IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 54 of 2021 (CRJ)

IN THE MATTER OF THE COMPANIES ACT (2020 REVISION)

AND IN THE MATTER OF MADERA TECHNOLOGY FUND (CI), LTD

Appearances:	**Mr. David Quest KC, Mr. Peter Hayden and Mr. Laurence Aiolfi of Mourant for the Petitioner**
	Mr. Matthew Hardwick KC, Mr. Justin Naidu and Mr. Daniel Johnstone for the Respondent
Before:	**The Hon. Justice Cheryll Richards KC**
Heard:	**10th October 2023**
Decision:	**28th March 2024**
Draft Judgment:	**31st July 2024**

Company Law - Section 95 (3) (d) of the Companies Act (2023 Revision), Alternative Remedy, Valuation of Shares, Date for Valuation, Value of Shares Decreasing, Buy-Out Offer

JUDGMENT

1. By Re-Amended Petition dated 27th October 2022, Fideicomiso F/000118, a Trust ("the Petitioner") sought the winding up of Madera Technology Fund (CI) Ltd) ("the Company") pursuant to s.92 (e) of the ***Companies Act*** (2021 Revision) on the just and equitable ground. The judgment of the Court dated 28th August 2023 concluded that a winding up order was justified but that the justice of the case could properly be met by the alternative remedy of an order providing for the purchase of the Petitioner's shares in the Company pursuant to s.95 (3) of the ***Act***.

2. Following upon the judgment, three issues arose for the consideration of the Court. Two of these are the valuation date for the purchase of the Petitioner's shares, the party who should bear the costs of the Petition and the basis for calculation of these costs. The third issue is the costs of two earlier proceedings, the Petitioner's application for an Injunction in Writ proceedings FSD 155 of 2020 and the Originating Summons application for directions in relation to the calling of an Extraordinary General Meeting ("EGM") in FSD 46 of 2021.

3. On 28th March 2024 the Court communicated its decision in respect of the main issue as follows: -

> "The submissions made on behalf of the Company are accepted that the valuation date should be the date of the order to wit "the first business day of the month following the date of the order, that being the date at which the Fund would strike its Net Asset Value ("NAV") in the ordinary course of business." Calculations to be done by the Administrator."

4. These are the reasons for the decision.

THE SEQUENCE OF EVENTS

5. The detailed sequence of events is set out in the earlier judgment and in so far as it may be relevant to the remaining issues before the Court is shortly summarised herein. The Petitioner invested in the Company in August 2018. It invested US$ 5,514,253.25 into Class A Accolade E.1 Subclass Shares in the Company. In return it received 5,514 shares at US $1,000.00 per share. At the date of its investment, it was the largest investor in the Company.

6. The investment carried with it certain information and voting rights. There was also the ability to call an EGM but the ability to do so was expressed differently in the various documents provided by the Company to the Petitioner. Under the Confidential Explanatory Memorandum ("CEM") provided to the Petitioner an EGM could be called at the request of shareholders having a majority by reference to the NAV of the Shares. By Article 26.4 of the Company's Memorandum and Articles of Association ("MAA"), the requisition for an EGM was by a simple majority of the voting shares at the date of the requisition.

7. The question of redemption rights has become more prominent in the case. The Subscription Agreement signed by the Petitioner by hand of Daniel Alberto Salazar Ferrer, the Chief Financial Officer and the CEM stated that the shares were not redeemable at the option of the investor[1]. In addition, by the said Agreement the Petitioner specifically agreed not to file a winding up petition on the just and equitable ground against the Company or make any other equivalent application in connection with its redemption rights.

8. The shares purchased were initially subject to a "lock-up period". The Petitioner's understanding was that it would have the opportunity to exit once this lock up period

[1] Page 401 of the original bundle - Paragraph 22 of CEM which says this share class are not redeemable

ended and there was an Initial Public Offering ("IPO"). It had this understanding based on a written presentation which had been prepared by one of the directors of the Company Mr. Kristopher Drankiewicz.

9. Prior to the ending of the lock up period, there were two major events which form the background to the series of actions on both sides. In January 2020, there was a final falling out between Mr. Drankiewicz and Mr. Bours Laborin. Mr. Laborin is a family member of the principals behind the Trust. He had introduced the Petitioner to the investment in the Company. He worked for an affiliate of the Company for a period during which he performed a liaison role between the Company and the Petitioner. Beginning in February 2020 the Petitioner began seeking information from the Company including as to its percentage shareholding and the basis for certain capital calls. It was the evidence at trial that the departure of Mr. Bours Laborin from his liaison role and the reasons which he gave for that departure led the principals behind the Petitioner to seek assurances and to question the trustworthiness of Mr. Drankiewicz. Mr. Drankiewicz's position is that it was the very opposite and it was Mr. Laborin who was not being truthful about the arrangements which had been made between them.

10. On the 25th June 2020, an email between Mr. Bours Laborin and the Petitioner's attorneys was mistakenly copied to Mr. Drankiewicz. Mr. Bours Laborin referred to a number of options including the last resort of the nuclear option of forcing a wind down of the Company in the pursuit of the overall goal of the Petitioner which was to gain more control and oversight of its investment. The evidence of Mr. Ferrer at trial was to the effect that Mr. Bours Laborin was not speaking on behalf of the Petitioner. Mr. Ferrer's attempts to reassure Mr. Drankiewicz were not successful in part because Mr. Drankiewicz did not respond to his overtures.

11. On the 29th June 2020 the Company gave notice of compulsory redemption of the Petitioners' shares pursuant to Article 12.1 of the MAA. The effect of this was that the Petitioner would no longer be a shareholder but would not be able to access the shares until the lock up period ended. In response, the Petitioner issued Writ proceedings on the

9th July 2020 in Cause FSD 155 of 2020. An injunction was granted by the Court which restrained the Company from redeeming the shares. On the 27th August 2020 the Company confirmed that it would not proceed with the redemption.

12. The lock up period ended on the 31st December 2020. Shortly thereafter the share price rose exponentially to a high of $59.09 per share on the 22nd January 2021.

13. On the 11th January 2021, Mr. Drankiewicz notified the Petitioner that 20% of its shareholdings would be redeemed. The Petitioner replied that it was happy to accept full redemption. Mr. Drankiewicz replied that it was only a 20% redemption and effected this. His evidence at trial was that the 20% redemption was roughly a full return on the initial investment made.

14. On the 28th January 2021, the Petitioner and two other shareholders, ("the Requisitionists") requested that the Company convene an EGM and proposed the appointment of four new directors, all of whom were connected in some way to the Petitioner.

15. On the 9th February 2021, attorneys on behalf of the Company advised that the Requisitionists did not have a sufficient number of shares to convene an EGM and seven days later explained that the power to call a meeting was not by reference to the NAV as stated in the CEM but by majority of voting shares as stated in the MAA.

16. On the 19th February 2021, the Petitioner filed an Originating Summons in the Grand Court in Cause FSD 46/2021. This sought an order that the Company convene an EGM or provide information so that the Petitioner could do so.

17. Four days later, on the 23rd February 2021 Mr. Drankiewicz, said that the Company would redeem 50% of the Petitioner's remaining shares in the Company on the 28th February 2021. The Court found on the evidence that this further partial redemption was done for an improper purpose in order to negatively impact the majority of the Petitioner.

18. On the 4th March 2021 the Company issued a Notice by which it converted the Petitioner's shares to non-voting shares pursuant to Article 29.3 of the MAA. The Conversion Notice included an offer of full redemption of the remaining 30% of the Petitioner's Shares. The primary reason given was the non-disclosure of the political offices held by certain members of the Bours family. The Court found that this reason was not a truthful one and that the conversion was done for an improper purpose to remove the voting rights of the Petitioner because of the request to call an EGM.

19. Thus, the summary position is that by March 2021 the Petitioner was a minority shareholder with only 2,294 non-voting shares. The Petitioner contended that between February 2020 and March 2021, the Company by a series of actions acted for improper purpose and or in breach of the MAA in the compulsory redemption of its shares.

20. The Court found that the conduct of the directors had been exercised for an improper purpose in a sequence of events culminating in two primary respects. Firstly, by the compulsory redemption of 50% of the Petitioner's shares on the 28th February 2021 and on the 4th March 2021 in giving notice of the conversion of the Petitioner's shares in the Company to non-voting shares.

21. The Company filed an application to strike out the Petition which was heard on the 4th June 2021. During that hearing the Company argued that a buy-out was an effective remedy and offered to purchase the Petitioner's shares at NAV. The Petitioner maintained that the only appropriate remedy was a winding up and relied in part on the need for a full investigation into the financial affairs of the Company which could only be appropriately done by an independent liquidator rather than by one of the directors. The Re-Amended Petition alleged a number of financial irregularities relating to the expenses charged to the Petitioner, potentially misleading investor statements and payment of excessive management fees by the Petitioner.

22. At trial the Company's evidence responding to these financial allegations was in the main unchallenged. The Court concluded that there was nothing which supported a need for a financial investigation.

THE MAIN ISSUE

23. Between January 2021 and the present, the share price has fluctuated considerably. It appears that this is entirely due to market forces. No one seeks to argue that the conduct of the Company or of the Petitioner had anything to do with this. The highest price point was in January 2021, shortly after the lock up period ended. It was then at US $52.35 per share. By March 2021 when the Petition was issued it was at US $39.92 per share. It has never returned to those levels. In October 2023 it was at US$12.00 per share.

24. The Petitioner seeks orders that the valuation date for its remaining shares should be as at the 15th January 2021. This being the date when it sought but was refused full redemption after the lock up period ended. This would mean that the shares would be purchased at a price of US$52.35 per share at a total cost of US$9,190,421.55. The Petitioner contends that the Order which the Court should make should be such as to put the Petitioner in the position it would have been in, if it had exited the Company in January 2021. Counsel argues that in practice the Petitioner intended to sell its shares in January 2021 and that the logic and justice of the judgment requires that the shares should be purchased on terms that would have been available to the Petitioner at that time. The ancillary orders sought are for interest from the valuation date and for a detailed breakdown of any deductions made to be verified by the independent director, Mr. Ronan Guilfoyle.

25. The Company's position is that the date of the share price should be the date of the Order being the "the first business day of the month following the date of the order, that being the date at which the Fund would strike its NAV in the ordinary course of business". The Company places heavy reliance on the fact that two offers of redemption were made to the Petitioner. The first offer was within the Conversion Notice in March 2021. The

second was shortly after the Petition had been filed and during the hearing of the Strike Out application in June 2022.

THE GUIDING PRINCIPLES

26. Both Counsel have helpfully drawn to the attention of the Court several cases dealing with unfair prejudice petitions as providing useful guidance in the exercise of discretion in circumstances of some similarity. The overarching principle is that in determining the appropriate valuation date, the Court has a discretion which must be exercised so as to achieve fairness between the parties as far as is possible, (See ***Re Elgindata Ltd***[2]).

27. The Court's discretion is to be exercised judicially and on rational principles in such a way that the purchase order arrived at is fair and equitable in all the circumstances of the particular case. There are circumstances when an early valuation date would be appropriate and others where the date of the order would meet the justice of the case.

28. The cases illustrate various applications of the principles to particular circumstances. I will review some of them below.

