land was acquired in 2002 the year before the commencement of the partnership arrangements between Mr. Dyrud and Ms. Webster and prior to Mr. Dyrud’s acquisition of an interest in the Company.
- [4] The business relationship between Ms. Webster and Mr. Dyrud began to deteriorate in or about late 2006. The disputes were in relation to the WDM partnership, FATCL, and related entities such as WDM Limited and SIRL.
- [5] Discussions took place between the parties resulting in an agreement that Mr. Dyrud would retire from the WDM partnership on terms which were reduced into writing but not signed. In or about May 2007 Mr. Dyrud withdrew from the WDM practice.

¹ 2014 Revised Laws of Anguilla Chapter C65.

- [6] The parties attended private mediation in Miami in December 2013 but were unable to settle their differences. Ultimately, the matters were resolved by binding arbitration between them. After a full hearing an award was published by the arbitrator on 2nd November 2016 (amended on the 9th May 2017).

The Arbitration

- [7] In the arbitration proceedings Mr. Dyrud had urged that given the interconnectedness of the WDM partnership to companies identified as “related entities” it would be impossible to wind up the affairs of the WDM partnership without addressing indebtedness carried by those entities for the benefit of the WDM partnership. With regard to SIRL he maintained that the company was the proprietor of 1.47 acres of land in Anguilla more particularly described as Registration Section East Central Block 89319 Parcel 109 and that in 2008 that parcel had been encumbered by a charge to secure US \$370,000 for the benefit of the WDM partnership. He maintained that he had withdrawn from the WDM partnership in or about May 2007. He attached a copy of the land Register for Parcel 109 in the incumbrances section of which was listed the charges placed on that parcel and the dates and amounts of each such charge. Parcel 109 is presently held as security for a loan obtained by the WDM partnership in 2005 and subsequent refinancing obtained in 2008.
- [8] Mr. Dyrud requested that in delivering the Award the arbitrator should determine and quantify the extent of his liability for any debt incurred following his *de facto* retirement from the partnership. In its Award the tribunal held, at paragraph 307 under the rubric “**Issue**

#18 What is the extent of the parties respective liability for indebtedness of the related entities?” that any liability that Mr. Dyrud might have had was proscribed by virtue of Clause 1.3 of the Partnership Withdrawal Agreement (“PWA”) which the Tribunal had ruled to be effective and enforceable: “ Therefore, save and except for any such claim against the firm that falls within the parameters of Clause 1.3 of the PWA, it is held that the Claimant has no liability for the indebtedness of WDM.”

The Winding Up Petition

- [9] By his petition Mr. Dyrud sought an order for the winding up of SIRL on the exercise of the powers of the Court under Section 217 (1) (a) (ii) of the **Companies Act**, that Section provides:

217. (i) The Court may order the liquidation and dissolution of a company or any of its affiliated companies-

(a) Upon the application of a shareholder, debenture holder, creditor, director or officer if the Court is satisfied that—...

(ii) it is just and equitable that the company be liquidated and dissolved”

- [10] Mr. Dyrud thus pursued a winding up of the Company on the just and equitable ground, alleging that the disputes and differences between Ms. Webster and himself and the ensuing litigation has caused the relationship between them to deteriorate to a point where there has been an irretrievable breakdown of mutual trust and confidence between them. He claimed that Ms. Webster has refused to speak to him sensibly, or at all, with regard to the Company or its affairs.

Mr. Dyrud’s position

- [11] The matter came up for hearing before Innocent J on 4th June 2020. In those proceedings Mr. Dyrud urged that SIRL was one of the corporate vehicles through which Ms. Webster and himself had conducted their business affairs in quasi-partnership with each other.
- [12] There had been total and irretrievable breakdown of the longstanding business relationship of mutual trust, confidence and cooperation between the parties, which is in substance in the form of a quasi-partnership. The PWA and the arbitration proceedings that foreshadowed the Arbitration Award² had eroded the underlying basis upon which the parties had come together for a common purpose and utilising a corporate structure that employed several corporate vehicles to realise the purpose of their quasi-partnership. There was clearly no point in continuing the business relationship which has been at an end for a considerable length of time. Mr. Dyrud relied on the case of in **re Yenidje Tobacco Company Limited**³ and argued that it was not reasonable in such circumstances to suppose that these two former partners can work together in the manner in which they ought to work.
- [13] There are no member exit mechanisms in SIRL's constituent documents.
- [14] It was further argued on his behalf that the parties were unable to speak sensibly regarding matters that had been resolved by arbitration. Ms. Webster refused to accept certain findings as to how Mr. Dyrud's shareholding in SIRL and as to how the debts of related entities are to be treated. There was, accordingly, a

² Arbitration Award made by John Bassie on 2nd November 2016.

³ [1916] 2 Ch. 426 at page 431.

functional deadlock because due to the relationship between the parties the carrying out of the business had become, in a practical sense, impossible.

- [15] Moreover, the primary object of SIRL (as its name suggests) was “to transact real estate business”. The only evidence in the case in this regard was that SIRL had fallen into disuse after a few land sales. The Company’s substratum had accordingly disappeared.

Ms. Webster’s Position

- [16] Ms. Webster opposed the petition. Her position was that SIRL was not a quasi-partnership company. It had been incorporated prior to the commencement of any quasi-partnership between Mr. Dyrud and herself and had been incorporated by her primarily for the purpose of transacting real estate business and thereafter for holding her personal and family assets.
- [17] She says that she had purchased Parcel 109 in 2002 without any financial contribution from Mr. Dyrud. That property is the sole asset of SIRL.
- [18] Parcel 109 is presently held as security for a loan obtained by the WDM partnership in 2005 and subsequent refinancing obtained in 2008 and prior to the acquisition of any shares by Mr. Dyrud in the Company. Ms. Webster argues that Mr. Dyrud, by virtue of his membership as a partner in WDM (the law firm) and other related entities, derived a benefit from the loans for which Parcel 109 stood as security. Where, as in this instance the purpose of the security continues to subsist, it is neither just nor equitable to force WDM Limited to dispose of its principal asset through liquidation.

