In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION

2019: No. 284

IN THE MATTER OF CENTAUR VENTURES LTD.
AND IN THE MATTER OF THE COMPANIES ACT 1981

BETWEEN:

DEEPAK RASWANT

Petitioner

-and-

(1) CENTAUR VENTURES LTD.
(2) THE CENTAUR GROUP LIMITED
(3) DANIEL JAMES MCGOWAN

Respondents

Before:	**Hon. Chief Justice Hargun**
Appearances:	**Matthew Watson of Cox Hallett Wilkinson Limited, for the Petitioner**
	Richard Horseman of Wakefield Quin Limited, for the Respondents
Date of Hearing:	**11 March 2020**
Date of Judgment:	**29 April 2020**

JUDGMENT

Petition seeking relief for oppressive or prejudicial conduct under section 111 of the Companies Act 1981 and a winding up order on the just and equitable ground; application to strike out the

Petition on the ground that the Respondents are willing to purchase the Petitioner's shares for fair value; scope of section 111 and principles to be applied

Introduction

1. By summons dated 26 August 2019, the Respondents applied to strike out the Petition presented by Mr Deepak Raswant (the "Petitioner" or "Mr Raswant") on the basis that the Respondents are willing to consent to an Order requiring The Centaur Group Limited ("CGL") and Mr Daniel James McGowan ("Mr McGowan"), the Second and Third Respondents, to purchase the Petitioner's shares at fair value, based on the Petitioner having a notional 50% shareholding in Centaur Ventures Ltd. ("CVL").

2. The application is supported by the Seventh and Eighth affidavits of Mr McGowan dated 19 August 2019 and 21 February 2020. The application is opposed by Mr Raswant and he relies upon his Fourth affidavit sworn on a date in July 2019 and his Sixth affidavit sworn on a date in March 2020.

Background

3. CVL was incorporated on 18 July 2014 as an exempted company in Bermuda under the Companies Act 1981 ("the Act"). Historically, CVL has acted as a commodities trader of coal in South Africa, but its trading activities appear to have been suspended when Optimum Coal Mine (Pty) Ltd. ("OCM") entered into business rescue in February 2018. CVL is not specifically targeting further coal opportunities at present, but will reconsider its position after its claim in the OCM restructuring has been resolved.

4. CVL has an ordinary authorised share capital of US $10,000 comprised of 1 million shares with a par value of US $0.01 each.

5. The initial shareholders in CVL were Mr Akash Garg ("Mr Garg") and CGL, another company incorporated in Bermuda. Mr Garg and CGL were equal 50% shareholders in CVL, both holding 50 shares each of the 100 issued shares.

6. The sole director of CGL is Mr McGowan and Mr McGowan has also been appointed a director of CVL since its incorporation. Mr Garg also acted as a director of CVL until 13 August 2018 when he sold his entire shareholding to Mr Raswant and resigned as a director of CVL. Since that date Mr Raswant has held 50 shares in CVL and replaced Mr Garg as a director.

7. It appears that Mr Raswant has a long-standing employment/business relationship with Mr Garg and Mr Garg's business entities. Mr Raswant acted as a director of AGEV Investment Ltd ("AGEV"), one of the Mr Garg's companies which was the recipient of loans made by CVL which now amount to $17,836,950.

Relief sought

8. The Amended Petition, amended on 19 February 2020, seeks relief under three separate provisions of the Act.

9. First, Mr Raswant seeks relief under section 111 of the Act, the alternative remedy to winding up in cases of oppressive or prejudicial conduct, that Mr Raswant be restored his shareholding to 50% in CVL and a declaration that the amended bye-laws adopted on 31 May 2019 are null and void and of no legal effect, and all actions taken pursuant to those bye-laws are also null, void and of no legal effect (which, for the avoidance of any doubt, includes the Board resolutions purportedly passed on 3 June 2019 and 10 June 2019). The effect of the relief sought under section 111, Mr Raswant asserts, is to obtain 50% of any surplus net assets upon the winding up of the CVL, which Mr Raswant says are valued at in excess of US $17 million. Section 111 of the Act provides as follows:

*"**Alternative remedy to winding up in cases of oppressive or prejudicial conduct***

> *111. (1) Any member of a company who complains that the affairs of the company are being conducted or have been conducted in a manner oppressive or prejudicial to the interests of some part of the members, including himself, or where a report*

has been made to the Minister under section 110, the Registrar on behalf of the Minister, may make an application to the Court by petition for an order under this section.

