IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF GUYANA

CCJ APPEAL No GYCV2019/012
GY Civil Appeal No 25 of 2016
GY Civil Appeal No 41 of 2015

BETWEEN

SHIR AFFRON NABI
RAFAEL NABI &
THE ESTATE OF SHIR AMINEEN NABI **APPELLANTS**

AND

ASHMIDPHIRAQUE SHEERMOHAMED **RESPONDENTS**
S. A. NABI & SONS LIMITED
MAURICE SOLOMON
(in his capacity as Liquidator/Receiver/Manager)

Before the Honourables: **Mr Justice J Wit, JCCJ**
Mr Justice W Anderson, JCCJ
Mme Justice M Rajnauth-Lee, JCCJ
Mr Justice D Barrow, JCCJ
Mr Justice A Burgess, JCCJ

Appearances

Mr Devindra Kissoon for the Appellants

Mr Christopher Parker, QC, Mr William Hare, Mr Miguel Vasquez for the Respondents

JUDGMENT
of
The Honourable Justices Wit, Anderson, Rajnauth-Lee, Barrow and Burgess

Delivered by
The Honourable Mr Justice Wit and Mr Justice Burgess
on the 28th day of August 2020

JUDGMENT OF THE HONOURABLES MR JUSTICE WIT, JCCJ AND MR. JUSTICE BURGESS, JCCJ:

Introduction

[1] Section 354 (e) of the Companies Act, Cap 89:01 of Guyana provides that: "A company may be wound up by the court if…(e) the court is of the opinion that it is just and equitable that the company should be wound up". Persaud J in the High Court made an order pursuant to this provision that Nabi and Sons Ltd (the company) be wound up. An appeal against that order to the Guyana Court of Appeal was dismissed by that court and Persaud J's winding up order upheld.

[2] The appeal now before this Court challenges the decision of the Court of Appeal.

Factual Background

[3] The company is a family owned and operated company. It was incorporated in Guyana on 11 September 1965 by two brothers, Shir Ahmad Nabi (Amin) and Azeez Sheer Mohamed (Azeez). Its main business as stated in its memorandum of association is construction and engineering. In the years following its incorporation, the affairs of the company were conducted by Amin, Azeez and another brother, Aslim Sheermohamed (Aslim). All three brothers held shares in the company at various points in time.

[4] All three brothers have now died. Before their passing, the relationship between them became acrimonious and plagued with hostility for several reasons. After their passing, their sons, Shir Affron Nabi (Affron), Rafael Nabi (Rafael) and Ashmidphiraque Sheermohamed (Ashmid), continued the animosity towards each other, in the words of Khan JA (Ag), "as if by way of testamentary disposition". This resulted, it would seem, in the eventual downfall of the company, which suffered from mismanagement and economic loss due to the family's persistent squabbles.

Litigation History

[5] In the foregoing circumstances, Ashmid, (in the appeal before us the first respondent), on 11 November 2009 filed a petition in the High Court seeking an order that the company be

wound up under section 354 (e) on the basis that it was just and equitable so to do. In the petition, Ashmid asserted that:

(a) he is the owner of shares in the company and is a contributory.

(b) his father Aslim is the owner of 463 shares in the company and the distribution of Aslim's shares to his heirs following his death is pending administration of his estate.

(c) Aslim had managed the company for 10 years and served as a director for over 30 years. During Aslim's lifetime, the company secured vital construction contracts and made substantial profits.

(d) however, disagreements between Aslim and Amin arose and since Aslim's death in 2006, Amin took over and managed the company.

(e) since Amin took over: (i) the company has been unable to secure similar remunerative contracts as Aslim had been able to secure during his lifetime; (ii) there has been no financial accountability on the funds of the company on the funds transferred to accounts in the name of Amin and his relatives abroad; (iii) records of the company are not being kept, (iv) general meetings of the shareholders are not being kept, (v) director's vacancies are not being filled and as such, directors meetings are not being held, (vi) records of the company are not being kept, (vii) he (Amin) formed another company similarly named Nabi Construction Inc which carried on the same construction business as the company at the same address, (viii) the accountant for the company has been dismissed, (ix) the company failed to transfer Aslim's shares after his death to his heirs, (x) failed to declare and pay dividends;

(f) there is insoluble deadlock in the affairs of the company due to the acrimonious and hostile relationship among the various persons claiming to be interested in the company to the extent that it is no longer doing construction business which was its primary purpose.

[6] The appellants in this appeal, (Affron and Raphael), filed an affidavit in opposition in which they claimed that:

(a) They were shareholders of the company.

(b) The First Respondent was neither a contributor (sic) or (sic) a shareholder of the company.

(c) Aslim (by then deceased) owned 191 shares in the company which were not transferred to anyone.

(d) Through acts orchestrated by the Petitioner, the company was unable to secure construction contracts which affected its profitability.

(e) There was no deadlock.

(f) The winding up of the company would be harsh and inequitable and that the First Respondent had not attempted to exhaust or seek the remedies available to him under Division L of Part II of the Companies Act 1991.

(g) It is not just and equitable to have the company wound up.

[7] According to the High Court's file, Persaud J heard oral evidence from the parties on the petition between the 7 June 2012 and 6 December 2013, and on 10 June 2015 granted the order for the just and equitable winding up of the company. The matter was then adjourned to 12 June 2015. It may be noted, parenthetically, that Persaud J's order was never drawn up and entered. The only evidence of its existence is a note on a flysheet.