- [19] SIRL has continued for many years without any difficulties. In fact, it continues to date without such difficulties, and the current dispute arises only because Mr. Dyrud is desirous of opportunistically realising his investment in the company in a way that prejudiced her and the Company. There appears to be no specific issue related to the corporate governance and management affairs of SIRL over which the parties are deadlocked. There was no deadlock in the company: the company had 3 directors one of whom was her sister. Further no deadlock had been shown to exist at the general meeting.
- [20] Mr. Dyrud has presented no evidence that his rights as shareholder have been or are being infringed. In essence, save and except for the bald assertions regarding irretrievable breakdown of the relationship between the parties, there exists no other ground upon which the court can competently exercise its discretion to order the dissolution of the company.
- [21] What is apparent is that Mr. Dyrud clearly wants out of the company. A party simply wanting to get their investment out of a company is not a reason for winding up that company. There has to be more. The conduct which causes breakdown must represent or lead to a deadlock between the shareholders in a general meeting,
- [22] Accordingly, Mr. Dyrud had not made out a case for the winding up of the Company on just and equitable grounds.
- [23] Mr. Dyrud for his part strongly disputed that he derived a benefit from the fact that Parcel 109 stood as security for loans obtained for the WDM partnership. In this regard he pointed to the decision of the arbitrator to the effect that "...save and except for any such

claim against the Firm that falls within the parameters of Clause 1.3 of the PWA, [Mr. Dyrud] ... has no liability for the indebtedness of WDM.”

The Decision of the Court

[24] Firstly, and most importantly, the Court found that SIRL was a quasi-partnership company. It was one of the corporate vehicles utilised by the parties to undertake their joint business ventures in the form of a quasi-partnership. Prior to Mr. Dyrud's acquisition of 50% of the shares in SIRL, those shares were held by a company named FINSCO as nominee. FINSCO was owned by FATCL. Mr. Dyrud and Ms. Webster were the directors and shareholders of FATCL which they operated as a quasi-partnership. Thus, the affairs and dealings of SIRL were so inextricably intertwined with the other related entities, of which Mr. Dyrud and Ms. Webster were directors and shareholders, that SIRL could conceivably be regarded as a quasi-partnership. The court found this to have been the common intention and understanding of the parties upon which they both agreed. In this respect, the common intention and understanding of the parties have been clearly frustrated by the dissolution of the WDM partnership and subsequent acrimony between them.

[25] The court was satisfied on the evidence that there was a state of deadlock in the management and affairs of SIRL, not necessarily connected to any distinct issue, but rather generally, which would entitle the court to make an order for its dissolution.

[26] The court also posited that if one accepts the position regarding Ms. Webster's liability for the indebtedness of the WDM partnership and

other related entities, as per the Arbitration Award, Mr. Dyrud had a viable reason for exiting the Company. This situation was emblematic of the breakdown in the relationship between the parties.

[27] The court further noted that the Company is presently not trading, generates no profits and is in a dire state of indebtedness. Coupled with that reality was the fact that by reason of irreconcilable differences and long-standing disputes resulting in protracted litigation between the parties regarding the management of the many related entities which they had operated in quasi partnership, the purpose for which the parties collaborated has been entirely frustrated. There was no point in continuing the business relationship which clearly has been at an end for a considerable length of time.

[28] The court accordingly granted the petition for the winding up of the Company and ordered that a liquidator be appointed for the purpose of dissolving the Company in accordance with the provisions of the **Companies Act**.

The Appeal

[29] Ms. Webster now appeals against the above decision of Innocent J. on four grounds. She argues that the learned judge erred in finding that the substratum of SIRL has gone. The property of the Company continues to be used to secure a subsisting debt obligation which had been incurred by the WDM partnership and continues to subsist with regard to WEBSTER LP, the firm that succeeded to the same practice, with the benefit of the same banking credit facility that continues to be secured by the assets of

SIRL. A winding up of SIRL would interfere with the subsisting commercial and/or contractual credit and security relationship between First Caribbean International Bank (Barbados) Limited ("FCIB"), SIRL and Ms. Webster. Secondly, she urges that the judge erred in rejecting (implicitly) Ms. Webster's contention that herself and Mr. Dyrud were each personally liable for the indebtedness of the (now dissolved) WDM partnership towards the FCIB and that accordingly, both benefitted from the use of SIRL's property to secure that debt. Thirdly, she argues that Mr. Dyrud, as a member of SIRL, has other remedies available to him if he is dissatisfied with the affairs of SIRL that would not interfere with the credit and security relationship between FCIB, SIRL and Ms. Webster. It was, for instance open to him to seek an order for his shares in SIRL to be bought out. Fourthly, she contends that the learned judge misunderstood and misinterpreted the Arbitration Award between the parties when he found as a fact that the debts of SIRL fell within the scope of the arbitration and had been determined by the arbitrator. In fact, the arbitrator did not speak to the indebtedness of SIRL.

Whether the substratum of SIRL is gone

- [30] Counsel for Ms. Webster urges that the judge erred in finding that the substratum of SIRL has gone. She says that SIRL was (and is) essentially a holding company for the property registered as Parcel 109, which property had, from as early as 2005 been used as collateral security for loans contracted for by the WDM partnership. After the WDM partnership had come to an end following the retirement of Mr. Dyrud, Ms. Webster continued the same law practice under the name and style WEBSTER LP with the benefit of the same banking credit facility that continues to be secured by

Parcel 109. Parcel 109 continues to be used as security for subsisting debt obligations that had been incurred by the WDM partnership and after Mr. Dyrud's retirement, by its successor WEBSTER LP.

[31] Counsel for Mr. Dyrud counters that in determining whether SIRL's substratum was lost the learned judge was required to identify the main object for which it had been incorporated. She says that Ms. Webster's evidence is that SIRL's primary object (as its name suggests) was 'to transact real estate business.' On 1st January 2005 Mr. Dyrud became a shareholder and SIRL continued thereafter with a share capital of 50,000 shares with Mr. Dyrud and Ms. Webster each owning fifty percent of the shareholding. Mr. Dyrud's testimony was that it was the agreement and understanding between the parties at the time that SIRL was to be used as a realty company through which the parties could buy and sell property in Anguilla as part of their joint business ventures. Accordingly, she argues, it was common ground that the primary object of SIRL was to transact real estate business. The only evidence was that SIRL's activities had ceased and that in that respect the Company had fallen into disuse after a few land sales. It was open to the lower court to find that there was a frustration of purpose in such circumstances.