(2) If on any such petition the Court is of opinion—

(a) that the company's affairs are being conducted or have been conducted as aforesaid; and

(b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up,

the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise."

10. Second, Mr Raswant seeks an order that it is just and equitable that CVL be wound up pursuant to section 161 (g) of the Act which provides that a company may be wound up by the Court if *"the Court is of the opinion that it is just and equitable that the company should be wound up."*

11. Third, Mr Raswant seeks an order that CVL be wound up pursuant to section 161 (e) of the Act which provides that a company may be wound up by the Court if *"the company is unable to pay its debts."*

Conditions to be satisfied for relief under section 111 of the Act

12. The practice of seeking relief for oppressive or prejudicial conduct and a winding up order is sometimes employed when there is a possibility that the Petitioner may not succeed in obtaining the relief for oppressive or prejudicial conduct. The relief of winding up of a company in those circumstances is in the alternative to the relief for oppressive or prejudicial conduct. Such a practice is discouraged since it may take a long time before the Petition is finally heard and determined and if the court ultimately grants a winding up order, any disposition of the company's property, and any transfer of shares made after the commencement of the winding up is, unless the Court otherwise orders, void under section 166 of the Act. The winding up is deemed to have commenced at the time of the presentation of the Petition (section 167 (1) of the Act). The result of including a prayer for a winding up order in addition to the relief under section 111 of the Act is to effectively paralyse the company in terms of trading or in terms of obtaining any loans from commercial lenders. This has been the consequence for CVL since this Petition was first presented by Mr Raswant on 3 July 2019. The undesirability of including relief for a winding up order in any petition seeking relief for oppressive or prejudicial conduct is referred to in the English *Practice Direction (winding up: petition by contributory)* (CH 1/90) [1990] BCLC 452.

13. Section 111 of the Act is based upon English legislation and in particular on section 210 of the Companies Act 1948 and section 75 of the Companies Act 1980. Section 210 of the Companies Act 1948 was linked with the winding up provision on the just and equitable ground under section 222 (f). In order for a member to succeed under section 210 it had to be shown that (a) the company's affairs are being conducted in a manner oppressive to some part of the members (including himself); (b) the facts of the situation would justify the winding up of the company on the grounds that this would be just and equitable; and (c) to wind up the company would unfairly prejudice the oppressed members. The relief under section 210 of the Companies Act 1948 was an alternative to the winding up on the just and equitable ground under section 222(f).

14. Section 75 of the English Companies Act 1980 introduced the concept of "unfair prejudice" and also severed all linkage with the winding up provisions. In particular, the petitioner no longer had to show that he is entitled to a winding up order on the just and equitable ground. Section 111 of the Bermudian Act adopted the concept of "prejudice" from section 75 of the English Companies Act 1980, but retained the linkage with the winding up provisions and in particular retained the requirements under section 210 of the Companies Act 1948 of having to show (a) that the facts of the situation would justify the winding up of the company on the grounds that this would be just and equitable; and (b) to wind up the company would unfairly prejudice the oppressed members. It follows therefore that relief under section 111 of the Act is an alternative to the relief for a winding up order under section 161 (g) of the Act. If the petitioner seeks and is able to obtain a winding up order under section 161 (g) on the ground that it is just and equitable that the company should be wound up, he could not at the same time obtain relief under section 111 on the simple ground that he will not be able to satisfy the statutory requirement that "*to wind up the company would unfairly prejudice that part of the members".*

Factual basis for claim to an alternative remedy to winding up for oppressive or prejudicial conduct under section 111 of the Act

15. First, as noted in my previous Ruling dated 26 August 2019, dismissing an application by Mr Raswant to appoint joint provisional liquidators of CVL pending the determination of the Petition ("the previous Ruling"), Mr Raswant complains that Mr McGowan has systematically abused Mr Raswant's rights as a director of CVL. It is said that he has unlawfully excluded Mr Raswant from important financial information, consultation and decision-making in respect of CVL's financial affairs, particularly in respect of its affairs in South Africa.