[8] On resumption of the case on 12 June 2015, it was moved that the Official Receiver be appointed provisional liquidator. The matter was however adjourned to 16 June 2015.

[9] On 16 June 2015, the Official Receiver was appointed as provisional liquidator for the company and ordered to provide a statement of affairs on the company by 30 June 2015.

[10] On 29 June 2015, the appellants filed an application by way of summons supported by affidavit seeking an order staying or revoking the winding up of the company.

[11] On 1 July 2015, the appellants filed an appeal against the order of Persaud J made on 10 June 2015 (the first appeal).

[12] The first respondent filed an affidavit in answer to the appellants' summons, to which the appellants filed an affidavit in reply on 7 September 2015. Of this, it is worthwhile noting that nowhere in the appellants' affidavit in reply did they disclose that they had filed an

appeal against the order of Persaud J, and nothing reveals that Persaud J was aware of the filing of this appeal.

[13] There were several further hearings and adjournments of the matter in the High Court.

[14] On 11 December 2015, the official receiver laid over with the court an interim report. He laid over a final report on 18 December 2015.

[15] On 5 February 2016, Persaud J refused to grant the application by summons made on 29 June 2015, and appointed Mr. Maurice Solomon (the third respondent in the appeal before us) as receiver manager for the company.

[16] The Appellants appealed this order to the Court of Appeal on 25 February 2016 (the second appeal).

Decision of the Court of Appeal

[17] Both the appeal of 1 July 2015 and the appeal of 25 February 2016 came before the Court of Appeal comprising Yonette Cummings-Edwards JA, Arif Bulkan JA (Ag) and Rafiq T. Khan JA (Ag). That court delivered its judgment on 26 July 2018. It held that it had jurisdiction to hear the first appeal of 1 July 2015 but that it had no jurisdiction to hear the second appeal of 25 February 2016.

[18] As regards the second appeal, the appeal of 25 February 2016, the court reasoned that the jurisdiction of Persaud J ended on 1 July 2015 when the appellants filed the first appeal with the court. At this point, the exclusionary jurisdiction of the court was invoked, and any order made in the High Court, thereafter, was without jurisdiction and therefore a nullity.

[19] In support of this principle, the court relied on a dictum of Crane JA (Ag) in *Abdool v Lariff Thani Persaud*[1] where he stated:

[1](1969-70) 14 WIR 50 at 57.

> …the jurisdiction of the Guyana Court of Appeal will then be attracted by notice of appeal duly filed and then provisions of Part II of the ordinance relating to civil appeals will become operative and "shall be to the exclusion of the jurisdiction of any other court…

[20] For this reason, the court held that it did not have jurisdiction to hear this second appeal of 25 February 2016.

[21] There was no issue of jurisdiction in respect of the first appeal which was an appeal against the winding up order of Persaud J made under section 354 (e). In this regard, the court noted that that section expressly provides that the High Court may order the winding up of a company if it is of the opinion that it is just and equitable to do so. That meant that the section vested in a judge of the High Court, such as Persaud J, sole discretion to exercise the winding up power under that section. Consequently, the appeal against Persaud's winding up order was an appeal against the exercise by him of the section 354 (e) discretion.

[22] The Court of Appeal noted that based on settled law, that court could not lightly interfere with the decision of Persaud J. As an example of authoritative statement of this principle, the court cited Viscount Simon LC in *Charles Osenton & Co v Johnston*[2] where he said:

> The appellate tribunal is not at liberty merely to substitute its own exercise of discretion by the judge. In other words, the appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion had it attached to them, in a different way. If, however the appellate tribunal reaches the clear conclusion that there had been a wrongful exercise of discretion, in that no weight or no sufficient weight has been given to relevant considerations…the reversal of the order may be justified.

[23] Thus, the court held that it would not interfere with Persaud J's winding up order unless the exercise of his section 354 (e) discretion was so clearly and plainly wrong in principle, that it constituted an improper exercise of his discretion and thus warranted interference by the court. In the circumstances of this case, that meant that the pivotal question was whether Persaud J's decision was based on a misunderstanding or misapplication of either the law or the evidence. The court assessed the evidence before Persaud J contained in the record

[2] [1941] 2 ALL ER 245 at 250

of appeal and held that in all of the circumstances, the learned trial judge was correct in finding it just and equitable to grant the order winding up the company under section 354 (e). Since no order or reasons were provided for Persaud J's decision, the court drew inferences from the way in which Persaud J decided the case.

[24] In approaching the applicable legal principles, the court noted that the Act did not provide any definition of "just and equitable" and that the Act also did not provide any list of factors to be considered in approaching these words. The court further noted that case law establish that the words are intended to be "elastic in their application to permit the court to intervene to relieve against an injustice or inequity". The just and equitable discretion must, however, be exercised judicially, on a principled basis and in recognition of the reluctance of the court to interfere lightly in the internal affairs of a company. The court referred to several cases providing examples of circumstances in which the winding up would be just and equitable. Despite this, the court noted, there are four situations which are commonly held to justify intervention. These are (i) where there is as a loss of substratum, (ii) where there exists a lack of confidence among members, (iii) where the parties being in deadlock, and (iv) where the partnership analogy applies.