[32] In **Eric Duneau v Klimt Invest SA and others**⁴ HHJ Mark Cawson QC reviewed the principles to be applied by the courts in cases where there is an application to wind up a company on the basis of loss of substratum. He posited that the Company's Memorandum of Association is the starting point to ascertaining the Company's purpose for the purpose of considering whether there

⁴ [2022] EWHC 596 (Ch).

has been a loss of substratum or purpose, but that it is permissible and appropriate to look at other materials. He considered the case of **Re Abbey Leisure Ltd**⁵, which concerned an application to strike out a petition brought by a contributory for a winding up on the just and equitable ground, alleging unfair prejudice as an alternative. The petitioner had deposed that there was an initial agreement between the shareholders that the business of the company should be limited to one particular venture. This was strongly disputed by the respondent and no such agreement was stated in the articles or available documents. However, it being a strike out application it was decided on the assumed basis that the assertion was true. Hoffmann J and the Court of Appeal held that the continuation of the business after the determination of that one venture might properly form the basis of a petition for winding up the company on the just and equitable ground.⁶ The judge took this case as authority for the proposition that an agreement or understanding between the members as to the purpose of the company can be taken into account in determining its paramount purpose.

- [33] In **Eric Duneau v Klimt Invest SA and others**⁷ the judge noted the pronouncement of Lord Parker of Waddington in the case of **Cotman v Brougham**⁸ that the question whether or not a company can be wound up for failure of substratum is a question of equity between a company and its shareholders. He then sought to identify the reason why loss of substratum ought to provide a basis for winding up of a company at the behest of a contributory. He cited

⁵ (1989) 5 B.C.C. 183.

⁶ see *Re Abbey Leisure Ltd* [1990] BCLC 342 at 67E-F and 68E (per Balcombe LJ) and at 68H-69A (per Sir George Waller).

⁷ *Supra* n 4.

⁸ [1918] AC 514.

the words of Jenkins J (later Lord Jenkins) in *Re Eastern Telegraph Co., Ltd.*⁹ to the effect that:

“...if a shareholder has invested his money in the shares of the company on the footing that it is going to carry out some particular object, he cannot be forced against his will by the votes of his fellow shareholders to continue to adventure his money on some quite different project or speculation.”

[34] His conclusion, at paragraph 228 of his judgment was that on appropriate facts, it may be just and equitable to wind up a company if its directors cause it to embark upon acts which are outside and different from what can fairly be regarded as having been within the general intention and common understanding of the members when they became members, even though the company could still pursue its original objects as set out in its memorandum of association.

[35] It is important to note that in the instant case, the judge did not find that the substratum of SIRL had gone. He found that the common intention and understanding of Mr. Dyrud and Ms. Webster, upon which they both agreed, was to carry on the business of operating a law practice in partnership with each other using corporate vehicles to facilitate the operation of the partnership and of any ancillary businesses which they operated in connection with it. He further found that the PWA and the arbitration proceedings that foreshadowed the Arbitration Award have eroded the underlying basis upon which they had come together to achieve those objectives¹⁰ and that their common intention and understanding in that regard had been frustrated by the dissolution of the WDM partnership.¹¹ This was not a finding that the primary purpose for

⁹ [1947] 2 All E.R. 104.

¹⁰ AXAHCV2020/0010 (delivered 5th January 2021, unreported) at paragraph 40.

¹¹ Ibid at paragraph 44.

which the Company had been formed could no longer be carried out so that the substratum had gone. Rather it was a finding that there had been an irretrievable breakdown in trust and confidence between Mr. Dyrud and Ms. Webster in consequence of which the purposes for which they had entered into a collaborative relationship with each other could no longer be achieved.¹²

[36] In my judgment the fact that Company is not presently carrying out the main activity for which it was originally incorporated is not determinative of whether it has lost its substratum. Whatever her intentions may have been at the time that Ms. Webster incorporated SIRL and acquired Parcel 109, the fact is that the Company was repurposed in the period after Mr. Dyrud acquired 50% of the shares. The evidence is that the Company had been used initially for the purpose of dealing in real estate but that this activity had ceased after a few transactions. Thereafter it was used by the parties as a device for facilitating the activities of the WDM partnership. It became in essence a vehicle for holding title to Parcel 109 which parcel had been charged to secure loans obtained by WDM. It is clear from the evidence that this is not a case in which Mr. Dyrud was forced against his will to adventure his money on a project outside of the real estate business in which he had originally agreed to invest. The repurposing of the Company to be a vehicle to hold Parcel 109 had been done with his concurrence as a 50% shareholder; he had executed all documents and done all things required of him for SIRL to be used as such, and as a partner of WDM he had benefitted from its use in that way. It is no longer open to him to assert that there had been a failure of substratum because SIRL no longer carried out the business of real estate brokerage. Still less could he contend that by being used

¹² Ibid at paragraph 39.

solely as a holding company for Parcel 109, SIRL had undertaken business which was entirely outside of that which he had intended and understood its purpose to be.

- [37] Notwithstanding the foregoing, I share the view of the learned trial judge that the common intention and understanding of the parties have been frustrated by the dissolution of the WDM partnership. In the instant case the court found that the common intention and understanding of Mr. Dyrud and Ms. Webster, upon which they both agreed, was to carry on the business of operating a law practice and trust company in partnership with each other, using corporate vehicles to facilitate the operation of the partnership and of any ancillary businesses which they operated in connection therewith. SIRL was one such corporate vehicle. Its purpose was to hold property which was utilised as collateral security for loans used to finance the operations of the WDM partnership. This was no longer possible after the dissolution of the WDM partnership. After the dissolution SIRL had been repurposed to provide that facility to Webster LP the successor to the WDM partnership. To that extent its substratum had gone, because SIRL could no longer serve the principal purpose for which the quasi partners had agreed to use it.

Whether Mr. Dyrud derived any benefit from the use of SIRL's property as security for loans.

- [38] It is obviously with this consideration in mind that it was argued in the court below and on appeal that Mr. Dyrud, by virtue of his membership as a partner in WDM (the law firm) and other related entities continued to derive a benefit from the use of SIRL's property as security for the indebtedness of the WDM partnership.