29. In the case of ***In re a Company (No 002567 of 1982)***[3] the English Court considered a motion to strike out a petition brought under s.225 of the English Companies Act 1948. I shall refer to this case in some detail because in my view it is of assistance in the instant case. The petitioner held one third shareholding in the company and was also a managing director. There was a breakdown in relations, and he was excluded from participation in management in September 1980. He asked that the other shareholders purchase his holding at a fair price. On 9th June 1981, C and R suggested that a fair market price be determined by an independent expert. The petitioner rejected the offer and filed a petition some days later.

[2] [1991] BCLC 959, page 1006, paragraph c
[3] [1983] 1 W.L.R.927

30. Having determined that the petition should be dismissed or struck out but allowing time for a detailed agreement to be reached, the secondary issue for determination was the date for valuation of the petitioner's shares.

31. Vinelott J. expressed the view that there were many cases where fairness would require an earlier valuation date than the date of the order such as when the petitioner was excluded from the company. The learned Judge concluded that an earlier valuation date would not be the appropriate course in the case. The primary reason for the conclusion was the fact that two offers to purchase the petitioner's shares had been made prior to the filing of the petition. Both offers included valuation by an expert and the question of whether there would be a winding up. The petitioner had described these offers as one-sided, which did not appear to be the case.

32. The conclusion in part was that since the petitioner had rejected previous fair offers in order to use the threat of winding up to obtain what he considered a fair value, his shares should be valued as at the date of submission to arbitration or to an expert valuer and not retrospectively from the date he had been excluded from the company's management.

33. The learned Judge noted the petitioner's argument that notwithstanding the offers made he was entitled to have the company wound up and considered the position had a winding up been granted: -

> *"In a winding up of the company he would get one-third of the net value of the assets of the company ascertained on sale rather than by valuation. Why -if I may put the point rhetorically – if he is paid out by valuation instead of sale, should he seek to make the valuation retrospective?"*

34. The Court considered that while there may have been deficiencies in the original offer, had these been identified they could have been answered at the time.

35. The conclusion was that in light of this history it would be wrong to allow the petitioner to go back to an earlier valuation date, this despite the loss of profits which he suffered from being excluded. In summary he should have negotiated terms. The learned Judge stated that: -

> *"The point that has troubled me is that the petitioner has been excluded, with the consequence that he has not shared in the profits of the company. The profits have all been paid out by way of remuneration to the respondents. It seems at first sight unfair that having been. at least on the face of it, wrongly and unfairly excluded from the profits of a joint venture, he should not be compensated. But again, this consequence is, it seems to me, a result of his own failure to accept a fair offer as long ago as 9 June 1981. If he had negotiated, then he might well have been able to secure agreement both to the valuation relating back to October 1980 and to an arrangement under which interest would be paid at the proper rate on what was ascertained to be his share."*

36. In the case of ***In re OC (Transport) Services Ltd.***[4]**,** the company, OC (Transport) Services Ltd., increased its share capital to permit an allotment to another company, Overland Contracts (Holdings) Ltd., in which one of the respondents had an interest. A resolution was passed to this effect in January 1980. The petitioner who was a director and shareholder, was not happy about this increase in share capital and the allotment and discussed options for the purchase of his shareholding. In June1981 he was removed from his office as a director. He presented a petition in September 1982 seeking a buy-out of his shares.

37. The Court was asked to determine the date at which the petitioner's shareholding was to be valued. The Court (Mervyn Davies J.) held that "on an application under s. 75 of the Companies Act 1980 sometimes fairness required that shares ordered to be purchased should be valued at a date earlier than the date of the petition". It was fair in this case that

[4] [1984] BCLC 251

a date prior to the date of the petition or the date when he was advised of his removal from office be chosen. This was because by these dates the value of the shares had been influenced by the company's association with Overland Contracts Holdings. The conclusion was that the shares should be valued as at the date of the resolution to increase the share capital of the company. The Court stated: -

> *"If …….shares may have suffered a sea change because of the company's altered status, then it is not right that he should be paid for the shares on the basis of the value of the 'changed' shares."*

38. In the case of ***In re London School of Electronics Ltd.***[5], the petitioner and City Tutorial College Ltd, ("C.T.C.") were shareholders in a limited company, (London School of Electronics Limited), which provided electronics courses to students. The petitioner was a director of the company and taught some of the courses. A and G were directors of C.T.C. The arrangement among them was described as a quasi-partnership. Following the deterioration of their relationship, A and G sought to remove the petitioner as a director by a resolution passed at a meeting on the 27th July 1983. Additionally, without notification to the petitioner they made an agreement with an overseas institution to secure recognition for B.Sc. degrees solely for C.T.C excluding the petitioner. The petitioner was deprived of his 25% share of the profits to be earned from the fees to be paid by these students in the forthcoming academic year. The petitioner left his post and started a new educational college in the academic year 1983-1984. He took with him twelve of the students of the company.

39. The petitioner presented his petition on the 10th February 1984 by which he sought an order under s.75 of the English ***Companies Act 1980*** that the majority shareholder C.T.C. be required to purchase his shares in the company. The Court concluded that notwithstanding the petitioner's own conduct the test was met in that it was satisfied that the company's affairs were being or had been conducted in a manner which was unfairly

[5] [1986] Ch 211

prejudicial to the petitioner and that the petitioner was therefore entitled to the order sought.

40. The second issue was the appropriate date for the valuation of the petitioner's shares. Both Counsel submitted that there was a general rule as to the valuation date at which shares are ordered to be purchased pursuant to s.75. Counsel for the petitioner argued that the valuation date ought usually to be the date of the order. This being the only fair method of compensating an unwilling vendor. Counsel for the respondent company submitted that it ought usually to be the date of the presentation of the petition or the date when the unfair prejudice occurred which in that case was the date of the board meeting of 3rd June 1983 and the date at which the petitioner offered to sell its shares to the company.

41. Nourse J. stated that if there was a general rule it would be the date of the order or the actual valuation rather than the date of the petition or the unfair prejudice. An interest in a going concern ought to be valued at the date on which it is ordered to be purchased: -

> *"If there were to be such a thing as a general rule, I myself would think that the date of the order or the actual valuation would be more appropriate than the date of the presentation of the petition or the unfair prejudice. Prima facie an interest in a going concern ought to be valued at the date on which it is ordered to be purchased. But whatever the general rule might be it seems very probable that the overriding requirement that the valuation should be fair on the facts of the particular case would, by exceptions, reduce it to no rule at all."*

42. Following a review of the decisions in similar cases including, ***In re a Company (No 002567 of 1982), In re O.C. (Transport) Services Ltd.*** and ***In re Bird Precision Bellows Ltd***.[6], the Court concluded that the conduct which was unfairly prejudicial to the petitioner was the decision of the company to appropriate certain students to itself. The

[6][1986] Ch.658

profits from those students would not have been earned until during the academic year 1983 to 1984 and thus it would not be fair to the petitioner to value the shares as at 3rd June 1983. It would be unfair to C.T.C. to value them as at the actual date of valuation when the efforts of A and G had resulted in a greater academic standing for the course. This owed nothing to the petitioner. It was thus held that the shares should be valued at a date in the academic year 1983 to 1984 and that the date of the presentation of the petition being midway was as good as any other.

43. The conclusion was that the Petitioner ought to be bought out on the footing that the unfair prejudice had never occurred.

> *"The whole object of the exercise is that Mr. Lytton should be bought out on the footing that the unfair prejudice had never occurred, in which event both he and the students would have remained with the company."*

44. The case of ***In re A Company (No 00 2612 of 1984)***[7] also concerned a petition under s.75 of the English ***Companies Act 1980***. This was brought by a minority shareholder on a claim for unfair prejudice. The factual basis relied on, included non-consultation on all major affairs of the company and deliberately diverting profit from the company to another company under the name Cumana Ltd. There was also an attempt to procure a rights issue. The main purpose of this was to reduce the petitioner's proportionate stake in the company. The Court concluded that the affairs were conducted in a manner which was unfairly prejudicial to the petitioner, held that the claim was made out and ordered the majority shareholder to purchase the petitioner's shares.

45. In issue was the date at which the petitioners' shares should be valued. Two of the four options included the date when the petition was presented and the date of the hearing. Vinelott J. referred to the case of ***Scottish Co-operative Wholesale Society v Meyer &***

[7][1986] 2 B.C. C. 99453

Anor [8] in which the order made was for purchase by the majority shareholder at the value the shares would have had at the date of the petition, had it not been for the oppressive conduct. The learned Judge agreed with Nourse J's reasoning in ***London School of Electronics Ltd.***, that there was no rigid rule applicable to all circumstances but inclined to the view that the date of the petition was the correct starting point with any necessary adjustment for unfair conduct which had depreciated the value shares. A departure from this date required some special circumstance. The learned Judge explained the rationale for this in the following way: -

> *"The date of the petition is the date on which the petitioner elects to treat the unfair conduct of the majority as in effect destroying the basis on which he agreed to continue to be a shareholder, and to look to his shares for his proper reward from participation in a joint undertaking. If he succeeds in his petition and establishes that the breakdown in the relationship justifies an order for the compulsory purchase of his shares, he has established that the respondents, if they had acted fairly, would have agreed, following the breakdown in their relationship, that his shares should be purchased at fair value."*

46. The learned Judge identified three factors in the case which confirmed the date of the petition as the proper date. The third of the three was the respondent's unwillingness to agree to a sale of the shares prior to the collapse of the price of companies in the technology field. The value of the shares had declined by about GBP ¾ million between the date of the petition and the date of judgment. Using the petition date, and the expert evidence which was accepted, the order was for the sale at a fixed price. The respondent was concerned that he would not be able to meet the purchase price from his own resources. The learned Judge said this: -

> *"The collapse of the price/earnings ratios of companies in the high technology field came after September. If, as a result, Mr. Bolton is unable with Mr. Lewis's concurrence to sell the shares of the company as a whole at the price which they*

[8] [1959] A.C. 324

would, I think, have commanded between April and September he has only himself to blame. It would be unjust that Mr. Lewis, who has always been willing to concur in a sale, should suffer because of Mr. Bolton's refusal to do so."

47. On Appeal (***Re Cumana Ltd.)***[9] the appellant challenged the unqualified nature of the order which had been made. It was argued that the date of judgment should have been chosen and that the remedy granted was unfair to the majority shareholder. The Court of Appeal dismissed the appeal against the findings of the learned Judge and held that the choice of the date for the valuation of shares was a matter for the exercise of the judge's discretion.

48. On the inability of the appellant to meet the purchase price, the Court held that impecuniosity was not a reason for not giving judgment against a wrong doer but said this: -

"Although, no doubt, a respondent's financial position would be a matter to be taken into account by the court in deciding upon the form of relief. That was a matter for the discretion of the trial judge."

49. Lawton LJ noted that the market may have moved in either direction. To the extent that it had deteriorated it did not provide justification for setting aside the judge's discretion. The learned Judge agreed that the choice of valuation of the date of the petition was appropriate but said: -

"I would stress, however, that the choice of a date for valuation in cases of this kind is a matter for the exercise of the trial judge's discretion. If, for example, there is before the court evidence that the majority shareholder deliberately took steps to depreciate the value of shares in anticipation of a petition being presented, it would be permissible to value the shares at a date before such action was taken."