16. Second, Mr Raswant complaints that Mr McGowan improperly engineered the dilution of Mr Raswant's interest in CVL from a 50% shareholder to less than 1% shareholder, so that all of its remaining assets, after payment of debts, will be paid to Mr McGowan and CGL (in which Mr McGowan owns a 50% stake through Centaur Holdings Limited ("CHL").

Mr Raswant relies heavily on this particular allegation as demonstrating not only wrongdoing on the part of Mr McGowan, but also a complete breakdown of trust and working relationship between the two directors and shareholders.

17. In relation to this allegation Mr Raswant argues that the dilution of shareholding involved Mr McGowan deliberately putting CVL in the position of being unable or unwilling to pay the debt owed to IMR Metallurgical Resources AG ("IMR") out of existing resources so as to avoid the need for a share issuance altogether. IMR served a statutory demand on CVL on 21 January 2019, in the amount of $976,023.65 that expired 21 days thereafter creating the possibility that IMR could apply to wind up CVL.

18. Mr Raswant says that this amount could have been paid to IMR if CVL did not make improper payments to the law firm Jones Day. It appears to be common ground between the parties that CVL paid $1,085,848 in legal costs to Jones Day over the period of its 11 invoices issued from 20 December 2017 to 9 October 2018 which CVL now admits in correspondence to Jones Day, were not its obligation to pay. Mr Raswant had no involvement in making these payments to Jones Day and was wholly unaware that they had been made, but it appears that these payments were approved by Mr Garg.

19. Mr Raswant also says in his sworn affidavit evidence that this amount could have been paid to IMR if CVL's debtors had been pursued in respect of debts which they owed to CVL. He refers specifically to three debts: (i) the principal amount of $8,700,000 together with interest in the amount of $1,442,867 owed by Centaur Commodities International DMCC that was due and payable to CVL by 1 August 2018; (ii) the amount of $17,853,370 owed to CVL by AGEV under a loan facility agreement dated 7 November 2016 and this amount was due and payable to CVL on 6 November 2018; and (iii) the amounts of $1,085,151 and $106,137.60 from Mr Garg under two shareholder loan facility agreements dated 10 April 2017 and 13 November 2017.

20. Mr Raswant argues that the dilution of shareholding was also made possible by Mr McGowan creating an atmosphere of hostility and distrust between himself and Mr

Raswant in relation to the conduct of CVL's affairs so as to cause Mr Raswant to be unwilling to invest more money in CVL even if it was appropriate to issue additional shares. The arbitrary fixing of 50,000 ordinary shares at $12 per share contributed to that atmosphere of hostility and distrust. As I noted in my previous Ruling, no credible attempt was made at that hearing by Mr McGowan or CVL to justify how it was determined that the number of shares on offer should be fixed at 50,000 and/or the offer price should be fixed at $12 per share.

21. Third, Mr Raswant relies upon the allegation in the previous litigation (No. 63 of 2019) that Mr McGowan, one of the two directors of CVL and an indirect 25% shareholder in CVL, unlawfully and/or fraudulently adopted bye-laws on 13 August 2018 (when Mr Raswant became a director and 50% shareholder in CVL), which unknowingly provided a right for Mr McGowan (on behalf of CGL), the remaining 50% shareholder to remove Mr Raswant as a director. This was not discovered by Mr Raswant until 21 January 2019, when CVL's Secretary provided a copy of these bye-laws to Mr Raswant. After proceedings were commenced, CVL consented to the Order on 19 March 2019, which restored the bye-laws and provided for full inspection of CVL's books and records by Mr Raswant. In consenting to this Order, CVL was also required to pay Mr Raswant's legal costs on an indemnity basis.

Factual basis for asserting that it is just and equitable that CVL should be wound up under section 161 (g) of the Act

22. First, Mr Raswant contends that CVL has ceased carrying on any business since February 2018, for which it was incorporated and as a result can fairly be said that its substratum no longer exists. In support of this proposition Mr Raswant relies on the fact that CVL has not traded for nearly two years; it has not entered into any material contract since 13 August 2018; it has no cash resources presently available to it; it has no known loan facilities available to it; it has no banking facilities of its own, such that it utilises a custodian account holder; and the only action the Company has taken since February 2018 are consistent with recovering assets to wind up its operations. As noted in my earlier Ruling, it does appear

that CVL has not entered into any new business contracts in the recent past and bulk of its activities appear to be directed at recovering its assets and in particular, progressing its very substantial claim of $74,577,285 in the Business Rescue Proceedings of OCM in South Africa.