On this question the learned judge accepted Mr. Dyrud's contention that the debts of the WDM partnership and the related entities in which he and Ms. Webster were involved, had been adjudged in arbitration proceedings between the parties to be solely the responsibility of Ms. Webster and Webster LP.

[39] Counsel for Ms. Webster argues that the learned judge had misinterpreted the Arbitration Award. She says that the judge failed to properly consider the Arbitration Award when he found as a fact that the debts of SIRL fell within the scope of the arbitration and had been determined by the arbitrator. She submitted that a close review of the Arbitration Award shows that the Arbitration Tribunal made no findings concerning SIRL's indebtedness. Upon a correct reading of paragraph 307 of the Arbitration Award, the Arbitration Tribunal restricted itself to a finding that Mr. Dyrud had no liability towards Ms. Webster for the indebtedness of the law firm partnership. She urged that SIRL's indebtedness remained a live issue which had not been determined by the arbitrator. She further argues that the only issue in relation to this point which had been decided in the arbitration was that Ms. Webster is responsible for the debts of the WDM law firm as shown in the 2017 accounts of the firm presented in the arbitration. The argument is that since SIRL was never a subsidiary of the WDM law firm or treated as such, its debts would not form part of the law firm's accounts. That did not mean that SIRL had no debts or that it was not responsible to the financial institutions for the loans accessed.

[40] This argument does not bear close scrutiny. An examination of the Award shows that before the tribunal, Mr. Dyrud had advised that given the interconnectedness of the WDM partnership to the "related entities" it would be impossible to wind up the affairs of the

WDM partnership without addressing indebtedness carried by those entities for the benefit of the WDM partnership.¹³ He explained that the parties were 50% shareholders in each of two companies which owned real property in Anguilla.¹⁴ It was these two companies that he identified in that context as “related entities”. The property owned by those companies (WDM Limited and SIRL) were heavily mortgaged due to their use to finance debts of the WDM partnership.¹⁵ Specifically, he referred to a significant charge placed on SIRL’s property Parcel 109 for the benefit of the WDM partnership in the year after his retirement¹⁶. It was in that context that he requested that in delivering his award the arbitrator should determine and quantify the extent to which he had any liability for any such debt incurred following his de facto retirement from the partnership.¹⁷

- [41] It can be seen that the issue which the arbitrator had been called upon to resolve was whether and to what extent Mr. Dyrud had any liability for indebtedness incurred by the WDM partnership and secured by charges placed on the property of related entities such as WDM Limited or SIRL following his retirement. As previously mentioned, the arbitrator addressed the question at paragraph 307 of his award under the heading **“Issue #18 What is the extent of the parties respective liability for indebtedness of the related entities?”** He found that any liability that Mr. Dyrud might have had for any indebtedness of the partnership was proscribed by virtue of Clause 1.3 of the PWA and that “...save and except for any such claim against the firm that falls within the parameters of

¹³ Paragraph 12 of Arbitration Award made on 2nd November 2016.

¹⁴ *ibid* at paragraphs 13-14.

¹⁵ *ibid* at paragraph 15.

¹⁶ *ibid* at paragraph 17.

¹⁷ *ibid* at paragraph 18.

Clause 1.3 of the PWA, it is held that [Mr. Dyrud] has no liability for the indebtedness of WDM.”

[42] It can therefore be seen that the Arbitration Award was not concerned with the determination or quantification of any debts owed by SIRL. It was premised on the (uncontradicted) assumption that any and all debts incurred by SIRL had been incurred for the benefit of the WDM partnership and/or that any and all charges on Parcel 109 existed to secure debts incurred by or on behalf of that partnership. SIRL is a limited liability company: liability for its indebtedness attaches to itself and its property, and not to its shareholders or directors. For this reason, the relevance of SIRL’s indebtedness to the matters in dispute is not clear.

[43] Mr. Dyrud and Ms. Webster had been responsible for the debts of the partnership incurred prior to the PWA in 2007. The judge found that the arbitrator had determined that by that agreement Ms. Webster had assumed the debts of the partnership “...save and except for any such claim against the firm that falls within the parameters of Clause 1.3 of the PWA”. Since it had not been shown that “any such claim...” existed or had been made, Mr. Dyrud had no demonstrated liability for any of the debts secured by charges on the property of SIRL. He derived no benefit from the fact that the repayment of those debts was secured by charges on the property of SIRL.

[44] It is further argued on behalf of Ms. Webster that the learned judge should have found that, although as between Ms. Webster and Mr. Dyrud, Ms. Webster had assumed the liabilities of the law firm when she continued its law firm practice following its dissolution on 31st December 2006, Mr. Dyrud had nonetheless continued to be

personally liable for the law firm's indebtedness to third parties such as the FCIB. I do not see that this argument can assist Ms. Webster. To the extent that Mr. Dyrud had assumed personal obligations to third parties such as FCIB either in his individual capacity or as a partner in WDM, or as a guarantor of partnership debt the PWA would not afford him a defense against any claim by such a third party. This circumstance notwithstanding it is not open to Ms. Webster, having assumed contractual responsibility for the repayment of such debts to assert in any dispute between herself and Mr. Dyrud that Mr. Dyrud is liable for the repayment of any debt for which she undertook contractual responsibility to repay.

- [45] For these reasons I reject the submission made on behalf of Ms. Webster that in arriving at his decision the learned judge had misinterpreted or had failed to properly consider the Arbitration Award.

The basis for the court's decision to exercise its discretion to make a winding up order

- [46] The learned judge gave three reasons for exercising his discretion to make the winding up order sought. Firstly, he held that SIRL was a quasi-partnership company. Secondly, he found that as a result of the acrimonious relationship between the parties there was a state of deadlock in the management and affairs of SIRL, not necessarily connected to any distinct issue, but rather generally, which would entitle the court to make an order for its dissolution. Thirdly, he held that there had been an irretrievable breakdown in trust and confidence between the shareholders/ quasi partners resulting from irreconcilable differences and longstanding disputes between them regarding the management of the partnership and its related

entities including SIRL which had resulted in protracted litigation between them. As a result, the purpose for which they had collaborated had been frustrated and there was clearly no point in them continuing their business relationship.