[9] 1986 2 B.C. C. 99495

50. In the case of ***Re Elgindata Ltd***[10], Warner J. held that on the facts in that case, the most appropriate date for valuing the shares was the date of the Court's order. This was a petition under s.459 of the ***Companies Act 1985*** brought by petitioners Derek Rowland and his wife on the ground of unfair prejudice. The Court concluded that it was satisfied that the majority shareholder, Mr. Purslow had been unscrupulous in his use of the company's money. He had used it for his personal benefit and for the benefit of family and friends. The Court was satisfied that this was conduct which was unfairly prejudicial to the interests of the petitioners[11].

51. The Court considered that while the conduct was inherently unfairly prejudicial it was not a major cause for the decline in the fortunes of the company and for the diminution in the value of its shares. This could only be attributable to the conduct of Mr. Purslow to a very limited and unquantifiable extent. Having decided that there should be a 'clean break' and that the minority shares of Mr. and Mrs. Rowland should be purchased, the question was on what basis the share price should be arrived at.

52. The Judge was invited to consider eight possible valuation dates. The eighth was a valuation date on the basis of what the shares would have been worth but for the unfairly prejudicial conduct which had occurred. The learned Judge said this: -

> *"If I am right in the conclusion that I have reached as to the extent to which the diminution in value of the petitioner's shares was attributable to conduct on the part of Mr. Purslow of which the petitioners are entitled to complain under s.459, to fix a date for the value of the shares at or near the time when the company's fortunes were at their peak would be grossly unfair to Mr. Purslow."*

53. It was observed that both the date of the petition or the date of order are open to a court to adopt where the facts are not such as to point to an earlier and different date being

[10] [1991] BCLC 959
[11] Ibid pages 1003-4

fairer. The conclusion was that on the facts of the case, the date of the order would be fair.

54. Both parties in the instant case, placed significant reliance on the judgment of the English Court of Appeal in the case of ***Profinance Trust SA v Gladstone***[12]**.** Counsel for the Company also drew the Court' s attention to the judgment at first instance[13].

55. The petitioner Profinance Trust SA, (PTSA) was a minority shareholder in the company Americanino Ltd. In December 1997, the petitioner presented a petition seeking a buy-out order of its 40% shareholding in the company. The basis for the petition under s.459 of the ***Companies Act 1985*** was that the affairs of the company were being conducted in a manner which was unfairly prejudicial to its interests. The disagreement between the petitioner and the company had led to the resignation of the petitioner's representative on the board eight or nine months earlier in April 1997. At that time the company was worth GBP 82,000. In December1997 when the petition was presented the company was worth GBP 80,000. By the time the petition was heard in March 2000, the company had increased in value and was worth GBP 215,000.

56. The respondent conceded that the petition was made out. The issue at trial was the date at which the minority shareholding should be valued. Based on expert evidence, there were agreed valuations at various dates. It was also agreed that these valuations eliminated any aspect of depreciation of the shares which could be attributable to the unfair prejudice alleged. The petitioner submitted that it would suffer prejudice because of the delay between the time of the presentation of the petition and the date of the order and that it should be the date when the petition was heard or the order was made.

57. Following an extensive review of several cases the learned Judge, Kim Lewison QC concluded that they did not support the proposition that there is a prima facie rule that the date of the court's order is the appropriate valuation date. The overriding principle is

[12] [2002] 1 BCLC 141
[13] [2000] 2 FCLC 516

fairness not only to the petitioner but to the other side as well. The wide discretion granted by s.459 was subject only to the limitation that it be exercised in a way which was fair to both sides. In some cases, fairness will require a date earlier than the date of the order because the value of the shares has diminished. Additionally, the court could fix a price which includes a component for delay. The learned Judge expressed the strong view that a petitioner is not entitled to a one way bet to be insulated from any fall in the price and to be able to take advantage of a rise in the price of the shares. The learned Judge stated that: -

> *"In my judgment the matter is one for the discretion of the judge, to be exercised according to basic notions of fairness. Although the foundation of any order is the unfair conduct of the respondent, it seems to me that fairness must mean fairness to both sides.*
>
> *In some of the cases a date earlier than the date of the order has been selected because the value of the shares in question has been diminished as a result of the conduct complained of. It is easy to see the fairness of that.* ***But it does not seem to me that fairness demands that the petitioner is entitled to a one-way bet,*** *able to take advantage of any rise in the share value, but insulated from any fall. Where the petitioner has continued to fund the company in a real sense, it may well be fair that his actual return on capital should equate to the rise in value of the company, but where, as here, the petitioner has been repaid in full, I do not consider that the same consequence necessarily follows."*[14] *(My emphasis added.)*

58. The conclusion of the trial Court was that it was appropriate to use the value as at the date of the petition (40% of this). A delay in payment factor of 20% was applied and a per annum total increase of 45%. The Court took into account a number of factors in assessing the value of the petitioner's shareholding. These included: -

[14] Ibid, page 22 paragraph h to i

i) The petitioner's startup capital had been repaid so he did not continue to finance the partnership.

ii) The petitioner would not have to suffer any discount because of a minority shareholding.

iii) The petitioner had claimed a much higher value for its shares so it is unlikely that he would have accepted an offer of 40% of GBP 80,000.

iv) The success of the company was due to the respondent's efforts and his ability.

v) After the petition was presented, the value of the company which had tripled was entirely due to the respondent's effort thus it would be unfair to him to value the minority shareholding at or near the time of the company's peak value.

vi) The petitioner should not profit from the delay some of which was its fault. This would be unfair.

vii) Some allowance could be made for delay, to eliminate the prejudice caused by the petitioner because of not having been paid out when it requested this.

viii) The transfer had not yet taken place. Thus, the petitioner continued to be an investor in the company.

59. On appeal, the petitioner argued *inter alia* that the trial judge had chosen the wrong valuation date. The Appellate Court held that the authorities showed that there were two competing considerations to bear in mind in deciding what valuation date was fair in the circumstances of a case. One was that the value should be close to the actual sale so as to reflect the value of what the shareholder was selling. The second was that the date of the petition was the correct starting point being the date that the petitioner elected to treat the unfair conduct of the majority as destroying the basis on which he agreed to continue to be a shareholder, the valuation being adjusted to take account of unfair conduct which had depreciated the value of the shares.

60. The Appellate Court confirmed the power to order interest with caution and in appropriate circumstances but considered that there had been errors made. These included the factual findings as to the start of the joint venture between the parties and

the reasons for the increase in the value of the company. The conclusion was that in the exercise of its own discretion the fairest course was to use a valuation date as at the time of the hearing. It was held in part that the clearest reason for selecting an early valuation date is that there has been a major change for better or worse in a company's capital structure. The Court stated: -

"60. The starting point should in our view be the general proposition stated by Nourse J in Re London School of Electronics [1986] Ch 211, 224:

> *"Prima facie an interest in a going concern ought to be valued at the date on which it is ordered to be purchased."*

That is, as Nourse J said, subject to the overriding requirement that the valuation should be fair on the facts of the particular case.

"61. The general trend of authority over the last 15 years appears to us to support that as the starting point, while recognising that there are many cases in which fairness (to one side or the other) requires the court to take another date. It would be wrong to try to enumerate all those cases but some of them can be illustrated by the authorities already referred to:

i) Where a company has been deprived of its business, an early valuation date (and compensating adjustments) may be required in fairness to the claimant (Meyer).

ii) Where a company has been reconstructed or its business has changed significantly, so that it has a new economic identity, an early valuation date may be required in fairness to one or both parties (OC Transport, and to a lesser degree London School of Electronics). But an improper alteration in the issued share capital, unaccompanied by any change in the

business, will not necessarily have that outcome (DR Chemicals).

iii) Where a minority shareholder has a petition on foot and there is a general fall in the market, the court may in fairness to the claimant have the shares valued at an early date, especially if it strongly disapproves of the majority shareholder's prejudicial conduct (Cumana).

iv) But a claimant is not entitled to what the deputy judge called a one-way bet, and the court will not direct an early valuation date simply to give the claimant the most advantageous exit from the company, especially where severe prejudice has not been made out (Elgindata).

v) All these points may be heavily influenced by the parties' conduct in making and accepting or rejecting offers either before or during the course of the proceedings (O'Neill v Phillips)."

61. In the case of ***Re Abbington Hotel Ltd***[15] the matter concerned an unfair prejudice petition under s. 994 of the ***Companies Act 2006*** and a cross petition. The Court found that both petitions established a case of unfair prejudicial conduct. On the facts this was primarily that the conduct of Mr. A, in August 2006 in seeking to sell the company and putting forward false minutes, for that was against the agreed basis that the company was to be established. The conduct destroyed the essential relationship of trust and confidence between the parties. The finding on the cross petition was that Mr. A had been excluded from participation in the management of the company after September 2006. There was thus jurisdiction to grant relief under s.996 of the ***Companies Act 2006***.

[15] [2012] 1 BCLC 410

62. There being no dispute that the shares of Mr. and Mrs. A should be purchased by the other party, "G" the issue was the date at which the shares should be valued. David Richards J. stated: -

> *"123 The starting point for the date of the valuation of shares for a buy-out order under s.996 is the date of judgment, but the court is free to choose such date as is most appropriate and just in the circumstances of the case. In particular, the date should be that which best remedies the unfair prejudice held to be established."*

63. A number of dates were canvassed. Mr. A had been excluded from the company from March 2007. The petition of "G" was presented on 4th April 2007. On the 31st July 2007 the first round of expert evidence was prepared. The first set of valuations was done on 12th December 2007. The date of updated evidence was May 2009. May 2009 was rejected as having no obvious connection with the prejudice to be remedied. The July 2007 date was accepted by the Court as providing a remedy for the exclusion of Mr. A. from the company.

64. With these principles in mind, I turn to consider the circumstances of the instant case.

THE SUBMISSIONS

65. By reference to the cases of ***In the matter of Virginia Solutions SPC Ltd***[16] and ***Tianrui v China Shanshui Cement***[17], the Petitioner submits that the remedy ordered by this Court should be one which provides an effective means of redress from what it suffered at the hands of the Company. It is said that anything other than an early valuation date would mean that the Petitioner would not have obtained an effective remedy. The central point made by the Petitioner is thus that the fall in the market price of the shares should be borne by the Company and its other shareholders and not by the Petitioner. In response

[16] CICA 4 of 2022, unreported 10th July 2023
[17] [2019] 1 CILR 481

to the Company's primary argument, the Petitioner asks the Court to disregard the two buy-out offers made on the basis that they were inadequate, and it was not unreasonable to reject them.

66. The Company argues that fairness requires recognition of the fact that on two separate occasions buy-out offers had been made to the Petitioner which had been rejected and that consideration should be given to the impact on its shareholders should an early valuation date be chosen.

THE 15TH JANUARY 2021 VALUATION DATE

THE SUBMISSIONS OF THE PETITIONER

67. Counsel for the Petitioner described this case as an unusual one not involving unfairness to a minority shareholder by the majority, but to a majority shareholder by the Board. Counsel submits that the Court has a broad discretion to do what is just in all the circumstances and that the foremost consideration for the Court should be what would be the best remedy for the unfair prejudice identified.

68. Counsel said that this case is not just about money. It has always been much broader than that, both at the Strike Out stage and at the Petition stage. A winding up order had been sought. While the primary remedy was not granted, the Court did not exonerate the directors. The valuation date then has to be decided in a way which best remedies the unfair prejudice found. Counsel referenced the case of ***Re Abbington Hotel Ltd***[18] and submitted that the best remedy in this case for the unfair prejudice found is a date in January 2021.