[25] The court found that based on the evidence there was a history of acrimony passed on from one generation to the next and that an amicable resolution to the internecine feud appeared impossible. The state of the company was reported as suffering continuous loss and that the appellants had started a separate business which appeared to be raising conflict of interest concerns. The shareholders were not in agreement on critical matters. There were persistent and serious disagreements which resulted in deadlock and which paralysed the operations of the company.

[26] In the foregoing circumstances, the court held that it could not find that Persaud J's exercise of his discretion was blatantly wrong. Also, in relation to the appellants challenge that the first respondent should have sought the alternative remedy of a buy-sell order under section 224 (5) of the Act before invoking section 354 (e), the court found that that remedy was not available to the first respondent and that it was not unreasonable to have the company wound up in the circumstances. Finally, the court held that the first respondent was not

debarred from seeking a section 354 (e) winding up order based on the equitable 'clean hands' maxim.

The Issues in the Appeal before this Court

[27] The appellants have now appealed the decision of the Court of Appeal to this Court. We agree with that court that it had no jurisdiction to hear the appeal of 25 February 2016, the second appeal, and so that appeal is not properly before us. Accordingly, the only appeal before us is the appeal of 1 July 2015, the first appeal.

[28] The notice of appeal of 1 July 2015 discloses a single ground of appeal. It is that the Court of Appeal erred in all the circumstances of the case in upholding the exercise of discretion by Persaud J to grant the order for the winding up of the company. This being so, two entangled issues arise for consideration in determining this appeal. The first of these is what is the function of this Court in the exercise of the section 354 (e) discretion and the second is whether there is any basis in the discharge of that function for this Court to interfere with the Court of Appeal's decision not to interfere with Persaud J's exercise of discretion in this case.

[29] These two issues are dealt with hereafter seriatim.

This Court's Function in the Exercise of the Section 354 (e) Discretion

[30] In the case of *Rodrigues Architect Ltd v New Building Society*,[3] this Court held that the law on the function of an appeal to an intermediate court, such as the Court of Appeal, against the exercise of a discretion by a trial judge was correctly stated in the oft-cited English Court of Appeal decision of *Phonographic Performance Ltd v AEI Rediffusion Music Ltd*.[4] There, Lord Woolf stated as follows:

> Before the Court can interfere it must be shown that the judge has either erred in principle in his approach or has left out of account or has taken into account some feature that he should, or should not, have considered, or that his decision was

[3] [2018] CCJ 09 (AJ) at para [6].
[4] [1999] 1 WLR 1507 at 1523D.

> wholly wrong because the Court is forced to the conclusion that he has not balanced the various factors fairly in the scale.

[31] This dictum underlines what is well settled in our law, namely, that an intermediate court has a limited function in an appeal against a judgment given by a trial judge in the exercise of a judicial discretion vested in the High Court alone. Upon such an appeal, an intermediate court has no jurisdiction to exercise an independent original discretion of its own. As De la Bastide, C.J. said in the Trinidad and Tobago Court of Appeal decision in *Jetpack Services Ltd. v. BWIA International Airways Ltd*: [5]

> It is only in the circumstances where the exercise of the judge's discretion is based on a misunderstanding or misapplication of either the law or the evidence that an appellate court is entitled to set aside the exercise of the judge's discretion and exercise an independent discretion of its own.

[32] De la Bastide, CJ adumbrated the principles as applicable to "an appellate court". In the English House of Lords decision of *Hadmour Productions Ltd v Hamilton*, Lord Diplock confirmed that these accepted principles were equally applicable to the House of Lords, an apex court. He stated there in relation to an appeal from the Court of Appeal to the House of Lords against the exercise of a discretion to grant an injunction as follows: [6]

> Before adverting to the evidence that was before the learned judge and the additional evidence that was before the Court of Appeal, it is appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordship's House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal, or upon the ground that there has been a change of circumstances

[5] (1998) 55 WIR 562 at 568.
[6] [1989] 1 AC 191 at 220

> after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified, the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own.

[33] In our view, the import of *Rodrigues Architect Ltd v New Building Society*,[7] is that the limitations on the function of this Court in relation to the discharge of a discretion by a trial court is the same as that of the Court of Appeal. This is so if only because section 11(6) of the Caribbean Court of Justice Act[8] provides: "The court shall, in relation to any appeal, have all the jurisdiction and powers possessed in relation to that case by the Court of Appeal…" By this provision, the power of this Court to interfere with the discharge of a discretion by a trial court becomes the same as the Court of Appeal.

Whether this Court Should Interfere

[34] The appellants accept all the foregoing principles. They argue, however, that this Court should interfere with the decision of the Court of Appeal to uphold the exercise by Persaud J of his section 354 (e) discretion to wind up the company on those accepted principles. They contend that the Court of Appeal acted upon wrong principles of law and or that that court misunderstood and misapplied the evidence in so upholding Persaud J's decision. The respondents agree that these are the only bases on which this Court can interfere but maintain that the Court of Appeal did not misunderstand or misapply either the law or evidence in this case and, consequently, that this Court should not interfere with the Court of Appeal's decision

[35] We now turn to considering these opposing contentions.