- [47] Ms. Webster challenges each of the above findings of fact and law by the learned judge. Taking each such conclusion in turn the appellant raises the following issues-

Whether SIRL was a quasi-partnership company

- [48] Ms. Webster contends that SIRL is not a quasi-partnership company. It had been incorporated in 1997 prior to the commencement of any business relationship between Mr. Dyrud and herself. Its purpose was to be a vehicle through which she would conduct her affairs and support her business ventures. SIRL acquired Parcel 109 in 2002 prior to the commencement of the partnership between Mr. Dyrud and herself and without any financial contribution from him. SIRL was (and is) essentially a holding company for a Parcel 109. Subsequently Mr. Dyrud acquired 50% of the shareholding in SIRL. The Company was not a subsidiary of the WDM partnership but a separate corporate entity.

- [49] Mr. Dyrud on the other hand submitted that from 2005, SIRL constituted a joint venture in the form of a quasi-partnership. It was the agreement and understanding between the parties that SIRL was to be used as a realty company through which the parties could buy and sell property in Anguilla as part of their joint business ventures. Mr. Dyrud had been issued and allotted shares in the company on the basis of that understanding. This, it was

submitted was a case in which, as in **Lau v Chu**¹⁸ two individuals had agreed to work on the basis of mutual trust and confidence and that trust had completely gone.

[50] In **Lau v Chu** the Privy Council relied upon and upheld the principles enunciated in **Ebrahimi v Westbourne Galleries Ltd (In re Westbourne Galleries Ltd)**¹⁹ the leading English case on whether a company is quasi-partnership, in that case Lord Wilberforce had posited at pp 379—380 that it would be impossible, and wholly undesirable, to try and define the circumstances when a corporate quasi-partnership might arise. His Lordship did however identify three elements, one or more of which was likely to be present in a company, which might be characterised as a corporate quasi-partnership.

[51] In my view the most important of these elements requires that there be an association formed or continued on the basis of a personal relationship, involving mutual confidence. It is the existence of a personal relationship with the necessary character of confidence that is the foundation for equitable obligations, and a factor which affects the conscience of a quasi-partnership's members, making it inequitable for them to rely on their strict legal rights. the requirement that there exists a relationship of “mutual confidence” has been described by Fancourt J in **Re Edwardian Group Limited**²⁰ as being the necessary “substratum” of the equitable considerations present in a quasi-partnership. Two other relevant elements identified by Lord Wilberforce include:

“...(ii) an agreement, or understanding, that all, or some (for there may be 'sleeping' members), of the shareholders shall participate in the conduct of the business; (iii)

¹⁸ [2020] 1 W.L.R. 4656.

¹⁹ [1973] AC 360.

²⁰ [2018] EWHC 1715 at (Ch) at para 232.

restriction upon the transfer of the members' interest in the company-so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere".

[52] In evaluating the evidence relied upon to demonstrate a personal relationship of mutual confidence, courts should focus on the substance, not the form, of the parties' relationship.

[53] In **Croly v Good and others**²¹ the petitioner, Mr. Croly ("C"), had been engaged by the company as a salesman. He had been paid on a commission basis but had subsequently received shares, ultimately acquiring a 40 percent holding. The first and second respondents, Mr. and Mrs. Good, held the remaining 60 percent essentially under the control of Mr. Good ("G"). C's case was that after he acquired those shares, the company had become a quasi-partnership between himself and G. C contended that it had been agreed that he would participate in managing the company's affairs and that he and G would divide the profits equally between them, drawing equal amounts of cash as payments on account of dividends to be declared at the year end. C alleged, however, that he had been expelled from the company, that no dividends had been declared, and that he had been left with a substantial debt in respect of the payments received on account of dividend. G, meanwhile, continued to run the company and to draw large amounts of cash. G's position was that he had been in sole control of the company throughout, and that C was simply an employee to whom various concessions had been granted for motivational purposes. C sought relief under the UK Companies Act 2006 s.994, alleging that the affairs of the respondent company had been conducted in a manner unfairly prejudicial to his interests as a

²¹ [2011] BCC 105.

member and asking for an order that respondents or either of them should buy out his shares at a value determined as at the date of his exclusion from the management of the company.

- [54] In that case the company had not been formed as a quasi-partnership company and it was not contended that it became one when C first acquired shares in it. The judge held, however that it did not matter when the company became a quasi-partnership, provided that it did so before the time of the conduct complained of, or at least that part of it which was alleged to be unfair because the company was a quasi-partnership. He held that there was no universal definition as to which companies fell into the quasi-partnership category. Although that concept developed from partnership law, it did not require that the company was entered into, or run, as if it were a partnership, or that the members regarded themselves as being partners. The evidence was that the company had put a remuneration strategy into effect in which C had agreed to be remunerated very largely by reference to dividends, which could only be paid from the profits of the company. In making that arrangement C had given up lucrative commission. He had participated in the management of the company to an important degree by becoming responsible for the recruitment and training of sales staff and by becoming a signatory on the company's bank account. He had exercised a substantial degree of autonomy and management responsibility in the area of sales. The court decided that in the circumstances the appropriate question was to ask whether the company had become a quasi-partnership by the time the remuneration strategy was put into effect: whether C by that stage was entitled to be treated as a quasi-partner or merely an employee who happened to have been given some shares. This question required an overall judgment on

the totality of the arrangements made and no element was conclusive either way.