69. Counsel submits that the Petitioner had been prejudiced by prejudicial conduct and that in line with the dicta in the ***Profinance*** case a claimant should not be impacted by the fact that the market had fallen between the date of the prejudicial conduct and the date of

[18] [2012] 1 BCLC 410

the remedy especially where there is disapproval of the conduct and delay between that conduct and the final resolution of the case.

70. Counsel sought to describe the unfair prejudice as being obstruction of the Petitioner from exercising a right of control over the Company which it was entitled to exercise having regard to its shareholding. It was prevented from having the right of full control over its own destiny, relative to the realisation of its shares.

71. Counsel submits that the logic and justice of the reasoning of the judgment points to a January valuation date because that was the date that the Petitioner intended to and should have been able to exit the Company. In practice the Petitioner intended to sell its shares in January 2021. The Order should be such as to put the Petitioner in the position that it would have been in, if it had exited the Company in January 2021. The shares should therefore be purchased on terms that would then have been available to the Petitioner at that time. It is said that this would be a fair valuation date and an effective and appropriate alternative remedy because it would restore the Petitioner to the position in which it would have been if the directors had acted properly.

72. In response to the arguments of the Company, Counsel submits that there is no question here of the Petitioner trying to profit from a one-way bet. The only bet was to see if the IPO could be achieved. However, when the Petitioner sought to collect on its bet, it was obstructed from doing so. The Petitioner was led to believe that it could exit and had tried to exit the Company and its subsequent attempt to exercise its shareholder rights was deliberately thwarted by the Company. The Company's action also caused the Petitioner to suffer loss as its shares fell in value. In these circumstances it is the Company which should bear the loss and not the Petitioner.

73. Counsel argues that the Company's position that the purchase order date should be the current price would mean that the Petitioner would be faced with a significant loss because of the fall in the share price from January 2021. It would be left without a

worthwhile remedy, having been improperly prevented from exercising its shareholder rights and deprived of some of its shares and voting rights.

74. Counsel for the Petitioner submits that the Petitioner would have lost the opportunity to exit the Company at the time of its choosing and would still have to pursue another writ action to recover the losses it has suffered which would be an unjust and inequitable outcome. The Petitioner would be in a worse position than it was at the time of the Strike Out application. Having succeeded in proof of its broader case it should be in no worse position than it was at that time.

75. Counsel urges that the United Kingdom authorities support the Petitioner's position that the conduct of the parties is relevant. The actions taken by the Company which the Court found led to a justifiable loss of trust and confidence were taken before the issue of the Petition and the misconduct of the directors was over an extended period of time and did not end in March 2021. It continued during the trial by the giving of evidence which the Court did not find to be truthful.

76. Counsel submits that the Company's position that the shares should be purchased at the current market value which is much less because of the fall in the market would be unjust and would effectively perpetuate the misconduct. If the only remedy is that the Petitioner be bought out now long after the market has fallen, the Petitioner's rights would all have been for nought. The effect of such an order would be for the Company to impose on the Petitioner a timetable which was perverse, which is what the Petitioner was complaining about. It would be no remedy at all.

77. It is submitted that while the most appropriate date is the 15th January 2021 date, there are two possible alternatives. The first is the 23rd February 2021 when the Company redeemed a further 50% of the Petitioner's shares. Counsel notes that the Court found that this was a deliberate attempt to seek to prevent the Petitioner from exercising its voting rights.

78. Counsel acknowledged that it is right to say that the Petitioner had no enforcement right to insist on redemption in January 2021. It is said that because there was no contractual right to redeem, the Petitioner was dependent on the directors acting with propriety in relation to the redemption of shares and on its voting rights to exercise control. That was its mechanism to have a say in the Company and realisation of its investment. It was deprived of an opportunity to have a say because of what the directors did. The fact that it could not exercise shareholder rights supports its case.

79. The second alternative date is the date of the presentation of the Petition on the 5th March 2021, one day after the issue of the Conversion Notice which removed the Petitioner's voting rights completely.

THE 15TH JANUARY 2021 VALUATION DATE

THE SUBMISSIONS OF THE COMPANY

80. Counsel for the Company in response to the submission of the 15th January 2021 valuation date submits that there is nothing about the 15th January 2021 that makes it a fair date. It is merely the date of partial redemption, a date when the Petitioner may have been happy to accept full redemption but there was no right to redeem. Counsel refers to the evidence of Mr. Ferrer at trial that full redemption is what the Petitioner wanted in January 2021. Counsel asked why this date would be a fair date when the shares were not redeemable, and the Petitioner had no right to a distribution as at that date. Counsel for the Company noted that the Petitioner claimed three things, that it: -

- had always intended to end the investment;
- was happy to accept full redemption in January 2021;
- and was improperly prevented from obtaining full redemption.

81. Counsel submitted that there had been no finding that the Petitioner had been improperly prevented from redemption in January 2021. The finding did not go as far as to conclude that the Petitioner had the right to redeem that it was improperly prevented from

exercising. Counsel said that the error of a right of redemption runs throughout the Petitioner's submissions. The absence of a right to redeem puts into sharp focus the reason that the January 2021 valuation date cannot be a fair date.

82. Counsel said that the Petitioner's argument is that it lost the opportunity to exit the Company at the time of its choosing, but it never had a right to exit the company at a time of its choosing. The only way it could redeem by choice was by the strong-arm tactic of bringing this Petition or similar conduct.

83. Counsel referred to the written presentation of 22nd March 2018 which had been made by Mr. Drankiewicz, which stated:-

- *"Upon IPO Investor Option of managed distribution."*

84. Counsel described this as a non-contractual representation made six months before the subscription agreement was signed by Mr. Ferrer in August 2018. This agreement says that shares are not redeemable. Counsel said that the representation does not alter the fact that the Petitioner did not have a right of exit.

85. Counsel submitted that the actual shareholders rights were, right to information, not to have capital calls, proper redemption, convening of meeting and voting rights. There were four shareholder rights identified by the Court. The only shareholder rights which the Petitioner was found to have been improperly prevented from exercising were convening and voting rights.

86. Counsel highlighted the changes in the share price through the significant dates. The share price dropped to US $49.96 on 23rd February 2021 and to US $7.40 on the 30th June 2022. At the time that the Conversion Notice was issued on the 4th March 2021 the share price was US $42.00. The redemption offer in the Notice remained open to the 4th June 2021 the date of the hearing of the Strike Out application and for seven days after the judgment was issued. At the date of the hearing of the Strike Out application the share price was US $51.00. In August 2023 it was US $13.25.

87. Counsel submits that to select a valuation date of January 2021 would be to permit the "one way bet" which was questioned by the English Court of Appeal in the case of ***Profinance***. It would give the Petitioner the most advantageous exit from the Company in circumstances where it had no right to redeem the shares and it had turned down buy-out offers on multiple occasions, which would have secured share valuations at significantly higher levels. Counsel argues that the Petitioner made its bet when it rejected these offers and took its chances that it would achieve its primary objective of a winding up of the Company. It did not. It achieved a limited objective. Counsel said that in these circumstances the fair valuation date is the date of the order made.

88. Counsel stated that the Appellate Court in ***Profinance*** endorsed the reasoning of the Judge at first instance that the petitioner is not entitled to a one way bet where it is insulated from any fall in the share price. Fairness must be evaluated from the perspective of both parties.

89. Counsel submitted that deciding on the issue of fairness is easy if the value is diminished because of conduct and referred the Court to the reasoning of the English Court in the case of ***Elgindata***. Counsel said that a similar analysis applies to the instant case and that from the case of ***Elgindata***, an important question is whether there is a link between the market fall and the unfair conduct. It would be grossly unfair to fix a date for the value of shares at or near the time when the share price was at its peak when the conduct of the Company has nothing to do with the dramatic fall in the share price of the Accolade shares.

90. Counsel's oral submission which this Court found to be of particular resonance is that the Petitioner cannot turn down an offer in the hope that there is a better remedy out there and when the market goes down, seek a backdated valuation. The effect would be that when the market goes down the Petitioner is effectively insulated. Counsel said that would be unfair to the Respondent when there is no link between the market fall and unfair conduct.

91. With respect to the alternative dates of 23rd February and 5th March 2021, Counsel submitted that the second date, of the 50% redemption, the Court found that this was to prevent the Petitioner from exercising its voting rights. However, those were voting rights and not exit rights. Counsel said that the date of issue of the Petition of 5th March 2021 may be a fair valuation date if that is the date that the Petitioner made its election as per the decision in ***Re Cumana***. Counsel submitted that this would not be a fair date in this case because a redemption offer had already been made.

92. Counsel for the Company said that a worthwhile remedy was provided on the 4th March 2021 when the offer was made to buy out the shares at the top of the market. The Petitioner was then offered the very thing which the Court has determined that it is entitled. Counsel sought to distinguish the case of ***Re Cumana*** where the trial Judge chose the date of the petition. There was evidence that the shares had gone down in value as in this case but the key difference from that case is that there was no share buy-out offer.

93. With respect to the submission that the Petitioner would be forced to pursue another action to achieve justice, Counsel said that it is very difficult to understand how a thwarted right to convene an EGM could translate into a claim for damages of US $7 million. It is not accepted that even before the redemptions the Petitioner had a right to call a meeting. Counsel said that the Court cannot assume some claim on which the Petitioner is bound to succeed which for some reason justifies a long back date. Counsel said that none of that affects the fairness of today as the correct valuation date.

94. Counsel for the Company acknowledged that the usual case would be that a wronged Petitioner should not have to bear a market fall and submitted that this is the reason that a buy-out offer in this case is of such significance. Counsel noted that at the hearing of the Strike Out application the offer remained open. At that time the price went back up to US $51.00. A repeated offer at this high share price was rejected. Counsel said that turning the clock back two years and nine months would permit the one way bet that the Court in the case of ***Profinance*** deprecates. Counsel said that it cannot be fair for the

Petitioner to achieve a US $7 million windfall where it has achieved only limited success. The fair valuation date consistent with the authorities and which would be fair to both parties is the date of the order as calculated under the CEM.

POSITION OF OTHER SHAREHOLDERS

95. Counsel for the Company said that were the Company to pay the share price as in January 2021, it would be paying the Petitioner US $9.1 million which would be US $7.3 million more than the current value of the shares of US $2.4 million. This would mean that other classes of shares would need to bear the cost as the liabilities exceed assets for this class of shares. The Company would be forced to realise 84% of its total NAV of $11.4 million. Counsel said that this was a relevant factor and somewhat perverse because in the judgment the Court considered other investors and the total destruction of the Company. It would be a bitter remedy if other shareholders had to cover this. Counsel submitted that: -

> *"It would be a bitter (and unintended) irony of this carefully selected alternative remedy if the backdated valuation date contended for by the PTR was now to cause substantial financial prejudice to the other investors – by reason of the imperative to liquidate assets of the Fund attributable to the sub-classes of those other investors in order to cover this liability."* [19]

96. Counsel for the Petitioner submitted that it is false reasoning to say that because the Court considered shareholders at the time of reaching its conclusions on the appropriate remedy, it cannot impose financial liability on the shareholders. Counsel said that winding up is a different kind of remedy and the imposition of financial liability on a company is a just consequence of being a shareholder in a company.