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[7] [2018] CCJ 09 (AJ) at para [6].
[8] Similarly, Article XXV (6) of the Agreement Establishing the Caribbean Court of Justice,

Whether Persaud J acted upon Wrong Principles of Law in the Exercise of his Discretion

"Just and Equitable" Jurisdiction in Section 354 (e)

[36] The *fons et origo* of this case is the jurisdiction vested in the High Court by section 354 (e) to wind up a company on the ground that it is just and equitable that the company should be wound up. In 1924, in *Loch v. John Blackwood Ltd*,[9] an appeal from the West Indian Court of Appeal (Barbados) to the Privy Council, it was held that a provision in the Barbados Companies Act, 1908, *in pari materia* with section 354 (e), conferred on the trial court a broad jurisdiction to order a just and equitable winding up. In that case, the ground advanced by the petitioner for seeking just and equitable winding up was that one of the directors had given reasons for loss of confidence in his probity and had shown that he regarded the business as his own. In those circumstances, it was held that a just and equitable winding up was justified.

[37] *Loch v. John Blackwood Ltd* was cited with approval in the decision of the House of Lords in *Ebrahimi v. Westbourne Galleries Ltd*,[10] the stanchion in the common law principles on what constitutes just and equitable winding up under provisions in pari materia with section 354 (e). *Ebrahimi* involved a closely held company in which two shareholders, a father, and a son, voted their majority shares to remove the father's long-time business partner, Mr. Ebrahimi, from the board of directors. Mr. Ebrahimi sought an order that the two other shareholders either purchase his shares or sell their shares to him or, alternatively, that the company be wound up. Lord Wilberforce's articulation of the principles which govern the court's power to order the winding up of a company on the basis that it just and equitable to do so is a veritable classic. He stated as follows:[11]

> The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own; that there is room

[9] [1924] AC 783.
[10] [1973] AC 360.
[11] [1973] AC360 at 379.

> in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligations he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.
>
> It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly, the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of the association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence-this element will often be found where a pre-existing partnership has been converted into a limited company; (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) 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.

[38] Very importantly, Lord Wilberforce went on to underline the general and flexible nature of the "just and equitable" test as follows:[12]

> There are two other restrictive interpretations which I mention to reject. First, there has been a tendency to create categories or headings under which cases must be brought if the clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of instances. Secondly, it has been suggested, and urged upon us, that…the words must be confined to such circumstances as affect him in his capacity as shareholder. I see no warrant for this either. No doubt, in order to present a petition, he must qualify as a shareholder, but I see no reason for preventing him from relying upon any circumstances of justice or equity

[12] [1973] AC 360 at 374-375.

> which affect him in his relations with the company, or, in a case such as the present, with the other shareholders.

[39] In our judgment, there is no suggestion in the Privy Council case of *Galantis v Alexiou*[13] that the authoritative force of *Ebrahimi* is in anyway attenuated in company law in Guyana. In this regard, the appellants, noting that the Guyana *Companies Act* is based on the *Canadian Business Corporations Act*, relied on dicta in *Galantis v Alexiou*[14] to argue that Canadian case law and treatises should guide the interpretation of section 354 (e). We agree with the Court of Appeal that the dicta must be taken in context. These were pronounced in relation to the interpretation of section 280 of the Bahamian Companies Act 1992, a section which was based entirely on the *Canada Business Corporations Act*. Per contra, the provision in section 354 (e), is not derived exclusively from the *Canada Business Corporations Act*. That provision traces its roots back to the English Joint Stock Companies Act 1848 which was later consolidated in the English Companies Acts of 1862 and 1908 and eventually in section 137 (f) of the Guyana Companies (Consolidation) Ordinance 1913 which itself was based on the English Companies Act of 1908. As is intimated in *Commonwealth Caribbean Company Law* by Andrew Burgess[15], English case law on a provision such as that in section 354 (e) remains persuasive in Guyana. What is more, the relevant provision in Canadian company legislation is also derived from English company legislation and, unsurprisingly, Canadian cases have built their "just and equitable" jurisprudence on Lord Wilberforce's speech in *Ebrahimi*. Canadian case law may therefore in some cases also be relevant in approaching section 354 (e).

[40] Accordingly, the authority of *Ebrahimi* in interpreting section 354 (e) cannot be doubted. In this regard, the unmistakeable import of Lord Wilberforce's articulation is that the words "just and equitable" in section 354 (e) are to be interpreted broadly as conferring upon the court the most ample discretion to order a winding up of a company. Those words are intended to be flexible in their application as to permit the court to intervene to relieve against an injustice or inequity in a circumstance. As Lord Wilberforce emphasised, the

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[13] [2019] UKPC 15 at 12
[14] [2019] UKPC 15 at 12
[15] (Andrew Burgess) Commonwealth Caribbean Company (1st Edition. Routledge 2013)

words are not intended to operate within strict and rigid categories but to apply to each case according to its particular facts: See also *Re Rogers and Agincourt Holdings Ltd. et al.*[16]

[41] Although the section 354 (e) winding up discretion is not be restricted to pigeonhole categories, case law and academic exegesis subsequent to *Ebrahimi* have identified examples of circumstances that may justify a finding that it is just and equitable to wind up a company. These include (1) where there is a loss of substratum; (2) where there exists a justifiable lack of confidence among the members; (3) where the parties are in deadlock; and (4) where the partnership analogy applies.

[42] As seen at para [24] of this judgment, the foregoing are the principles which informed the Court of Appeals approach to the section 354 (e) just and equitable jurisdiction. That court also correctly adverted to two other provisions in the Companies Act which impact the exercise of that jurisdiction, namely, section 356 (1) (c) and section 357 (2) (b) and to the equitable maxim that "he who comes to equity must come with clean hands" applied to the section 354 (e) just and equitable jurisdiction.