23. Second, it is said that CVL is potentially insolvent. The management accounts for CVL, as at February 2018, show assets of $146,121,273 and liabilities of $128,707,037 showing net equity of $17,434,236. Included in the liabilities is the amount owing to Griffin Line General Trading LLC ("Griffin Line") in the amount of $97,664,293. This amount represents indebtedness under a loan facility in the amount of $100 million granted by Griffin Line to CVL and there appears to be in dispute as to whether this amount is presently due now or sometime in the future.

24. CVL contends that the indebtedness to Griffin Line is not due and payable until 4 January 2021, relying on a loan amendment agreement which appears to be executed by Mr McGowan on behalf of CVL and Mr Singhala on behalf offer Griffin Line. The document does indeed state that the repayment date has been extended to 4 January 2021. The court was referred to correspondence from Kennedys, Bermuda attorneys acting on behalf of Griffin Line, which appears to dispute the validity of the loan amendment agreement and appears to suggest that the signature of Mr Singhala on the amendment agreement may not be genuine. I am not in a position to take a considered view on this issue. However, I do note that if the amount was due in June 2017, as appears to be contended in the letter from Kennedys dated 17 May 2019, it is not clear why no formal demand for its repayment was made until 27 January 2019 by Kobre & Kim (UK) LLP and why the audited accounts of Griffin Line continued to show that the loan made by Griffin Line was "current" as at 31 December 2017.

25. Third, Mr Raswant contends that an investigation is required to be instituted arising out of the payment of the Jones Day invoices for legal services which CVL did not engage Jones Day to perform and which were of no benefit to CVL.

26. Fourth, there has been an irretrievable breakdown and loss of trust and confidence between Mr McGowan and/or CGL on the one hand and Mr Raswant on the other hand.

27. Fifth, the affairs of CVL have been and are being conducted in a manner that is unfair, oppressive and prejudicial to the interests of Mr Raswant as a member of CVL and Mr Raswant relies upon matters set out in paragraphs 15 to 21 above.

Factual basis for the contention that CVL is cash-flow insolvent and should be wound up under section 161 (e) of the Act

28. The indemnity costs ordered in relation to proceedings (No. 63 of 2019) were taxed in the amount of $142,881.79 and on 29 November 2019 Mr Raswant served a statutory demand on the registered office of CVL demanding payment of the said sum. As CVL has failed to pay the statutory demand, Mr Raswant contends that CVL should be wound up pursuant to the terms of section 161 (e) of the Act.

29. In relation to the statutory demand CVL contends that it has made it clear to Mr Raswant that the cost order will be paid. However, CVL is presently subject to a worldwide freezing order issued by the High Court in London, which has the effect that until IMR judgment is paid off, the order remains in effect and CVL is unable to make payment to Mr Raswant without breaching the order. In this regard CVL owed IMR US $2,635,875 and has repaid US $2,391,983.55. A further US $431,164.86 and GBP 94,427.17 was added for damages, interest and legal fees. CVL had agreed a payment arrangement with IMR which would have seen all amounts paid by 31 January 2020. This arrangement was breached when Mr Raswant filed this petition on 3 July 2019.

30. CVL contends that it is unable to raise any further capital due to the Order of this Court dated 10 September 2019 which prohibits the issuing of any further shares and as a result CVL has been unable to honour its arrangement with IMR and is unable to raise additional funds to pay Mr Raswant's statutory demand. Mr McGowan has confirmed under oath that

if Mr Raswant consents to an order that his shares be purchased at a value to be determined, then the costs order can be paid in short order.

Application for the appointment of joint provisional liquidators of CVL

31. On 6 August 2019 I heard an ex parte application (on notice) by Mr Raswant seeking an order that the two partners of Deloitte Ltd in Bermuda be appointed to act as provisional liquidators of CVL. By Ruling dated 26 August 2019 I declined to make that order for two reasons.

32. First, I concluded that there is credible evidence that the appointment of provisional liquidators is likely to be seriously damaging to the commercial interests of CVL and as a consequence, its creditors and shareholders. CVL filed evidence to the effect that if an order was made appointing provisional liquidators it would immediately trigger default clauses in various loans with CVL's lenders and thus triggering immediately repayment of long-term liabilities which are not presently due. I concluded that this was a reasonable concern on part of CVL.