[19] Paragraph 28 of Submissions

97. Counsel submits that the Company's concern as to the possible prejudice to shareholders cannot be a reason not to grant the orders sought. It is a basic principle of company law that shareholders share in the fortunes and misfortunes of a company. They are subject to the general company law principles and may if they so wish pursue their own actions against the directors. Counsel said that while the Company may have a strong claim to be indemnified by its directors, this is not for decision today. Justice suggests that the loss should in the first instance be borne by the Company and not the Petitioner.

98. On this point I accept the strength of the argument of the Petitioner. I accept that the circumstances are different at this stage and did not think that the Company's argument in effect as to impecuniosity should be a reason not to make an appropriate valuation order if it was considered fair to do so in the circumstances of the case.

ANALYSIS

99. For my part, I found it difficult to accept the arguments made by the Petitioner as to the 15th January 2021 date being the most appropriate.

100. Counsel for the Petitioner endeavoured to highlight what is said to be a distinction between the present case and the ***Elgindata*** case. Counsel said that this is an entirely different type of case from ***Profinance*** and it is not fair to characterise this as a case where a one way bet is being sought.

101. Counsel said that the key difference and consideration in this case is that the Petitioner intended, wanted and planned to exit the Company in January 2021 and had a legitimate expectation of being able to do so because it was told it could do so. It was improperly obstructed from doing so. There may be some cases where that is unfair, for example, where there is a fall out and a petitioner never intended to sell the shares.

102. Counsel for the Petitioner responded to the strong point made by the Company that the shares were not redeemable in the following way. The submission is that the *Company* could always redeem the shares if it wanted to. Shareholders can exercise control over the

Company and thus over redemption of shares, if necessary, by convening a general meeting and passing a shareholder resolution. The Petitioner should have had that right and was trying to have that right. That opportunity was denied to it by various actions taken by the directors. Counsel said that: -

> *"..he is not saying that the fall in the market was the fault of the directors but it was the fault of the directors that the Petitioner was exposed to the fall in the market when it did not intend to because the Petitioner intended to leave the Company shortly after the IPO in January if necessary by exercising its rights as a shareholder. The directors contributed to that by not allowing the Petitioner to have the opportunity to do so and the Petitioner was forced to stay. This was simply putting Petitioner in the position in which it intended to be.*
>
> *The Petitioner always intended to collect its bets and effectively leave the casino in January 2021 If necessary, by exercising its rights as a shareholder but was forced by the directors to stay."*

103. I note that the Petitioner has always maintained that this Petition is not about redemption rights, and it could not be. There was no right of redemption, and the Petitioner had agreed not to bring a petition about redemption rights. Thus, it had no right of full redemption in January 2021. The Petitioner agrees that it had no right of redemption at its option and well knew that it did not. Counsel's argument is that the directors could have offered full redemption had they chosen to do so.

104. I was not persuaded as to the strength of the argument that because the Petitioner had intended to exit after the IPO this meant that there was prejudicial conduct when it was told that there was to be only a partial redemption.

105. Intention cannot be the same as a contractual agreement. Confusing as it may have been to the Petitioner, no finding was made as to there being prejudicial conduct because there was a partial rather than full redemption on that date. To say that a thwarted intention

may equate to prejudicial conduct is very likely focusing on redemption rights, which the Petitioner had agreed not to do.

106. I accept the arguments of the Company on this point and conclude that the 15th January 2021 date would not be fair in the circumstances of this case.

107. As to the alternative date of 28th February 2021, the further partial redemption which was found to have been effected for an improper purpose, this may have been more of a possibility but for the following reasons. If the effect of the conduct on the value of the shares is a relevant question as is suggested in some of the cases referenced above, the answer in this case is that it is doubtful that the conduct identified affected the value of the shares.

108. It is said that the prejudicial conduct caused the Petitioner *to be exposed to the fall in the marke*t. In summary Counsel for the Petitioner submitted that inability to exercise its voting rights because of the prejudicial conduct led to its inability to exit the Company at a time of its choosing and thus it suffered loss.

109. In my view to say that had they been permitted to call an EGM, they were bound to have succeeded in passing a shareholders resolution which would then have inexorably led to the ability to exit the Company at that particular time and at that share price may well be speculative to more than a limited extent. In short, I could not see a direct nexus or straight line from the conduct to the ability to exit, much less to exit at the price of the shares which obtained at that time. The value was not diminished because of conduct, but because of market forces. There appears to be no causal link between the market fall and the unfair conduct. There appears to be no clear nexus between the identified obstruction and the ability to exit at that particular time and price.

110. Among the rights found to have been interfered with was the right to convene an EGM and voting rights. It is correct that voting rights were removed in March 2021. This was found to be serious misconduct but again it is difficult to identify a direct nexus between

the failure to allow the calling of an EGM, the removal of voting rights and full redemption of the Petitioner's shares at the price which then obtained.

111. At this point, noting the significant change in the share price which would well be regarded as "a sea change" and the many fluctuations over the period of time, my initial view was that the earlier date of the Petition of 5th March 2021 was the likely fairest date being the date when the Petitioner elected " *to treat the unfair conduct of the [majority] as in effect destroying the basis on which he agreed to continue to be a shareholder, and to look to his shares for his proper reward from participation in a joint undertaking* ….".

112. This is the conclusion I would have reached but for the issue of the offers made.

113. I should add for completeness that in reaching that conclusion I again noted the Company's arguments as to the position of other shareholders but did not find this to be definitive or even a primary focus. In effect it is impecuniosity. I accept the arguments of the Petitioner and consider that at this stage this has to be secondary to the primary question.

THE OFFERS TO REDEEM

114. It follows from what I have said as to the conclusion that I would have reached as to the date of the Petition being the valuation date, that the question of the offers to redeem is critical to a final decision on the issues raised.

115. Counsel drew to the Court's attention the guidance in ***Hollington on Shareholders Rights: -***[20]

> *"In determining the fairness or otherwise of the treatment of the petitioner, the court will take into account any offer made to the petitioner, and if the petitioner is offered*

[20] Ninth Edition, Sweet & Maxwell, 2020, paragraph 8-25

all that he can reasonably expect by way of final relief, i.e. a purchase of his shares at a demonstrably fair value together with such costs as he is entitled to ….”

116. The arguments of the parties focused on the nature and adequacy of the two offers to redeem. Both Counsel relied on the dicta in ***O’Neill and Another v Phillips and Another***[21]. Each argued that the criteria had or had not been met.

THE PETITIONERS’ ARGUMENTS ON THE NATURE OF THE OFFERS

117. Counsel for the Petitioner submits that neither offer was a reasonable or qualifying offer. Neither offered to resolve all the issues which have been subsequently determined in the Petitioner’s favour. Counsel submits that the offer only helps the Company if it can persuade the Court that this was a reasonable offer which ought to have been accepted.

118. Counsel for the Petitioner submits that both offers were deficient and that there are five reasons why it was not unreasonable to refuse to accept the offer of 4th March 2021. Counsel says that three of these continued to apply to the June 2021 Strike Out offer.

i) It was coupled with the Conversion Notice and was in fact not an offer at all.
ii) It did not address costs of the two other proceedings.
iii) It provided no redress as to the shares already redeemed in January and March and from the Company’s refusal to redeem the shares in January 2021 and subsequent compulsory redemption of the shares at a lower price in February 2021.
iv) It provided no redress for the capital calls which had been wrongly made.
v) The Petitioner was not offered an independent valuation or information, necessary to verify that valuation.

[21] [1999] 1 WLR 1092

119. As to the first reason it was submitted that the redemption offer contained in the Notice of Conversion dated 4th March 2021 was in reality, a continuation of the improper conduct that had caused the Petitioner to lose trust and confidence. The Notice was accompanied by a written resolution referring to the political position of members of the Bours family which resolution was found by the Court not to be a genuine document.

120. Counsel submitted that in considering whether it was reasonable to accept the offer it is important to note that the offer which is described as an offer of full redemption also purported to remove the voting rights of the Petitioner' shares. The Petitioner was being forced to accept a fait accompli, lose its voting rights or redeem its shares. There was no option to keep its shares with voting rights.

121. Counsel said that it is extraordinary for the Company to now be arguing that the Petitioner acted unreasonably by in effect declining to comply with this unlawful Notice. The Notice was not only unlawful it was based on false reasoning and was dishonest.

122. As to the second reason, Counsel noted that generally an offer to buy-out is not a reasonable one unless it makes provision to pay the costs of the other party. While it is correct that it could not include the costs of the Petition, it could have included the costs of the other two actions. Although the Injunction application and Originating Summons were separate actions, they were aimed at the same conduct and were at the heart of the complaint and entirely justified. Both had been some months before the Notice was issued. There was a reasonable period for the Company to make a reasonable offer to pay the Petitioner's costs which by then it should have realised it was liable to pay. The Company eventually withdrew its redemption notice. It never accepted any responsibility for what it had done and never made any offer to pay the costs in July 2020 or any time between then and March 2021. Counsel said that the Company has now conceded that it would pay the costs of those sets of proceedings, but this concession was only made one week before the hearing as a footnote in the filed Skeleton argument. The fact that costs were reserved until today underlines the point that the issue of costs was a live one between the parties.

123. As to the third reason, Counsel submitted that by the time of the 4th March offer, the Petitioner had already suffered a loss because it had been unable to redeem all its shares. The Company had failed to allow the Petitioner to redeem shares in 2021 and had imposed partial redemption. There was no recognition of those losses in the Conversion Notice and no offer of redress for those losses. The Company did not take responsibility for its misconduct or advert to the fall in the share prices. There was a lack of redress in respect of shares already redeemed in January and March. All that was offered was a redemption of the remaining shares with no redress for what had happened.

124. As to the fifth point, it is submitted that it is not a new point that the Petitioner requested information about expenses. The dicta in ***O'Neill v Phillips*** requires that there should be equality of arms and transparency between the parties. The Petitioner had a continuing concern about the information being provided by the Company. No independent director was appointed until 30th March 2021. It was reasonable for the Petitioner not to rely on Mr. Drankiewicz to determine the value of the redemption.

125. Counsel submitted that the offer made in the course of the Strike Out proceedings, should also be rejected and that most of the five points still apply to that offer. The offer was repeated but was not improved. There was a difference in the form of proposal but no difference in substance. Counsel submits that while it is right to say that it was put in a free-standing way and can be characterised as having been decoupled from the Conversion Notice, the only reason that it could be made that way is that the Company had already removed the Petitioner's voting rights at that stage.

126. Counsel acknowledged that by then the issue of the capital calls may not have applied because by that time there had been a recognition that they were wrongfully made.

127. Counsel argued that the offer at the hearing was even more deficient in respect of costs. The Petition was already on foot. The Petitioner had already incurred costs so the offer should have included the costs of the two proceedings as well as the costs of the Petition.

128. Counsel said that the fifth point, the calculation for overlapping reasons, still applied.

THE COMPANY'S ARGUMENTS ON THE NATURE OF THE OFFERS

129. Counsel for the Company submitted that the Petitioner's points are in relation to the quality or nature of the offers which were made, potential concerns about calculation and the absence of an offer of costs.

130. Counsel described the first point as the qualitative deficiency. Counsel said that it is accepted that the Court found that the Conversion Notice was not issued for proper purpose but that this does not affect the fact that the Notice did offer full redemption of shares. Counsel said putting aside the context in which it was made, one is looking at the remedy which the Company's misconduct gave the Petitioner an entitlement to receive.