[43] First, section 356 (1) (c). This provides that "[a]n application to the court for the winding up of a company shall be by petition presented by a contributory". It is manifest from this provision that two preliminary conditions must be satisfied before a section 354 (e) winding order may be made. These are that the application must be made to the court by petition and the applicant can only be made by a contributory.

[44] The requirement that the application be by petition is satisfied simply by the petitioner filing the petition in accordance with an order of the High Court Rules. The requirement that the applicant be a contributory, on the other hand, is more complicated.

[45] Section 350 defines a contributory as follows:

> The term "contributory" means every person liable to contribute to the assets of a company in the event of it being wound up, and for the purposes of all proceedings prior to the final determination of the persons who are to be deemed contributories, includes any person alleged to be a contributory.

[16] (1997) 14 OR (2d) 489 (Ont. CA).

It is worth noting here also that section 352 (1) provides that if a contributory die, either before or after he has been placed on the list of contributories, his personal representative shall be a contributory. Included within the definition of contributory, therefore, are the personal representative of a deceased contributory and, for the purposes of all proceedings prior to the final determination of the persons who are to be deemed contributories, a person alleged to be a contributory.

[46] At para (88) of its judgment the Court of Appeal opined that a shareholder of a company is a contributory as follows:

> A shareholder of a company is necessarily a contributory within the meaning of section 350 of the Act since as Burgess points out in *Commonwealth Caribbean Company Law*:[17]
>
> > 'the concept of limited liability under the Companies Act operates to allow a company to recover a contribution from its shareholders equal to the value as determined by the directors at which the shares held by the shareholders are issued to enable the company to discharge its obligations. Limited liability, in other words, describes the extent to which a company can require its shareholders to make a financial contribution based on the value of the shares issued to him to meet the company's liabilities'.

We entirely agree with this statement of the law. We would add for completeness that the personal representative of a shareholder and a person alleged to be a shareholder for the purposes of all proceedings prior to the final determination of the persons who are to be deemed a shareholder are also contributories for purposes of section 350.

[47] Second, section 357 (2) (b). This provides as follows:

> Where the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the court if it is of the opinion-
>
> > (b) that in the absence of any other remedy it would be just and equitable that the company should be wound up, shall make a winding up order, unless it is of the opinion that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.

[17] (Andrew Burgess) Commonwealth Caribbean Company (1st Edition. Routledge 2013) 91

[48] The Court of Appeal considered this provision between paras (104) – (107) of its judgment. There, that court accepted the principle that the section 354 (e) just and equitable winding up jurisdiction is to be exercised subject to section 357 (2) (b). According to the court, this means that the section 354 (e) remedy is not to be granted if the court is of the opinion that some other remedy is available to the petitioner and that they are acting unreasonably in seeking the section 354 (e) remedy rather than that other remedy. The court noted that, as Lord Cross of Chelsea pointed out in *Ebrahimi*, notwithstanding that section 357 (2) (b) made provision for alternative remedies "the jurisdiction to wind up under [section 354 (e)] continues to exist as an independent remedy".[18] In our judgment, these are the undoubtedly the principles that flow from section 357 (2) (b).

[49] Third, the clean hands equitable maxim. As Lord Wilberforce recognized in Ebrahimi, the "just and equitable" provision "enable the court to subject the exercise of legal rights to equitable considerations". Naturally, the court in considering the way in which its just and equitable jurisdiction should be exercised must have regard to general guidelines embodied in what are called the maxims of equity. On such maxim is the maxim that "he who comes to equity must come with clean hands. Between paras [90] and [94] of its judgment, the Court of Appeal gave extensive consideration of the effect of this principle on the exercise of the just and equitable jurisdiction in the context of this case.

[50] All in all, we are satisfied that the Court of Appeal acted upon correct principles of law in upholding Persaud J's section 354 (e) discretion in ordering the winding up of the company on just and equitable grounds. The question therefore becomes whether that court misapplied those principles to the evidence before it as contended by the appellants.

Whether the Court of Appeal Misapplied the Applicable Principles of Law to the Facts

(a) Whether the First Respondent had locus standi

[51] As noted at para [43] of this judgment, section 356 (1) (c) stipulates that an application for a section 354 (e) winding up of a company order must be by petition and must be made by

[18] [1973] AC 360 at 385.

a contributory. The application was in fact made by petition and no issue has been raised by the appellants on this requirement. In their grounds of appeal at para 2 (a) (ix), however, the appellants have submitted that the Court of Appeal "erred in law and in fact" in holding that the first respondent had established by "admissible evidence" that he was a contributory within the meaning of section 350. At para 2 (a) (xxvii), they further asserted that the Court of Appeal erred "in law and in fact" in that the court failed to consider "that the Petitioner had no standing to commence" the section 354 (e) winding up action.

[52] In approaching this challenge, we think it useful to recall that, as held by the Court of Appeal, the clear law is that a shareholder, or someone in the position of a shareholder, is a contributory as defined by section 350. The only question for us is, therefore, whether there was evidence that the first respondent was a shareholder or in the position of a shareholder. In answer to this, we are satisfied that there was ample evidence available to the Court of Appeal to hold that he was a shareholder or in the position of a shareholder.