33. CVL's balance sheet shows total assets of $146,121,273 of which $74,577,285 is represented by CVL's claim in the restructuring proceedings of OCM in South Africa. The claim represents the largest asset of CVL and it is clearly in the interests of CVL, its shareholders and creditors, that the recovery of this claim is not adversely affected.

34. CVL is represented in relation to the OCM claim by Tabacks, a law firm in South Africa. Tabacks have expressed their view in a memorandum dated 5 August 2019, which was produced to the Court, stating that the appointment of provisional liquidators will severely damage CVL's prospects of a successful recovery of the claim. Tabacks state:

> *"17. Suffice to state as follows, placing CVL under a JPL process, will not only completely and finally remove <u>any chance of recovery</u> of CVL's funds given the delays it will occasion, it would completely halt the sales and rescue process of*

OCM. In a potential liquidation scenario the operation would be handed back to proxies of its erstwhile owners, the Gupta family, a position which, in itself would be the end of OCM."

35. Second, the Respondents were prepared to agree to terms which were designed to meet, in large measure, the concerns expressed by Mr Raswant. These terms included that:

    (a) CVL is not allowed to accept any offer in relation to the OCM claim unless that offer achieves full recovery of the claim.

    (b) CVL is not allowed, without prior notice to Mr Raswant and Board approval (i) to make any payment in excess of $25,000 for any one transaction; (ii) to dispose of or otherwise deal with any asset of CVL including any loan payable to CVL; and (iii) to deal with any monies that is in CVL's custody accounts.

    (c) CVL is not allowed to declare or pay any dividend that shall confer any benefit on CGL or Mr McGowan.

    (d) CVL is not allowed to offer for subscription, allot, or register any of its unissued share capital.

    (e) CVL is not able to amend its bye-laws.

    (f) CVL is obliged to provide to Mr Raswant, within 48 hours, any and all documents in relation to the OCM claim for the period 18 April 2019 to present.

    (g) CVL is obliged to provide to Mr Raswant a copy of any document that may be sent, created or received by CVL within 24 hours of it being sent, created or received by CVL.

The Respondent's application to strike out the Petition

36. Shortly before the hearing of the application for the appointment of provisional liquidators, CGL and Mr McGowan made an open offer, dated 2 August 2019, to Mr Raswant to purchase his shareholding in CVL (which was agreed to be 50% of the shares in CVL for this purpose) at fair value. The Court indicated to the parties that this was an encouraging development as this is the usual order the court would make if it finds that there has been unfair prejudice or oppression in the affairs of CVL. There was no application at this stage by the Respondents that the Petition should be struck out on the basis that to continue with the Petition, and in light of the open offer to purchase Mr Raswant's shares, constituted an abuse of process.

37. Following the Ruling dated 26 August 2019, Mr Raswant engaged in extensive correspondence which appeared to explore the details of the open offer to acquire his 50% shareholding. Thus, in the letter from Mr Raswant's attorneys dated 2 September 2019, Mr Raswant sought confirmation in relation to the following matters associated with the proposed valuation of his 50% shareholding:

    (a) for the purpose of the valuation, the share capital of CVL shall be 100 issued shares, of which 50 shares are held by CGL and 50 shares held by our client;

    (b) there shall be no discount for our client's 50% shareholding;

    (c) that the identity of the expert is to be agreed by the parties, failing which is to be determined by the Court;

    (d) that both parties shall have the right to make submissions to the expert, with a form of the submissions (whether written or oral) to be left to the discretion of the expert;

(e) there shall be an opportunity to ask questions of and cross-examine Mr McGowan on questions relating to a valuation;

(f) that our client shall have complete and unfettered access to the books and records of the CVL and its subsidiaries and how your client propose to facilitate the provision of this information in respect of CVL and its subsidiaries. In the event that there is a dispute as to access to the books and records of CVL and its subsidiaries, there shall be liberty to apply;

(g) in respect of (f) whether CVL will be able to procure a copy of the file from Tabacks;

(h) what is the proposed valuation date;

(i) whether interests accrue from the valuation date and, if so, at what rate;

(j) what timeframe is proposed for the purchase of shares upon the issuing of a valuation;