131. Counsel said that there was no ambiguity about the offer. It was unequivocal, not ambiguous or uncertain. There is no problem of qualification. Counsel referred to Mr. Ferrer's evidence at trial in response to the question why the offer was not accepted, which was that the moments were different, this was about the contravention of their rights.

132. Counsel submitted that the offer was decoupled from the Conversion Notice on 4th June 2021 in the course of the hearing on the Strike Out application. Counsel referred to the transcript of that hearing and to what is described as the clear offer made by Counsel Mr. Eldridge on behalf of the Company[22]. The response of Counsel for the Petitioner Mr. Hayden was that the Petitioner was not seeking a buy-out order.

133. Counsel submitted that there was nothing about the quality of the offer that was problematic. Counsel said that a new point is raised by the Petitioner about concerns as to the calculation and there is nothing in this point. Counsel noted that Mr. Eldridge said

[22] Transcript, page 36

in the course of the offer made during the application that there would be a completely independent calculation. It was to be calculated in accordance with NAV and by the Administrator. Counsel said that the Petitioner well knew that the calculation would be undertaken by administrators because that is what the CEM said. The directors delegated calculations to the Administrator, NAV Consulting, a professional third party. No suggestion has ever been made that there is a basis to doubt the integrity of NAV Consulting.

134. As to the absence of an offer in the Conversion Notice to pay for costs, Counsel said that the 4th March 2021 offer could not have included costs for the Petition because the Petition had not yet been issued. On the absence in the second offer, Counsel said that the case of ***O'Neill v Phillips*** refers to where litigation has been on foot. If an early offer is made, it does not necessarily have to include an offer for costs.

135. Counsel said that the other actions were separate at the time. The Petition was issued on 4th March 2021. On 17th March 2021, two weeks after the Petition was issued, the Petitioner issued a Summons for directions in those two other actions. On 26th March 2021 costs were reserved. Counsel said that costs were not necessarily to be included and need not always be included.

136. Counsel said that these are really hindsight deficiencies. The offer was rejected with Counsel for the Petitioner indicating that an independent investigation was being sought.

ANALYSIS

137. In the case of ***O'Neill v Phillips,*** Lord Hoffman considered the effect of an offer to buy shares as an answer to an unfair prejudice petition under s.459 of the English ***Companies Act 1989***. The principles enunciated in the case of ***Calderbank v. Calderbank***[23] were held to be applicable. The learned Judge stated that if the petitioner was offered

[23] [1976] Fam 93

everything to which he was later held to be entitled after trial, this would entitle the respondent to say that all costs after the offer was made should be borne by the successful petitioner.

138. Mr. Phillips, the respondent/applicant made an offer in the course of interlocutory hearings. The offer was rejected on several grounds, one of which was that there was no provision for the petitioner's costs. The learned Judge stated that an offer was inadequate without costs because "*a petitioner who has a well-founded case will not achieve everything to which he is entitled unless there is an offer of costs."* Unfairness is not only the exclusion of a minority shareholder but exclusion without a reasonable offer.

139. Lord Hoffman identified five factors which would constitute a reasonable offer: -

i. It must be to purchase shares at a fair value that is without a discount for a minority shareholder unless there are special circumstances.
ii. If the value is not agreed, it should be determined by a competent expert.
iii. The offer should be to have the value determined by an expert as an expert.
iv. The offer should provide for equality of arms, meaning that both parties should have the same right of access to company information as to the value of the shares and the right to make submissions to the expert.
v. The offer should provide for costs.

140. With respect to costs, Lord Hoffman said that in that case where an offer was made after nearly three years of litigation it had to be made with an offer of costs. The learned Judge went on to say this: -

> *"But this does not mean that payment of costs need always be offered. If there is a breakdown in relations between the parties the majority shareholder should be given a reasonable opportunity to make an offer (which may include time to explore the question of how to raise finance) before he becomes obliged to pay costs."*

141. The majority shareholder should be given a reasonable time to make the offer before his conduct is treated as unfair even if a petition has already been presented: -

> *"As I have said, the unfairness does not usually consist merely in the fact of the breakdown but in failure to make a suitable offer. And the majority shareholder should have a reasonable time to make the offer before his conduct is treated as unfair. The mere fact that the petitioner has presented his petition before the offer does not mean that the respondent must offer to pay the costs if he was not given a reasonable time."*

142. These principles have been held to be applicable to a winding up petition. In ***CVC-Opportunity Equity Partners Ltd. and Anor. V Demarco Almeida***[24], one of the two issues before the Court was whether the offer made to the respondent to purchase his shares was a fair one so that it was unreasonable for him to reject it. The Court citing ***O'Neill v Phillips*** drew attention to the requirement that the offer must plainly be reasonable. In considering what amounts to a reasonable offer, it was noted that while the court in that case was concerned with a petition for relief under s.459 of the ***Companies Act 1985***, on grounds of oppression or unfair prejudice, there was no distinction in principle with an offer in respect of a petition for winding up on the just and equitable ground.

143. The Court said that the amount which the petitioner would obtain for his shares on a winding up represents the least that they can be worth to him but does not represent their fair value as between the parties. The Court allowed the appeal holding that the offer to purchase based on a liquidation or breakup value fell far short of a fair offer and remedy to his complaint. The petition ought therefore not to be restrained.

144. The Company in the instant case makes the point that the deficiencies which are being raised now are 'hindsight deficiencies' and highlights the basis for the refusal of the offers at the material time.

[24] [2002] UKPC 16

145. In ***Butcher v Wolfe and Wolfe***[25], the appellant appealed against an order to pay the costs of the respondent. The trial judge held that it had been unreasonable to refuse a ***Calderbank*** offer which refusal had led to costs being unnecessarily incurred. The case had been settled on the same basis as had been proposed by the offer.

146. The Court of Appeal held that the Judge was right to conclude that the refusal was unreasonable. The appellant had achieved nothing in the litigation that could not have been had by accepting the earlier offer made before the action commenced.

147. The appellant argued that the ***Calderbank*** offers were made on a "take it or leave it" basis and a plaintiff was not bound to explore with a defendant whether something more might be available. The Appellate Court did not accept this argument as being too inflexible an approach to protecting parties to litigation against unreasonable opponents. The Court referenced the duty to negotiate and held that: -

> *"The obligation to negotiate placed upon the parties by the Court of Appeal in* ***Gojkovic v Gojkovic (No. 2)*** *was not limited purely to family proceedings. A party who had refused a* ***Calderbank*** *offer point blank and failed to negotiate might be penalised in costs if such refusal was unreasonable. A* ***Calderbank*** *offer would influence, but not govern, the exercise of discretion on costs, and in the present case, the judge had been entitled to order costs against the appellant who had achieved nothing that could not have been had by accepting the earlier offer."*

148. Mummery LJ considered the appellant's argument that it was reasonable to reject the offer made and considered the reason why the offer was rejected. The learned Judge noted that there was a blank refusal and that the case was fought on a point of principle: -

> *"These points do not persuade me that Mrs. Butcher was reasonable to reject the offer. In the letter of rejection on 1st November 1995 neither of these points*

[25][1999] 1 FLR 334

were raised as reasons for rejecting the offer. The refusal was a blank, outright refusal. So, the critical question for the determination of the issue of costs is: why did Mrs Butcher reject the offer, pursue the proceedings, and run up legal costs for the defendants as well as for herself? To put it another way: why was this case fought? Was it fought because she did not want to settle all her claims relating to the land? Was it fought because she objected to the proposed expert procedure? The answer to these questions was given by the judge. The case was fought because Mrs Butcher took a position on the basis of the valuation of her share. She wanted vacant possession as opposed to the tenanted basis of valuation. A vacant possession value might have added as much as 40 percent to the estimated tenancy valuation. When she settled it was on the basis for which the defendants had always contended and which she had always opposed. Mrs Butcher fought the case on a point of principle. She ultimately conceded that point in the settlement. If she had accepted that the defendants were correct on this point of principle, the case would probably have been settled. The legal costs of the proceedings would not have been incurred. I agree with the judge that Mrs. Butcher should have to pay the costs."[26]

149. The appeal was dismissed with the court concluding that "*the judge was entitled to make the order for costs against the appellant"*. Mummery J. stated that the trial Judge was *"entitled to take into account the Calderbank offer and to identify and take into account the appellant's reason for refusing to accept that offer"* and in concluding that the refusal to accept it was unreasonable. The appellant "*had pursued the proceedings with the objective of obtaining a vacant possession valuation of her interest. She achieved a tenanted basis of valuation of her interest. The case was settled on the same basis of valuation as had been proposed in the Calderbank offer."*

[26] Ibid page 341 to 342

150. Simon Brown LJ in a concurring judgment summarised the facts in the following way: -

> *"The plaintiff's response was immediate, terse and absolute: "your clients' offer is refused". Mr Wonnacott submits, however, that it was a perfectly justifiable response and that the offer ought not properly to have been found sufficient to protect the defendants against an order for costs when, at trial, the plaintiff obtained her judgment. That judgment, he points out, although on a basis less favourable than she was claiming, was more favourable than the defendants were openly acknowledging she was entitled to and, insofar as it translated into cash, substantially exceeded the £200,000 offered in the letter."*[27]

151. The learned Judge cited the case of ***Roache v News Group Newspapers Ltd***. (unreported 19th November 1992) a judge must look closely at the facts of the particular case before him and ask who has won as a matter of substance and reality. In that case there had been a payment into court by the plaintiff of the exact sum awarded. The trial judge had denied the defendant its costs on the basis that in tandem with the payment there had not been the offer of an injunction. The plaintiff therefore claimed that he had obtained more than was offered to him. The Court rejected this argument on the basis that the undertaking would no doubt have been theirs for the asking and the true reason the offer was rejected is because they wanted to win a larger sum from the jury.

152. Citing the judgment of the Master of the Rolls in that case: -

> *"The overwhelming probability is, in my view, that if he had chosen to accept the money in court he could have had an undertaking, equivalent in effect to an injunction, for the asking. That he chose to go ahead can only, in my view, have been because he wanted to win a larger sum from the jury than the defendants had offered. There can in my view be no doubt that the defendants emerged from this*

[27] Ibid page 343

trial as substantial winners: they had held the award to a sum no greater than was already on offer."

153. The learned Judge concluded that the real reason the offer was rejected was because the appellant refused to accept the offered basis of valuation, that had she been prepared to accept the basis, the defendants would have readily agreed to release her from the strict terms of the offer. The appellant could have asked for the offer to be modified so as to permit her to pursue her separate claim in the partnership proceedings.

154. There were two offers made in the instant case.

155. It is true as the Company submits that the latter four of the five reasons given for the inadequacy of the first offer can likely be answered in the Company's favour. I will discuss this in more detail below. It is the first reason which in my view tips the balance in favour of the Petitioner as to the first offer.

156. Counsel for the Company accepts that the offer of the 4th March 2021 was within a context which was found to be improper, but nevertheless urges that it was a reasonable offer when considering the remedy to which the Petitioner is entitled. Counsel for the Petitioner is correct that the Petitioner was faced with the option of losing its rights.

157. While there may well be an argument that the principle in ***O'Neill v. Phillips*** is that "*it is the removal of rights without a reasonable offer which is unjust",* my view is that it would be difficult as a practical matter to separate the offer from the context of it, the Conversion Notice. One can hardly fault the Petitioner for refusing to accept an offer which came in tandem with the removal of its rights. It would have been a bitter pill for the Petitioner to swallow. I do not consider that it was unreasonable for the Petitioner to have rejected it.