[53] To begin with, in the annual returns of the company in the record before the Court of Appeal, the first respondent was recorded as the owner of nine shares in the company. It is to be noted that this supported the first respondent's claim to be owner of nine shares. Further, the undisputed evidence was that the first respondent is the heir of Aslim, one of the original promotors and incorporators of the company. And, while it remained unclear as to how many shares in the company were owned by Aslim, it is undisputed that he was at the time of his death a not insignificant shareholder in the company.

[54] In his will, which was also in the record before the Court of Appeal, Aslim devised his property movable and immovable to his wife and children, including the first respondent. It emerged from the record before the Court of Appeal also that, in the administration of Aslim's estate, the value of Aslim's shareholding in the company was declared at $76,261,525. The first respondent was under the terms of the will entitled to a division of Aslim's shares in the company.

[55] The record before the Court of Appeal also revealed that there was some litigation before the High Court by Amin to stop the process of the administration of Aslim's estate which would have naturally affected vesting of Aslim's shares in the first respondent in

accordance with the terms of Asli's will. There was also evidence before the Court of Appeal that, even though Amin's efforts were unsuccessful, Aslim's shares have not been transferred.

[56] It is manifest from the foregoing that there was sufficient evidence to support the Court of Appeal's conclusion that the first respondent was a contributory. There was evidence that he was a shareholder of nine shares in the company. There was also evidence that he was entitled to shares as a beneficiary under Aslim's will and was as such an alleged shareholder in the company. Accordingly, the first respondent was a contributory within the meaning of section 350 and therefore had locus standi to commence the section 354 (e) winding up petition.

(b) Whether the Court of Appeal erred in making findings of fact unsupported by evidence

[57] In their written and oral submissions to this Court, the appellants noted that Persaud J did not give reasons for his winding up order, "and also, made no findings of fact". Because of this, the appellants argued, the Court of Appeal had no evidential basis on which to ground its decision to uphold the order of Persaud J.

[58] This argument was raised by the appellants before the Court of Appeal. To this, the Court of Appeal relying on a dictum of Lord Denning MR in *Ward v James*,[19]held that even though Persaud J did not give reasons which would enable that court to know the considerations which have weighed with him in the exercise of his discretion, that court could infer simply from the way in which he had decided.

[59] In our judgment, section 7 (1) (b) of the Court of Appeal Act, Cap 3: supports the Court of Appeal's power to so hold. That section provides that on the hearing of an appeal from any order of the High Court in any civil cause or matter, the Court of Appeal has power to draw inferences of fact. What is more, appeals to the Court of Appeal turn on the record of which documents were before the trial court and what happened in that court. The record contains the pleadings, pre-trial motions, a transcript of what occurred during trial, the exhibits put into evidence, post-trial motions, and any discussion with the judge that did not take place

[19] [1966] QB 273 at 293

"off the record." The Court of Appeal was therefore fully entitled to have recourse to the record in exercising its section 7(1)(b) power to draw inferences of fact in the case before it.

[60] In its admirably well-reasoned judgment, the Court of Appeal meticulously made its findings of fact based on the record. If the appellants failed to get available evidence which they regarded as critical into the record, or to object to something prejudicial from being included in the record, they have only themselves to blame. Their opportunity to do so has died and cannot be now resurrected in this Court.

(c) Whether the Court of Appeal misapplied the just and equitable principles

[61] As has already been seen, the Court of Appeal observed in its judgment that there does not exist any exhaustive list of circumstances or principles upon which a court may exercise its just and equitable winding up jurisdiction but that, this notwithstanding, case law and academic writing identify four situations in which the court may do so. These include the situation where the parties are in deadlock. The Court of Appeal found that the directors of the company were in deadlock and on this basis held that Persaud J was justified in the exercise of his just and equitable winding up discretion. The appellants contend that the Court of Appeal misapplied the just and equitable principle as the evidence does not support a finding of deadlock among the parties.

[62] We disagree with that contention of the appellants. In fact, we find that there was an abundance of evidence to support the finding that the parties were in deadlock. As the Court of Appeal found, there was clear evidence that there was no communication between the appellants and the first respondent and that statutory shareholders' and directors' meetings were either not being held, or that when they were held some shareholders were excluded. Indeed, this history of acrimony among the first and second appellants and the first respondent was inherited by them from their respective fathers who had started the feuding during their lifetime. In fact, this history was already in full display before this Court in 2011 when it dealt with the case of Sheermohamed *v Nabi and Sons*.[20]

[20] [2011 CCJ 7 (AJ)

[63] There is also relevant evidence in the Report of the Official Receiver who, as was noted above, was appointed as provisional liquidator of the company by the court prior to the appeal of 1 July 2015 also provides substantial evidence of deadlock. That Report records, inter alia, that:

> (i) For the year 2004, the profits before tax (PBT) of the company was $30,294,783. In 2005, the PBT was $7,583,999.
>
> (ii) After 2006, the company's profits continuously diminished and there were substantial losses for several years up to 2010 with the cessation of the construction business which was the main source of revenue.
>
> (iii) A new company with a similar name to the company- Nabi Construction Inc- was formed in 2007 by Shir and Raphael to carry on the same or similar business to the company. Shir and Raphael continued as shareholders in the company which raised a concern as to whether there was a conflict of interest.
>
> (iv) After Nabi Construction Inc was registered, construction activity and income of the company diminished substantially. For 2008, construction gross income was $71.4 million compared to $265.1million in 2007.
>
> (v) From 2009, only rental income from properties owned by the company, amounting to $21,832,574 became the main source of income of the company.
>
> (vi) From 209-2011 management fees were being charged to the company but it was not known what services were being provided to the company which warranted such expenditure.
>
> (vii) The balance sheet of the company showed that it was indebted to Nabi Construction Inc as follows: $6,725,390 in 2008, $20,186,869 in 2009, and $18,786,869 in 2010 which sums were attributed to "payment" for job "workers". Details were required since these two companies were in competition.
>
> (viii) Assets of the company particularly construction equipment and tools were being disposed of without satisfactory explanation.