- [55] After full consideration of the evidence the court found that the profit-sharing arrangement which existed between the parties, could only work if each relied on the other to act in their shared interests. In entering into those arrangements C and G had come to have a personal, rather than a purely commercial, relationship. It was a relationship that required trust and confidence and it mattered not that they had never expressly articulated any such feelings, on that overall assessment. The court held that C's participation in the company had been in the character of an owner rather than an employee and that he was not only a shareholder but had become a quasi-partner in the company.
- [56] This case is illustrative of the principle that when determining whether or not a company could be characterised as a quasi-partnership company or whether a petitioner was or had become a quasi-partner the court looks through the various legal entities used by the parties to structure their dealings, to the core elements of the underlying business relationship.
- [57] In the instant case, as found by the judge, the common intention and understanding of Mr. Dyrud and Ms. Webster, upon which they both agreed was to carry on the business of operating a law practice in partnership with each other using corporate vehicles to facilitate the operation of the partnership and of any ancillary businesses which they operated in connection with therewith. SIRL was one such corporate vehicle: its purpose was to hold property which was utilised as collateral security for loans used to finance the operations of the WDM partnership. It was clearly a quasi-

partnership company because it was ‘... an association ... continued on the basis of a personal relationship, involving mutual confidence or understanding.’ The understanding was that the two law partners and shareholders would participate in the conduct of its business, that business being initially the business of a real estate agency and subsequently the holding of property to be used to provide collateral security for loans used to finance the parties’ partnership and business ventures. The court found that the affairs and dealings of SIRL were so inextricably intertwined with the WDM partnership and its other related entities, of which Mr. Dyrud and Ms. Webster were directors and shareholders, that SIRL could properly be regarded as a part of the joint adventure conducted by them in quasi-partnership with each other.

[58] This had the legal effect of importing additional equitable considerations beyond strict legal right of the parties.

[59] In my view the learned judge was clearly right in his determination that SIRL was and had been operated by the parties as a quasi-partnership company.

Whether there was a state of deadlock in the management and affairs of SIRL

[60] Ms. Webster argues that the learned judge erred in fact and/or law in finding²² that there is a functional deadlock of the parties. She says that this was not a conclusion that it was open to the learned judge to reach on the evidence. The judge had found that while it was not in dispute that the relationship between Mr. Dyrud and Ms. Webster had broken down to the point that they can no longer

²² Supra n. 10 para 47.

coexist within a business relationship²³, there appeared to be no specific issue related to the corporate governance and management affairs of SIRL over which the parties are deadlocked.²⁴ Mr. Dyrud had presented no evidence that his rights as shareholder have been or are being infringed.²⁵ The dispute between the parties was not in the nature of a deadlock in the management of the company but rather arose out of the arbitration process.²⁶ She says that the acrimony which had resulted from the arbitration and litigation in relation to other companies had not affected the operation of SIRL and there is no evidence of any deadlock between the parties at board or company level.

[61] Mr. Dyrud's case was that there had been a breakdown of trust and confidence between the parties in the management of the WDM partnership, WDM Limited, FATCL and First Nevis Trust Company Limited and that this had also infected the relationship of trust and confidence between the parties which has resulted in deadlock in the management of SIRL. The court held, no doubt because of the state of animosity and mutual acrimony that characterised the relationship between the parties that there was a state of deadlock in the management and affairs of SIRL, not necessarily connected to any distinct issue, but rather generally, which would entitle the court to make an order for its dissolution.

[62] Functional deadlock occurs when because of the inability of members to cooperate the company is unable to function at board

²³ Supra n.10 para 13.

²⁴ Supra n.10 para 14.

²⁵ Supra n.10 para 19.

²⁶ Supra n.10 para 26.

or shareholder level.²⁷ Where the subject company is other than a quasi-partnership company, it is the management of the company sought to be wound up that must be addressed, so long as the subject company is still capable of being effectively managed, and decisions made about important aspects of the direction of its business and assets, deadlock about other matters is neither here nor there.²⁸

[63] In its decision in **Ng Eng Hiam v Ng Kee Wei and others**²⁹, an appeal from the Supreme Court of the Federation of Malaya, the Privy Council gave the term a narrow meaning. It held that "deadlock" meant that there had to be complete deadlock in the management of the company. As Lady Arden JSC observed in **Lau v Chu** at paragraph 88:

"...This would cover the case where the constitution of the company did not provide any means for resolving the deadlock, as where there were only two directors who were also 50:50 shareholders, and there was disagreement between them and neither of them was entitled to a casting vote. This was the case in *Ng Eng Hiam*. So, if one of the directors has executive powers, for example as a managing director, and the acts complained of could be carried out by him under those powers, disagreement between him and his fellow director would not give rise to deadlock."

This is the position with regard to companies other than corporate quasi-partnerships.

[64] Where the subject company is a corporate quasi-partnership, what matters is the relationship between the quasi- partners, and the extent to which the necessary basis of trust and confidence

²⁷ supra n 18 per Lord Briggs JSC at para 14.

²⁸ supra n 18 per Lord Briggs JSC at para 23.

²⁹ [1964] UKPC 53.

has evaporated. For this purpose, no aspect of their business relationship is likely to be irrelevant.³⁰

[65] In quasi-partnership companies, deadlock often covers some of the same territory as failure to observe the equitable obligations which are not written into the articles, but which are owed by one quasi- partner to another. ³¹

[66] This is exemplified by the facts of **Lau v Chu** itself. In that case the quasi partners had descended into a morass of acrimony, suspicion and counter allegations. The first instance judge found that consequently Mr. Lau had been excluded in various ways from management participation in the company's business. There was nothing in the articles of the company which gave Mr. Lau the right to participate in management. The company had however been found to be a quasi-partnership company and the judge inferred that one of the equitable obligations owed to Mr. Lau was the right to so participate. Accordingly, he held that the exclusion was in breach of the equitable obligations which Mr. Chu owed to Mr. Lau.

[67] In upholding the decision of the judge, Lady Arden JSC found that the exclusion had resulted in an inability of the parties to make decisions on important aspects of their business unrelated to management. Accordingly, she stated at paragraph 93 that:

“Mr. Lau did not accept that he should be excluded from the management of the businesses. So, the situation developed in which the parties were unable to agree about OSL's business and in that sense, which is not the sense in which the Board used the term in *Ng Eng Hiam Hiam* 31 MLJ 238, there was deadlock.”

³⁰ Supra n 18 per Lord Briggs JSC at para 25.

³¹ Supra n 18 per Lady Arden JSC at para 92.

[68] I observe that unlike the situation in the case of **Lau v Chu** there is no claim that Mr. Dyrud has been excluded from participation in the management of SIRL or that Mr. Dyrud's quasi-partner has otherwise failed to observe equitable obligations owed to him. Certainly, no evidence has been produced in support of such a claim. As the learned judge noted at paragraph 26 of his judgment:

“In the present case, the dispute between the parties seemingly concerns Ms. Webster's indebtedness to Mr. Dyrud which emanates from the Arbitration Award, and Mr. Dyrud's employment of the winding up process as a method of enforcing the Arbitration Award. It cannot be said, in these circumstances, that the dispute is in the nature of a deadlock in the management of the company.”