158. More difficult to put to one side is the offer of the 4th June 2021, at the hearing of the Strike Out application. I accept as the Company submits that at that time it was decoupled from the Conversion Notice. This was three months after the Petition had been filed and

relatively early in the proceedings. I accept that this was an early offer and not one being made in the course of litigation which had been on foot for several years.

159. The offer was clear and unequivocal and openly made before the Court. Counsel for the Company highlighted some of the statements made during the hearing. Mr. Eldridge said this in part: -

> *"We would like, they said they want nothing more than to get their money back. We for our part would like nothing more than to give them their money back and to let everyone go their separate ways- ...rather than taking their money and going and rather indeed than simply disputing any difference between what we give them and what they say they are entitled to , which is what they could obviously do if they thought they had been short changed , what we are faced with is an application to blow the entire Fund up."*
>
> …
>
> *They are welcome to go at any time. ... In fact, we'd like them to, they don't have to stay. Why don't they take their money and go?"*
>
> ..
>
> *The buy-out was offered in conjunction with the taking away of the voting shares and strictly speaking that window closed, but my instructions are that ...[if the petition is struck out] we are content for that to be on the basis of an undertaking that we hold the buy-out offer open at NAV for a seven-day period after the order..."*[28]

160. Counsel for the Petitioner responded that they were not seeking a buy-out order, but a winding up because of the need for an investigation: -

[28] Transcript part one 4th June 2021

"…what we are seeking on this petition isn't the buy -out order. We're seeking a winding-up order, because we want an investigation …the Petitioner isn't asking to be bought out, the Petitioner is asking for the company to be wound up…"

161. Was the rejection reasonable?

162. Of the other four reasons put forward by the Petitioner, the costs of the other two proceedings could have been raised. They had been left extant in related but separate proceedings. The Company had not contested either of the two. Other than the initial filings, not much further had occurred. Some time had passed but these were not proceedings which had been on foot for several years. These were early days in respect of the costs of the Petition.

163. The non provision of redress for the shares already redeemed in January and the lower priced redemption in February 2021 could have been raised. Whether this was a reasonable claim given the contractual position on redemption rights is doubtful. Nevertheless, the difference in price by this time was not so significant as to be an insurmountable obstacle.

164. As to the valuation reason, I agree with the submission that whether an independent valuation is necessary in this case is questionable. The Company is in effect a conduit for investment. The Petitioners' shares are invested in a publicly traded company. The price of the shares is dependent on market forces and is publicly known. The Company has always had an independent third-party administrator and had an independent director at the time of the application.

165. There is no evidence to suggest that there was any attempt to consider or entertain the offer or to negotiate. There is no evidence to suggest that the offer was thought to be deficient because of one or more factors. It was rejected out of hand. Counsel for the Petitioner was clear and unhesitating that an independent investigation was required and

thus what was being sought was a winding up order. This was plainly the reason for the rejection.

166. I accept that as Counsel for the Company submits that what is being raised now are "really hindsight deficiencies". They are minor. The Petitioner was being offered purchase of its shares calculated at NAV by the Administrator in accordance with the CEM. It was a reasonable offer. Even if I am wrong and it was deficient in some way, it was not by much so as to make a discernable difference. The Company made no secret of the fact that it was open and willing to consider disputes as to what the Petitioner claimed to be entitled.

167. I find that this open offer does affect the question of fairness as to the date that the Petitioner's shares should be valued.

168. Counsel for the Company in submissions asked rhetorically why should the Company which made an offer find itself penalised by a back dated valuation, three times the value. I consider that this would be deeply unfair to the Company.

169. It very much appears to me to be the case that the Petitioner, faced with the buy-out offer at what was then a high price, made a one way bet that a winding up order would be made. That was its objective.

170. Counsel for the Company also noted in a persuasive submission that in a winding up the sale would be at current prices, a share price as in January 2021 would not be available. Counsel said this: -

> "*If winding up is ordered – liquidators would sell the shares at current market price. Not at $52.00 as in January 2021 it would have been at current prices.*
>
> *In order to do justice and in order to avoid detriment to shareholders How can it be right that shares are valued at a price that would never be available in a winding*

up. That is not fair to the Company who made offer in 2021 and to investors who would be harmed."

171. In summary accepting the submissions made by the Company I considered: -

i. The nature of the investment. This is a going concern which prima facie should be valued as at the date on which it is ordered to be purchased. (See ***In re London School of Electronics Ltd.***).
ii. The share price and fluctuation in the price is due to market forces and there is no direct nexus between the prejudicial conduct and the share price.
iii. The Petitioner received a clear and unequivocal offer in June 2021 when the share price was at its height.
iv. The offer was for a calculation at NAV.
v. The offer was a reasonable one.
vi. The Petitioner rejected that offer out of hand not because of deficiencies with it but because it wanted a winding up order.
vii. In doing so, the Petitioner made a choice for a specific reason. I think it made a one-way bet.
viii. It is not unfair to the Petitioner to value the shares as at the date of the sale (market value) because of its rejection of the earlier offer.
ix. It would be unfair to the Company which made that offer to now have a retrospective share price fixed which is three times higher than the market value.

ANCILLARY MATTERS

172. The Petitioner seeks interest on the basis that it would have exited the company in 2021 and has been kept out of the value of the shares since January 2021 when it should have been able to realise them. The Company opposed the application on the basis that if the valuation date is backdated it would be quite wrong to add interest to these sums. There would be no compensatory need to add interest to the high value, that would compound

serious unfairness. In light of the conclusion, I have reached the issue of interest falls away.

173. The Petitioner submitted that there is no objection in principle to the deduction of any expenses of the Company which would customarily fall on shareholders. However, it is said that there must be a transparent process which provides an understanding of the nature of those deductions. In particular the Company should not be permitted to attribute any costs for defending the various sets of proceedings and including that in the calculation of shares. The costs of the proceedings should not be treated by the Company as an expense in calculation of shares. The Company does not disagree with this submission.

COSTS OF THE PETITION

174. The Petitioner seeks its costs of the Petition on an indemnity basis pursuant to the ***Companies Winding up Rules*** (2023) Consolidation ***("CWR")*** O. 24, r.8. This provides as follows: -

"General Rules as to Costs (O. 24, r. 8)

8. (1) The general rule is that the costs incurred by a person who successfully presents a creditor's winding up petition under Order 3, Part II or creditor's petition for a supervision order under Order 15, rule 3 should have his costs paid out of the assets of the company, such costs to be taxed on an indemnity basis unless agreed with the official liquidator.

(2) In the case of a contributory's winding up petition under Order 3, Part III, the general rules are that –

> *(a) if the Court has directed that the company itself is properly able to participate in the proceeding, the general rule is that the costs of a successful petitioner be paid out of the assets of the company; or*
> *(b) if the Court has directed that the winding up petition be treated as an inter partes proceeding between one or more members of the other members or members of the company as respondents, the general rule is that none of the costs should be paid out of the assets of the company and the unsuccessful parties should pay the costs of the successful party, such costs to be taxed on the standard basis unless agreed."*
>
> ...
>
> *(4) The Court shall make orders for costs in accordance with these general rules unless it is satisfied that there are exceptional and special circumstances which justify making some other order or no order for costs.*

175. Counsel for the Petitioner submits that the starting point is that the Petitioner must be regarded as a successful party. The conduct justified the making of a winding up order which is the gateway to the alternative remedy. It is submitted that this is not a case where the Company can say that the Petitioner was not justified in pursuing this Petition. While the Petitioner was not able to persuade the Court that there are financial irregularities which require investigation and did not win on every single point, nevertheless the thrust of its case was a serious one which was accepted by the Court, that the lack of probity of the directors gave rise to a justifiable lack of confidence. Thus, the Petitioner should now be regarded as having achieved substantial success in the case and should be entitled to costs.

176. Counsel makes reference to the ***CWR*** and submits that if directions are given as in this case that a company is a proper party, the company bears the costs. This is generally allowed on an indemnity basis where it is heard against a company so that a petitioner does not subsidise the company.

177. Reliance is placed on the case of ***In Re Wyser-Pratte Eurovalue Fund Limited***[29]**.** Counsel noted that the judgment of Jones J. was in the specific context of a case where an alternative remedy was granted to a petitioner. In that case, the Court considered the application of the ***CWR*** to costs on a contributory's petition. The Court held that where a contributory's petition for winding up on the just and equitable ground was heard pursuant to a court order as a proceeding against the company, ***CWR*** O. 24 r. 8 (2) (a) put a successful contributory who was entitled to its costs from the company's assets in the same position as a creditor. The same principle applied that such a petitioner should not be required to subsidise other members of the class benefiting from the order. Effectively the petitioner was entitled to costs on an indemnity basis because it was being paid out of a fund. The costs of *inter partes* proceedings would generally be on the standard basis (***CWR*** O. 24 r.8 (2) (b)) unless the paying party had conducted the proceedings or that part to which the order related, improperly, unreasonably or negligently.

178. The second point made by the Petitioner is that indemnity costs are appropriate in this case because of the findings made by the Court against the Company acting by its directors. It is said that the conduct of the business and the conduct of litigation prior to and during the defence of the Petition was such that it meets the threshold of improperly, unreasonably or negligently. Counsel refers to the conduct of Mr. Drankiewicz in litigation in putting forward evidence which was found to be untruthful at trial.

COMPANY'S SUBMISSIONS ON COSTS

179. The Company's main submission on costs is that there are present truly exceptional circumstances in this case by reason of which the Petitioner should pay the Company's costs of the Petition on and from the 4th March 2021, being the first date that there was an offer to redeem the Petitioner's shares. Counsel refers to ***GCR*** O.22 r14 which speaks to the cost consequences of a without prejudice offer: -

[29] [2010] (2) CILR 233

> *"14. (1) A party to proceedings may at any time make a written offer to any other party to those proceedings which is expressed to be "without prejudice save as to costs" and which relates to any issue in the proceedings.*
>
> *(2) Where an offer is made under paragraph (1), the fact that such an offer has been made shall not be communicated to the Court until the question of costs falls to be decided and the Court shall take into account any offer which has been brought to its attention when making an order for costs. Provided that the Court shall not take such offer into account if, at the time it is made, the party making it could have protected that party's position as to costs by means of a payment into Court under Order 22."*

180. Counsel relies on the ***Calderbank*** principles and the dicta in the local cases of ***G v G***[30] and ***Re eHi Car Services Limited***[31]. In ***G v G,*** the approach to ***Calderbank*** letters in matrimonial litigation and the principles enunciated in ***Gojkovic*** were accepted as applicable in the Cayman Islands**.** Henderson J. in ***G v G*** stated that if the applicant receives no more or less than the offer made, he/she is at risk not only of not being awarded costs, but also of paying the costs of the other party. In that case, although the offer made by the husband was more favourable to the wife than the amount awarded by the Court, the behaviour of the husband was a factor to be considered, the husband had failed to provide disclosure in a timely manner and an explanation for certain payments. The Court held that the wife's failure to respond to the offer which had been made was reasonable against this background.