(k) do your clients have the financial capacity to pay for the shares and if there is any financial limit on the inability to pay. CVL has no cash assets and is subject to a freezing. Please provide documentary evidence of the financial position of CGL and Mr McGowan evidencing its ability to pay from cash resources;"

38. During the course of this open correspondence CGL and Mr McGowan agreed, for the purposes of the valuation only, that the share capital of CVL shall be 100 issued shares, of which 50 shares are held by CGL and 50 shares held by Mr Raswant, and that there shall be no discount for Mr Raswant's 50% shareholding. CGL and Mr McGowan also agreed that the identity of the expert is to be agreed by the parties as requested by Mr Raswant, failing which it is to be determined by the Court, and that both the Respondents and Mr Raswant shall have the right to make submissions to the expert, with a form of the

submissions (whether written or oral) to be left to the discretion of the expert. It was also agreed that the parties split the cost of the proposed valuation.

39. CGL and Mr McGown also agreed to give Mr Raswant a "credit" for 50% of the amount Mr Raswant complaints was paid to Jones Day.

40. The only contentious point which CGL and Mr McGowan did not agree to was in relation to the request made on behalf of Mr Raswant to increase CVL's cash at bank for any valuation by US $40,486.87 in respect of the various invoices paid by CVL on behalf of Centaur affiliated entities. This request was refused by CGL and Mr McGowan on the basis that the invoices were validly incurred from a legal perspective, and from a commercial perspective they had already agreed to all the demands made by Mr Raswant. Despite the voluminous correspondence exchanged by the parties in relation to this open offer, Mr Raswant has not accepted its terms. Indeed, at the hearing of this application, Mr Raswant contended that his primary position is that this Court should make a winding up order in relation to CVL and proceed to appoint provisional liquidators.

41. In *O'Neill and another v Phillips and others* [1999] UKHL 24 Lord Hoffmann emphasised the importance of encouraging the parties, where at all possible, to avoid the expense of money and spirit inevitably involved in minority oppression proceedings and the desirability of making an offer to purchase at an early stage. Lord Hoffmann also set out in the basic ingredients of such an open offer to purchase the shares:

> *"But I think that parties ought to be encouraged, where at all possible, to avoid the expense of money and spirit inevitably involved in such litigation (See Shakespeare, Sonnet 129) by making an offer to purchase at an early stage... Usually, however, the majority shareholder will want to put an end to the association. In such a case, it will almost always be unfair for the minority shareholder to be excluded without an offer to buy his shares or make some other fair arrangement. The Law Commission (Shareholder Remedies (Law Com. No. 246) (1997) (Cm. 3769), paras. 3.26-56) has recommended that in a private company limited by shares in*

which substantially all the members are directors, there should be a statutory presumption that the removal of a shareholder as a director, or from substantially all his functions as a director, is unfairly prejudicial conduct. This does not seem to me very different in practice from the present law. But the unfairness does not lie in the exclusion alone but in exclusion without a reasonable offer. If the respondent to a petition has plainly made a reasonable offer, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out. It is therefore very important that participants in such companies should be able to know what counts as a reasonable offer.

In the first place, the offer must be to purchase the shares at a fair value. This will ordinarily be a value representing an equivalent proportion of the total issued share capital, that is, without a discount for its being a minority holding. The Law Commission (paragraphs 3.57-62) has recommended a statutory presumption that in cases to which the presumption of unfairly prejudicial conduct applies, the fair value of the shares should be determined on a pro rata basis. This too reflects the existing practice. This is not to say that there may not be cases in which it will be fair to take a discounted value. But such cases will be based upon special circumstances and it will seldom be possible for the court to say that an offer to buy on a discounted basis is plainly reasonable, so that the petition should be struck out.

Secondly, the value, if not agreed, should be determined by a competent expert. The offer in this case to appoint an accountant agreed by the parties or in default nominated by the President of the Institute of Chartered Accountants satisfied this requirement. One would ordinarily expect the costs of the expert to be shared but he should have the power to decide that they should be borne in some different way. Thirdly, the offer should be to have the value determined by the expert as an expert. I do not think that the offer should provide for the full machinery of arbitration or the half-way house of an expert who gives reasons. The objective should be economy and expedition, even if this carries the possibility of a rough edge for one

side or the other (and both parties in this respect take the same risk) compared with a more elaborate procedure. This is in accordance with the terms of the draft regulation recommended by the Law Commission: see Appendix C to the report.
Fourthly, the offer should, as in this case, provide for equality of arms between the parties. Both should have the same right of access to information about the company which bears upon the value of the shares and both should have the right to make submissions to the expert, though the form (written or oral) which these submissions may take should be left to the discretion of the expert himself.