[69] Applying the foregoing principles to the facts at hand, I find that there is no evidence of a functional deadlock in SIRL either at the board level or at the level of the general meeting. There is little scope for deadlock at the board level because the company has three directors, the third being Ms. Webster's sister. At best it can be shown that there is a potential deadlock at the level of the general meeting because the two shareholders have an antagonistic relationship with each other and each of them has a single vote. In **Lau v Chu** at paragraph 14 Lord Briggs JSC summarised a functional deadlock as being “... where an inability of members to co-operate in the management of the company's affairs leads to an inability of the company to function at board or shareholder level.” In this case the inability of the company to function at board or shareholder level has not been demonstrated. Put another way, this potential problem (which is always present in companies with two equal and adversarial shareholders) has

not yet manifested itself in any actual disruption or impairment of SIRL's ability to function.

[70] That is of course not the end of the matter. The learned judge found (and I agree) that SIRL is a quasi-partnership company. At paragraph 17 of **Lau v Chu** His Lordship explained that in the case of a quasi-partnership company a winding-up order is the response of equity to a state of affairs between individuals who agreed to work together on the basis of mutual trust and confidence where that trust and confidence has completely gone. He clarified that in the context of quasi-partnership companies, the concept of 'deadlock' extends beyond the operability or efficacy of procedures for the management of the company and extended to an inability of the quasi-partners to agree upon matters concerning important aspects of the direction of its business and assets. His Lordship went on to observe that a complete breakdown in trust and confidence may well be the cause of functional deadlock, in a two-party quasi-partnership. Thus, in **Lau v Chu**, in determining the factors which were relevant to the question of whether the management of the subject quasi partnership company was deadlocked Lord Briggs JSC observed at paragraph 36 that:

"Finally, the fact that Mr. Chu may have acted in breach of fiduciary duty owed to OSL or PBM arising from the buy-out of PRC Holdco presented a major management challenge for those two companies, namely whether to sue Mr. Chu for an account, about which the two men would be bound to be deadlocked."

[71] I take this as authority for the proposition that in assessing whether a quasi-partnership is deadlocked it is permissible to take into account not only matters concerning aspects of the business operations or assets of the company upon which the

parties were already deadlocked, but specific disputes which were likely to arise between the parties relating to important aspects of the company's business or assets and which would likely result in deadlock. I do not however think that a deadlock can be established merely because the relationship between quasi-partners has deteriorated to such an extent that they may well be unable to agree generally on matters which had not yet arisen and could not be specifically identified.

- [72] In this regard I respectfully differ from the learned judge in so far as he held that there was a state of deadlock in the management and affairs of SIRL, '...not necessarily connected to any distinct issue, but rather generally, which would entitle the court to make an order for its dissolution'.

Breakdown in trust and confidence

- [73] The court has power to order the winding up of a quasi-partnership company where there has been an irretrievable breakdown in trust and confidence between the participating members whether or not such a breakdown in trust and confidence has resulted in a complete functional deadlock. In **Lau v Chu**, Lord Briggs JSC explained at paragraphs 14 to 15 that a winding up may be ordered where the company's members have fallen out in two related but distinct situations (which may or may not overlap) viz. (a) where there is a functional deadlock, in consequence of which the inability of members to co-operate paralyses the company from functioning; and (b) where the company is a corporate quasi-partnership, and there has been an irretrievable breakdown in trust and confidence between the participating members. In the latter case

such an irretrievable breakdown in trust and confidence between the members could justify a just and equitable winding up, '...essentially on the same grounds as would justify the dissolution of a true partnership'.

[74] At paragraph 17 of **Lau v Chu** Lord Briggs, JSC explained the difference between the two situations as follows:

"[17]. The important potential distinction between the two types of breakdown case is this. If there is a complete functional deadlock, then a winding up may be ordered regardless of whether the company is a corporate quasi-partnership. But if the company is of that type, then a breakdown of trust and confidence may justify a winding up even where there may not be a complete functional deadlock. In the former case winding up is a remedy for paralysis. In the latter it is the response of equity to a state of affairs between individuals who agreed to work together on the basis of mutual trust and confidence where that trust and confidence has completely gone. But of course, both may exist together, and a complete breakdown in trust and confidence may well be the cause of functional deadlock, in a two-party quasi-partnership like the present"

[75] As to the basis on which a true partnership may be wound up, Lord Cozens- Hardy MR in **re Yenidje Tobacco Company Limited**³² quoting from Lindley on Partnership observed at page 430:

"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."

³² Supra n 3.

[76] In my judgment the instant case is one in which a breakdown of trust and confidence may justify a winding up even where there may not be a complete functional deadlock. Here the learned judge found that it was beyond dispute that the relationship between Mr. Dyrud and Ms. Webster has broken down to the point that they can no longer coexist within a business relationship.³³ He found at paragraph 40 of the judgment that there clearly is no point in the parties continuing [their] business relationship which clearly has been at an end for a considerable length of time. He there noted that the PWA and the arbitration proceedings that foreshadowed the Arbitration Award have eroded the underlying basis upon which Mr. Dyrud and Ms. Webster had come together for a common purpose and utilising a corporate structure that employed several corporate vehicles to realise the purpose of their quasi-partnership. The instant proceedings in his view were "... just another chapter in the seemingly never-ending saga of litigation between the parties concerning the many intertwined entities that they jointly owned and operated at most instances in the form of a quasi-partnership." He noted that SIRL is presently not trading, generates no profits and is in a dire state of indebtedness.

"Coupled with that reality is what the court accepts as the irreconcilable differences and the long-standing disputes between the parties regarding the management of the many related entities, including the present company, which they engaged in as a quasi-partnership, which has resulted in protracted litigation between them. The purpose for which the parties collaborated has been entirely frustrated."³⁴

³³ Supra n 10 at para 13

³⁴ Supra n 10 at para 39.

The learned judge had an abundance of evidence upon which he could have arrived at that conclusion and, in fact, little or no evidence on the basis of which he could found otherwise.