181. In ***Re eHi Car Services Limited***[32], Kawaley J. expressed the view that the Court should generally adopt the simple approach of making it unreasonable to refuse an offer which is not bettered at trial. The learned Judge stated: -

[30] [2010] 1 CILR 365
[31] Cause FSD 115 of 2019 unreported 31st March 2020
[32] Grand Court Unreported 31st March 2020

> *"33. Under Cayman Islands law, the reasonableness of the refusal comes into play at the preliminary stage of deciding whether or not cost consequences should flow from refusing an offer that the paying party was subsequently able to 'beat'. And in making such an assessment, the starting point is that the receiving party is at risk of paying the paying party's costs after an offer has been made and reasonable time afforded to consider it. To 'give teeth' to GCR Order 22, rule 14, the Court should generally adopt a simple approach which leans heavily towards making it unreasonable to refuse an offer which is not bettered at 'trial'. This approach should not ordinarily be complicated by an analysis of the legal arguments used to buttress a W/P offer, unless the commercial merits of the offer and the legal basis for it are inextricably intertwined."*

182. Counsel submitted that in this case the overarching question is what is it about the findings that has justified the Petitioner in pursuing this Petition and justifies rewinding the clock to take advantage of the higher share price at the top of the market in January 2021? What was the Petitioner seeking in the Petition compared with what it has obtained? Counsel argues that the order for costs is being made in circumstances where the Petitioner has made good its case but has received no more and potentially substantially less than was offered by the Company on 4th March 2021. The remedy given is no better than the share buy-out offer which was made.

183. Counsel noted that the Petitioner explained in its Petition that it required a winding up order in particular because it sought the appointment of Liquidators to conduct an independent investigation. In the Strike Out application the Petitioner made an unequivocal statement of purpose to similar effect. The alleged financial irregularities was an important reason for the need for a financial investigation. The Petitioner failed to establish that the redemption offer was not an adequate remedy, that there was a need for an investigation and failed to prove that there was manipulation of valuations and discrimination with respect to the charge of management fees.

184. Counsel submits that while the evidence of Mr. Guilfoyle came subsequently, there had been responses to the financial irregularities identified from as early as 1st April 2021 in the First Affidavit of Mr. Drankiewicz. This was filed within three weeks of the issue of the Petition. Despite Mr. Guilfoyle being appointed, the Petitioner did not engage with him in respect of any possible financial irregularities.

185. Counsel said that the Court declined the Petitioner's primary remedy, did not accept that there is a need for an investigation and ultimately determined that a share buy-out order was the appropriate remedy although a buy-out offer was the very one that the Company made on the 4th March 2021 and the very offer the Petitioner insisted it did not want on the 4th June 2021. Counsel said that there is only one sensible answer to the question what has the Petitioner achieved. It has achieved nothing by issuing and prosecuting the Petition. The Petition was unnecessary, and the adverse findings do not justify this litigation.

186. Counsel for the Company submitted that the trial process and the Court's finding has demonstrated that the Company and its legal team made the right call that a buy-out is an adequate remedy that better serves the justice of this case. Counsel submitted that where the Petitioner says that it cannot be in a worse position having proved its broader case, the response is straight forward, there was no need to prove the case in order to obtain the buy-out remedy that it has now achieved. A successful claimant is likely to be in a worse position if he is ultimately shown to have achieved nothing more than what was offered. Counsel submits that the critical legal requirement that the Petitioner receives no more than the offer has been satisfied and the just order in this case would be for the Petitioner to pay the costs of the Company.

187. The alternative submission is that in any event the circumstances are such that an award at the level of indemnity costs is not appropriate. If costs are to be ordered it should be on the standard basis. Counsel points out that the jurisdiction in the Cayman Islands to award indemnity costs is narrower than that in the English jurisdiction, which is much wider.

ANALYSIS

188. I accept that in this case as a starting point, the Petitioner is to be regarded as the successful party. In the case of ***Asia Pacific Limited v Arc Capital LLC and Haida Investments Limited*** [33], the Cayman Islands Court of Appeal considered an appeal from a grant of winding up order. The trial Judge in granting the order held that the buy-out offer made was not an adequate alternative remedy because the basis for the valuation was unclear. The Appellate Court dismissed the appeal holding that as *"it had not been likely at the outset of proceedings that a buy-out order would be made, the rejection of the buy-out offer was not unreasonable, particularly given the hostility of K and the likelihood that he would not have made any payment pursuant to a buy-out order."*

The Court stated that: -

> *Para 39, "the true analysis is that the court allows the petition, holding that the petitioner has established grounds upon which it would be just and equitable to wind up the company, but it goes on to hold that, in the circumstances, it would be appropriate "as an alternative to a winding -up order ' to make an order under s.95 (3)." (My emphasis).*

189. The Petitioner is entitled to its costs as the successful party. Should the fact of the offer made in June 2021 disentitle the Petitioner against the background of its success? I am conscious of possible inconsistency given the conclusions above, but I do think that the circumstances and test may be different. To the question on costs, what has the Petitioner achieved beyond a buy-out of its shares, the answer must be that the Petitioner has established its wider case and met the threshold that it is just and equitable that the Company be wound up. However, in my view the fact of the alternative remedy identified and the June offer which was found above to have been a reasonable one cannot be

[33] [2015] 1 CILR 299

ignored. I accept the alternative submissions of the Company as persuasive as to the offer made on 4th June 2021. I conclude that the fact of the offer constitutes special circumstances which justify the making of an order for costs on the standard basis only.

190. For completeness I have considered the alternative submission of the Petitioner that the misconduct of the Company and its conduct of the proceedings justifies indemnity costs.

191. In ***Asia Pacific Limited*** the Court held that indemnity costs were appropriate where the "*appellants had made false allegations regarding C's conduct as a director"*. The Court approved the decision in ***Al Sadik v Investcorp Bank BSC and Five Others***[34] that a party who asserts a cause of action which he knows has no legitimate basis is acting improperly. This is distinguished from a party who is advancing an honest case which is not accepted. The conclusion was that on the basis of the findings of fact the judge had taken the view that the appellant was advancing a case which it knew to be dishonest.

192. In ***Al Sadik v Investcorp Bank BSC***, the Grand Court (Jones J.) held that the plaintiff had conducted part of the proceedings in respect of his breach of contract claim improperly, unreasonably or negligently within the meaning of ***GCR*** O.62, r.4 (11) because he had advanced the claim knowing it to be false. In respect of the remainder of the proceedings no grounds had been established to justify indemnity costs. A finding that a witness was not credible was not by itself sufficient. The outcome of litigation frequently turned on the court's assessment of credibility.

193. The Court noted that there is a more limited jurisdiction to grant such costs in the Cayman Islands than in the United Kingdom.

"Rule 4(11) is aimed at substantive misconduct on the part of a party personally which results in the court expressing its disapproval by making an order for indemnity costs against him.

[34] [2012] (2) CILR 33,

10….On the other hand, I accept Lord Falconer's submission that causation is not a necessary element of liability under r.4(11), which implies that it must be penal in nature. The purpose and effect of an order for indemnity costs under r.4(11) is to express the court's disapproval of a party's misconduct by stripping him of the protections which would otherwise apply. It follows that if the court is satisfied that Mr. Al Sadik is guilty of substantive misconduct in this sense, I have power to express the court's disapproval by making an order for indemnity costs whether or not his misconduct has caused Investcorp to incur any costs which would otherwise have been avoided.

14 In my judgment, a proceeding, or some identifiable part of it, can only be said to have been conducted "improperly" within the meaning of r.4(11) if the court is satisfied, in all the circumstances of the case, that a party has invoked the court's jurisdiction illegitimately or abused the process in a way which attracts moral condemnation. A party who asserts a cause of action when he knows that he has no legitimate basis for doing so is acting improperly. Pursuing an action for some ulterior motive is an abuse of the process which may be categorized as improper."

194. In the instant case, the Company put forward a response to the Petition at trial which the Court did not accept as truthful in some respects. This was an assessment of credibility. Applying the principles discussed in the cited cases, I would have said that this does not rise to the level of abuse of process such that indemnity costs should be awarded. As to the misconduct, my view is that these may properly be reflected in the orders below.

COSTS OF OTHER PROCEEDINGS

195. It is now accepted that the Company should pay the costs of the Injunction and Originating Summons proceedings. There is disagreement as to the basis upon which these should be paid. The Petitioner argues that given the various findings of misconduct

and impropriety made in relation to those sets of proceedings, the Company's conduct was such that it ought to pay the costs of those proceedings on an indemnity basis.

196. With respect to the costs of the Injunction proceedings, Counsel for the Petitioner submits that indemnity costs are appropriate because these were only necessary because of the conduct of Mr. Drankiewicz in targeting the Petitioner and trying to prevent it from exercising its shareholder rights. The Court accepted that Mr. Ferrer made efforts to engage with Mr. Drankiewicz and to discuss the matter which were not responded to.

197. Similarly, the Originating Summons procedure only became necessary as a result of the targeting of the Petitioner. The Court found that this was deliberately done by way of the second partial redemption to ensure that the Petitioner would not have sufficient votes to convene an EGM.

198. In submissions which I found powerful and persuasive, Counsel said this :-

> *"59.As regards the costs of the Injunction Proceedings, the Court has found that they were justified because Mr. Drankiewicz chose to act in a manner which would prevent the Petitioner from exercising its shareholder rights and in breach of the law of proper purpose. He specifically targeted the Petitioner to force it out of the Company to prevent it exercising its shareholder rights. The proceedings were also wholly unnecessary and could have been easily avoided if Mr. Drankiewicz had chosen to engage with the Petitioner. Instead, he ignored Mr. Ferrer's attempts to engage with him asking what comfort he required and was unable to offer any explanation for his conduct. The Company later unconditionally withdrew the Compulsory Redemption Notice but refused to concede that it was improper and has failed to accept any responsibility for the costs incurred. Again, the appropriate order is for indemnity costs.*
>
> *60.As regards the costs of the Originating Summons Proceedings, the Court has found that Mr. Drankiewicz acted improperly by targeting the Petitioner and making the second partial redemption to ensure that, whatever the outcome of those proceedings, the Petitioner would not have sufficient votes to convene an EGM. This was a blatant abuse. Mr. Drankiewicz's attempts to explain away the second partial redemption have been found to be untruthful and contrived. In such a situation the only proper order is one for indemnity costs."*

199. The Company's position is that by ***GCR*** O.62 r. (4) 11, proof is required that the Company conducted the proceedings improperly, unreasonably or negligently. Counsel submits that the Company did not contest the Injunction proceedings and withdrew the notice on the 27th August 2020, some six weeks later. There is no sense in which the Company conducted the proceedings improperly, unreasonably or negligently. Counsel said that the Company's conduct is a paradigm case in which indemnity costs should not be awarded.

200. Counsel said even more so for the Originating Summons procedure. The Company did nothing. It did not file evidence and never defended the proceedings. There is no sense in which the Company conducted the proceedings improperly, negligently or unreasonably. Standard costs should be awarded in relation to those two actions.

201. In my view, plainly but for the misconduct of the Company, neither of the two proceedings would have been necessary. The pre-action conduct of the Company is of note. Counsel for the Petitioner's submissions are fully accepted.

202. The Company should pay costs on the indemnity basis in respect of these two sets of proceedings.

203. This judgment would not be complete without the Court's clear record of its deep gratitude to Counsel for the understanding, unequivocally shown to the Court, when additional time was requested to ensure that the judgment could be completed in the way the Court needed it to be. Such professional courtesies, so unhesitatingly extended, are fully recognised by this Court, and truly gratefully received.

Dated this the 21st day of August 2024

The Hon. Justice Cheryll Richards KC
Judge of the Grand Court