Fifthly, there is the question of costs. In the present case, when the offer was made after nearly three years of litigation, it could not serve as an independent ground for dismissing the petition, on the assumption that it was otherwise well founded, without an offer of costs. 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. 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."

42. CGL and Mr McGowan submitted that the open offer which they have made to Mr Raswant to purchase his shareholding in CVL complies with the requirements set out by Lord Hoffmann in *O'Neil v Phillips.*

43. The first requirement is the offer to purchase must be at a fair value on a pro rata basis normally without the application of a discount by reason that the interest to be purchased is a minority holding. CGL and Mr McGowan submit that they are offering to purchase Mr Raswant's shares at fair market value with no discount applied.

44. The second requirement relates to the appointment of an independent competent expert. CGL and Mr McGowan are willing to use any reputable accounting firm to be agreed between the parties and in the event parties cannot agree, then a firm could be nominated by The Institute of Chartered Accountants of Bermuda to undertake the valuation or the Court can appoint an appropriate accounting expert. CGL and Mr McGowan had proposed that the costs of such a valuation should be shared between the parties.

45. The third requirement relates to the mode of valuation. CGL and Mr McGowan are in agreement that valuation should be determined by an expert and that such a valuation would be binding upon the parties. In particular, it is agreed by the parties that the expert is not acting as an arbitrator.

46. The fourth requirement relates to the issue of costs of the underlying proceedings. CGL and Mr McGowan have agreed that they will pay the costs of and occasioned by the Petition but that they should not be obliged to cover the costs of Mr Raswant's failed application to have the provisional liquidators appointed. CGL and Mr McGowan also contend that they should have their costs since the date of the offer to purchase Mr Raswant shares on 2 August 2019 which has been unreasonably refused.

47. The final requirement relates to the requirement for equality of arms. CVL has agreed that it will ensure that Mr Raswant will have full access to all information which bears on the value of the shares and both parties will have the right to make submissions to the expert on any areas of disagreement.

48. In the circumstances CGL and Mr McGowan submit that they have offered to fulfil the five requirements on a satisfactory basis and in the circumstances invite the Court to strike out the Petition and to give directions for the valuation to proceed. Having regard to the terms of the offer made and outlined above, I accept the submission that on the face of the offer it complies with the requirements set out by Lord Hoffmann in *O'Neill v Phillips.* However, it is necessary to consider why Mr Raswant maintains that this Petition should proceed to

a full hearing and a winding up order made, both in his affidavit evidence and the submissions of his counsel at the hearing of this application.

49. First, Mr Raswant relies upon the alleged unlawful conduct of dilution of his shareholding in CVL. However, for the purposes of the open offer, CGL and Mr McGowan have offered to purchase Mr Raswant's shares on the basis that he is a 50% shareholder in CVL. In the circumstances, this is no longer a material issue. I accept as reasonable the condition attached by CGL and Mr McGowan that they should be given credit for their capital contribution for the cash injection used to pay IMR in the amount of US $943,980.

50. Second, Mr Raswant relies upon the loss of substratum and he points to the fact that CVL has not undertaken any transactions for nearly 2 years. I accept the general submission that the alleged loss of substratum bears no relevance to the question as to whether the offer to purchase is reasonable or not. Furthermore, CGL and Mr McGowan consider that CVL may undertake transactional business in future but for present time, its entire efforts and resources are being directed at the business rescue proceedings of OCM and the associated legal proceedings. They also point out that CVL has never conducted any transactional business since Mr Raswant became a shareholder and he should have been aware that CVL was not conducting any business at the time he purchased his shares in CVL.

51. CGL and Mr McGowan also point out that until CVL finalises an agreement to sell its creditor claim in OCM, there is a possibility that CVL could or would be paid back the monies it is owed, which were made to OCM for prepayments of South African coal, in coal itself rather than cash. If such is the case, CVL would then have to trade and sell the coal received from OCM.