Alternative remedy

[77] Mrs. Tana'ania Small Davis, KC for the appellant says that just and equitable winding up of a company should be a remedy of last resort and sparingly used having regard to all the circumstances of the case. She urges that winding up of SIRL would interfere with the subsisting commercial and/or contractual credit and security relationship between FCIB, SIRL and Ms. Webster.

[78] Mrs. Small Davis' position is that Mr. Dyrud, as a member of SIRL has other remedies available to him if he is dissatisfied with the affairs of SIRL that would not interfere with the said credit and security relationship, including to seek an order for his shares in SIRL to be bought out.

[79] Counsel points out that winding up of a company kills the company and, if a less draconian form of relief is available, the court should favour that over a winding up order.

Burden of proof that Mr. Dyrud unreasonably failed to pursue an alternative remedy

[80] In **Lau v Chu** at paragraphs 20 to 21 per Lord Briggs JSC, the Privy Council held that the legal burden of proof is on the petitioner to establish his or her entitlement to relief and, if so, that a winding up would be just and equitable if there were no other remedies available. If the petitioner can so establish, then the legal burden of

proof shifts to the respondent to prove that the petitioner has unreasonably failed to pursue some other available remedy rather than seeking a winding up.

[81] In any case in which it is sought to wind up a quasi-partnership company on just and equitable grounds a petitioner may rely upon any circumstances of justice or equity which affect him in his relations with the company, or with the other shareholders.³⁵

[82] Whilst the circumstances under which a just and equitable winding up petition might be brought ought not to be regarded as limited or reduced to the sum of particular instances, a well-recognised basis for seeking a winding up on the just and equitable ground is the breakdown of trust and confidence between participating members within a quasi-partnership.

[83] Here Mr. Dyrud has established that SIRL is a quasi-partnership company in which an irretrievable breakdown in trust and confidence has occurred between the participating members. Accordingly, he has shown an entitlement to some form of relief. Moreover, in the absence of any reasonable alternative remedy, these facts could entitle him to an order for the winding up of the company on just and equitable grounds.

[84] In this regard in **Lau v Chu** Lord Briggs, JSC at paragraph 20 observed:

“[20] It is well established that winding up is a shareholders' remedy of last resort. But this does not mean that winding up is unavailable to members if they have any other remedy.

³⁵ See **Re Westbourne Galleries** [1973] AC 360, per Lord Wilberforce at 375. **Lau v Chu** per Lord Briggs JSC at para 25.

The member retains a significant element of choice in the remedy to be sought, even though the court has the last word.”

[85] It is for Ms. Webster to show that in the circumstances under review Mr. Dyrud has unreasonably failed to pursue some other available remedy rather than seeking a winding up.

[86] The only alternative remedy suggested by Ms. Webster’s Counsel is that it was open to Mr. Dyrud to realise his investment by selling his shares on the open market. In **Lau v Chu** Lord Briggs, JSC noted at paragraph 49 that:

“[49]. It might in the Board’s view be an answer to a case based purely on functional deadlock that a member could extract himself by a sale of his shares, but only if he could be expected to be able to do so upon fair terms.”

[87] The present case is not one which is based purely on functional deadlock. Here the problem is the complete breakdown of trust and confidence between the erstwhile quasi partners a situation which may justify a winding up even in the absence of complete functional deadlock. The learned judge found at paragraph 39 of his judgment that the Company is presently not trading, generates no profits and is in a dire state of indebtedness. At paragraph 49 of his judgment, he found that the sale of Mr. Dyrud’s shares on the open market would be a less than viable option given the perennial state of the company’s indebtedness. For my part I also note that the fact that Mr. Dyrud was selling a 50% shareholding in a private company with no concomitant share in management or control would provide a disincentive for a prospective purchaser to offer to pay full value. An incoming third-party purchaser of Mr. Dyrud’s shareholding would be faced with Ms. Webster and her sister as a

majority of the board, with no right to appoint any director other than himself or a single nominee of his to the board. The fact that SIRL was not trading or generating any profits and that it operated only to hold property that was heavily mortgaged to secure the indebtedness of a company unconnected to the intended purchaser would render it unattractive to any purchaser other than, perhaps Ms. Webster. I agree with the learned judge that the sale of Mr. Dyrud's shares on the open market would be a less than viable option.

Judges exercise of discretion

[88] I do not disregard the other circumstances which the appellant says makes a winding up order draconian and inappropriate. An appellate court may interfere with the exercise of discretion by a trial judge only in circumstances in which:

“... the appellate court is satisfied (1) that in exercising his ...judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong”.³⁶

[89] Likewise, an appellate court is constrained when called upon to review factual findings by a judge. An appellate court will only interfere with such findings in a rare case such as where the conclusion on the primary facts was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding

³⁶ See Michel Dufour and others v. Helenair Corporation Ltd. and Others (1996) 52 WIR 188 per Floissac at 190-191.

of the evidence, or (iii) which no reasonable judge could have reached.³⁷

[90] In exercising its discretion in the instant case, the court had not only to consider the ways in which an ordered liquidation of the company might inconvenience one of the two members of a quasi-partnership company, but also the effect that refusal of such an order would have on the quasi-partner who is entitled to relief based on the occurrence of an irretrievable breakdown in trust and confidence between himself and the other quasi partner. This might be even more relevant in circumstances in which the member claiming relief can be seen to derive no practical benefit from the ongoing operation of the company in which such a breakdown has occurred and has no other practicable way of extricating himself from the situation complained of. There is no basis for this appellate court to interfere with the exercise by the learned judge of his discretion in the present case. Here the learned judge considered the relevant circumstances and did not err in principle in coming to his decision to order the winding up of SIRL. In my judgment the challenge to the exercise by the learned judge of his discretion to order the winding up of SIRL cannot be sustained.

Order

[91] For the foregoing reason I would order that the appeal be dismissed with costs of the appeal to be paid by the appellant to the second respondent. Such costs are to be assessed by a

³⁷ Mark Byers and others v. Chen Ningning (also known as Diana Chen) BVIHCVAP2015/0011 (delivered 12th June, 2018, unreported)

Judge or Master of the High Court if not agreed within 28 days of the date of this judgment.

I concur.
Mario Michel
Justice of Appeal

I concur.
Louise E. Blenman
Justice of Appeal

By the Court

Chief Registrar