> (ix) For 2014, the company made a small profit after tax of $1,206,460 realised from rental income compared with 2004 when its profit after tax was $20.5 million when it was engaged in construction.

[64] The Report also observed that the shareholders were not in agreement on critical matters affecting the company.

[65] Recalling the foregoing evidence, the Court of Appeal concluded that:

> The continued existence of the company provides a convenient battleground for the various shareholders to wage their personal wars of attrition against each other. The company to its detriment, has become a pawn in their personal disputes which seem devoid of reason and maturity. Each time one side does not get its way, it approaches the court all 'virtuous and blameless', asking for the relief to which they claim to be entitled and the court is compelled by law to become an arbiter in their self-inflicted problems.

[66] In our judgment, the Court of Appeal was palpably right. This was as clear a case of deadlock as can be imagined. The disagreement between the parties on some very important aspects respecting the management and functioning of the company was acrimonious and persistent spanning as it did two generations. This intergenerational feud has seriously interfered with the normal operations of the company and has left it paralysed. This was not case of the parties arriving at a temporary cul de sac. The general decision-making process within the company has broken down and there is no realistic prospect of it being repaired.

[67] There are numerous cases where the courts have ordered just and equitable winding up in circumstances like this case. In our judgment, such an order is warranted here unless (i) "some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy" as provided in section 327 (2) (6); or, (ii) there is some applicable maxim of equity which prevents from claiming the exercise of the section 354 (e) winding up jurisdiction.

[68] We turn next to considering these issues.

(d) Whether section 357 (2) (6) should have been applied to deny the invocation of the section 354 (e) discretion

[69] The appellants have argued before us that the Court of Appeal erred in not finding that, on the facts, the winding up order should not have been made as there was an available alternative remedy, namely, an order that the first respondent sell his shares to the appellants. The appellants cited section 224 (5) of the Companies Act as the statutory source of the court's power to make such an order. Presumably, section 224 (5) (f) was the specific provision on which the appellants sought to rely.

[70] Section 224 appears under the heading "Restraining Oppression" and is found in Division L of the Companies Act which is headed "Civil Remedies". Section 224 (5) provides for a "buy-out order" as follows:

> In connection with an application under this section, the court may make any interim or final order it thinks fit, including-
>
> > (f) an order directing a company, subject to subsection 8, or any person, to purchase shares or debenture of a holder thereof…
>
> In the meantime, section 224 (2) provides that "[a] complainant may apply to the court for an order under this section".

[71] It is plain from these provisions that a section 224 (5) (f) buy-out order is only available to a "complainant". In *Commonwealth Caribbean Company Law*,[21] "complainant" is described as "a novel category in Commonwealth Caribbean company law, and appears to be intended to protect the interests of [inter alia] shareholders…" A section 224 (5) (f) buy-out order is therefore a civil remedy which is available to an aggrieved shareholder in an oppression remedy action. The appellants in this case are not complainants within the contemplation of the "Civil Remedies" provisions in the Companies Act and therefore are not entitled to a buy-out order under section 224 (5) (f).

[21] (Andrew Burgess) Commonwealth Caribbean Company (1st Edition. Routledge 2013)

[72] The Ontario Court of Appeal decision in *Wittlin v Bergman,*[22] cited by counsel to support an argument that an order available under the oppression remedy provisions are equally available as an alternative pursuant to section 224 (5) (f) is readily distinguishable. This case concerns an application by a complainant for an oppression remedy under section 241 of the Canadian Business Corporations Act (a section *in pari materia* with section 224 of the Guyanese Act) where shareholders were unable to work together. The trial judge found that there was no oppression under section 241 but resorted to the court's jurisdiction in section 214 (1) (b) (ii) (a section similar but not identical to section 354 (e) in the Guyanese Act) to dissolve corporations when the court is satisfied that it is just and equitable that the corporation be liquidated or dissolved. The trial judge determined that it would be just and equitable for one side to buy out the other and ordered the parties to participate in a buy-sell mechanism. On appeal, the Ontario Court of Appeal held that a finding under s. 214(1)(b)(ii) that it was just and equitable that the corporation be dissolved or liquidated was appropriate. Section 214 does not restrict a judge to ordering liquidation or dissolution. Section 214(2) provides that on an application, a court may make such order under this section or under s. 241 as it thinks fit. The trial judge exercised this authority to order that one party buy out the other. However, on the facts of this case, it was not appropriate that either the appellants or the respondents purchase the other's shares. This was a case where it was appropriate to order the corporation to purchase the shares of the appellants. Accordingly, the appeal was allowed, and the trial court judgment replaced by a judgment which included the terms of sale as set out in the court's endorsement.

[73] It is obvious from even a cursory reading of this case that the court was only able to make the buy-out order it did because section 214 (2) expressly provided that the court could make orders available under the oppression remedy provisions in section 241 in the exercise of its section 214(1)(b)(ii) just and equitable jurisdiction. There is simply no provision in the Guyana Act like section 214 (2). The Court of Appeal was therefore correct in holding that the orders that can be made under the oppression remedy provisions cannot be viewed as alternative remedies for purposes of section 327 (2) (6).

[22] [1995] 23 BLR (2d) 182 (Ont. CA). This case was applied in the Manitoba Court of Appeal in Rady et al v Silpit Industries Co [2016] 52 BLR (5th) 196 (MAB CA).

[74] Assuming, however, that the Court of Appeal had the power to order a buy-out as an alternative remedy, the appellants' argument would still flounder on the facts of this case. The facts are that there is unending, intractable disagreement as to how many shares are owned by Amin and by Aslim's estate. Surely, there can be no order for a buy-out where there is such profound uncertainty as to the subject matter of the buy-out, namely, the number of shares to be bought.

(e) Whether the clean hands maxim of equity should have been applied by the Court of Appeal

[75] The appellants cite Lord Cross of Chelsea in *Ebrahimi* for the legal proposition that a petitioner, as was the first respondent, who seeks to rely on the "just and equitable" clause must come to court with clean hands and that 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. [23] Relying on this authority, the appellants maintain that the first respondents' hands were not clean and the Court of Appeal should have applied *Ebrahimi* to the facts of this case and denied him a just and equitable winding up order.

[76] The appellants pointed to the testimony of Mr. Fernandes, the duly constituted attorney of the first respondent, that the first respondent "did his best to prevent contracts from being awarded to S. A. Nabi". In this regard, the appellants noted that admitted into evidence was a notice placed in the newspaper by the respondent threatening legal action against anyone doing business with the company, similar letters written by the first respondent to the Chairman of the Tender Board and copied to all the company's clients and to the President of Guyana. This, the appellants contended, was intended to, and did interfere with the company's business.

[77] The equitable maxim "he who comes to equity must come with clean hands" undoubtedly applies to the exercise of the section 354 (e) just and equitable winding up jurisdiction. In *Argyll (Duchess) v Argyll (Duke),*[24] Ungoed-Thomas said of this maxim: "A person coming to Equity for relief…must come with clean hands; but the cleanliness required is to be

[23] [1973] AC 360 at 387.
[24] [1967] Ch 302 at 332.

judged in relation to the relief that is sought. In that case itself, it was held that the claimant's blameworthy conduct was not connected to the relief sought and as a result the maxim did not apply. In the House of Lords decision in *Tinsley v Milligan*,[25] it was held that the unclean hands principle does not debar a claim which does not involve reliance on the blameworthy conduct.

[78] Judged in the context of the first respondent's petition for a section 354 (e) just and equitable winding up on the basis that the parties were in deadlock, the "uncleanliness" asserted by the appellants is not that required to deny him relief. Where deadlock is alleged, the pivotal question is whether shareholders can work together as if they cannot the company is likely doomed to failure. The appellants have not established any connection between the first respondent's alleged blameworthiness and the deadlock between the parties in the sense that the latter would have been caused by the former, although it is likely that the first respondent's conduct was prompted by the actions of the appellants. In any event, the first respondent's claim does not involve reliance on his "uncleanliness". For these reasons, the appellants' arguments on the 'unclean hands' maxim fails.

[79] It should be quite apparent, however, that we disagree with the Court of Appeals reason for rejecting the appellants unclean hands argument. That court's reason was in effect that the appellants hands were no less unclean than the first respondent. We feel bound to emphasise that that court should have considered only the hands of the first respondent, and that there was no need to balance the misconduct of the first respondent against that of the appellants.

Conclusion

[80] "Refusal to meet on matters of business, continued quarreling, and such a state of animosity as precludes all reasonable hope of reconciliation and friendly cooperation"[26] suffices to justify a just and equitable winding up order and that is exactly the situation that screams from every page of the record of this case. Decennia of acrimony and distrust between the main actors in this family tragedy have unfortunately created a Gordian knot that

[25] [1994] 1 AC 340
[26] *Lindley on Partnership* (12th edition), p 593

reasonably no longer could be disentangled by the *dramatis personae* themselves. In those circumstances, we agree with the courts below, that that complicated knot had to be cut by the sword of justice as provided by section 354 (e) of the Companies Act. For the foregoing reasons we will dismiss the appeal with costs for the respondents.

POST SCRIPTUM BY THE HONOURABLE MR JUSTICE WIT, JCCJ:

[81] The Court heard this matter on 21 November 2019, a little more than nine months ago. The delay in delivering this judgment is, measured against our own standards, excessive and regrettable. As the presiding judge of this panel and co-author of this judgment I wish to take full responsibility for that delay for which I offer my apologies."

Disposition

The Court makes the following orders:

(a) The appeal is dismissed, and the judgment of the Court of Appeal is affirmed.

(b) The Appellants shall pay to the Respondents costs of this appeal, certified, to be taxed in default of agreement.

/s/ J Wit

The Hon Mr Justice J Wit

/s/ W Anderson

The Hon Mr Justice W Anderson

/s/ M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ D Barrow

The Hon Mr Justice D Barrow

/s/ A Burgess

The Hon Mr Justice A Burgess