52. In all the circumstances I am satisfied that the alleged loss of substratum has no material relevance to the issue whether Mr Raswant is acting unreasonably in not accepting an offer to purchase his shares in response to his application for relief under section 111 of the Act.

53. Third, Mr Raswant complaints about CVL's affairs prior to the time he became a shareholder and director and in particular he complains in relation to loans made by CVL to its shareholders and third parties. However, as CGL and Mr McGowan point out, all the loans complained of were made with the unanimous consent or acquiescence of all the shareholders of CGL. All the relevant loans complained of were made with the knowledge and consent of CGL and Mr McGowan, representing 50% of the shareholding, and Mr Garg representing the remaining 50% shareholding. Counsel for the Respondents relies upon *Re Batesons Hotels Limited* [2014] 1 BCLC 507, where His Honour Judge Hodge QC held, applying the principle in *Re Duomatic* [1969] 1 All ER 161, that a successor in title to a member who consented to the conduct in question could not sustain a complaint in respect of conduct which had been consented to by the previous shareholder. Judge Hodge QC said at [58]-[59]:

> *"58. Mr Groves, in oral submissions, placed particular reliance upon the decision of the Privy Council in the case of Bermuda Cablevision Ltd v Colica Trust Co Ltd [1997] BCC 982. Mr Groves relied upon that authority for the proposition that the fact that the trustees of the shares had approved the relevant conduct could not be a complete answer. Mr Groves relied in particular on passages at page 990F through to 991H. In my judgment, the complete answer to that submission, and Mr Groves's reliance upon the Bermuda Cablevision case, is that there the unlawful conduct constituted a criminal offence, and was not capable of being validated, even by the unanimous consent of all of the company's shareholders, otherwise the relevant section would have been something of a dead letter and would not have achieved the statutory objective which the provision was enacted to achieve.*
>
> *59. Mr Groves submitted that it cannot be the law that anything that is ratifiable by the members is incapable of constituting unfair prejudice. In my judgment, as Mr Berragan submitted, a petitioner cannot complain about matters to which he, or those from whom he derives title to his shares, have expressly consented. Mr Groves emphasised that the passage from* Hollington on Shareholders' Rights*, which was cited by the district judge at paragraph 49, refers in terms to the fact that an*

aggrieved minority shareholder who has acquiesced in the wrongdoing in question will, under general equitable principles, be debarred from bringing a derivative claim in respect of that wrongdoing. Mr Groves emphasised that the passage was directed to the bringing of a derivative claim, and not the presentation of an unfair prejudice petition under section 994 of the Companies Act. In my judgment, that is an irrelevant distinction. If one cannot complain about conduct to which all of the shareholders have acquiesced by way of derivative claim, I simply cannot see how it can be said that that conduct can be said to have been unfairly prejudicial to any part of the company's members. All have consented to it. A shareholder who comes to the company later, and after the conduct to which consent has been given, cannot say that that conduct has been unfairly prejudicial to him."

54. Furthermore, to the extent that loans were made to AGEV, the company owned by Mr Akash Garg, in the amount of US $17 million, Mr Raswant would have been aware of this transaction as he was, at the relevant time, a director of AGEV.

55. I have previously noted that to the extent that Mr Raswant complains of the payments made to Jones Day, CGL and Mr McGowan have met that complaint by agreeing that the payments made to Jones Day will be considered an asset of CVL for the purposes of the valuation.

56. Finally, in relation to allegations of past mismanagement, whilst CGL and Mr McGowan deny the allegations, it is always open to Mr Raswant to raise these issues with the valuation expert who is entitled to take these issues into account, if considered appropriate, in coming to the appropriate valuation. Any impropriety on the part of the majority shareholder can be taken into account when valuing the shares of the minority shareholder. Thus, in *Re a Company, ex parte Kremer* [1989] BCLC 365 Hoffmann J held that any allegations of impropriety could be taken into account in valuing the company.

"Counsel for the petitioner says that this is a case of impropriety in the conduct of the respondent and that, therefore, that principle should not apply. I think that is

giving too extended a construction to what I said. The remark was made in the context of the use of the valuation provisions in the company's articles, and what I meant was that there might be cases of impropriety on the part of the respondent which had so affected the value of the shares in the company as to make it inappropriate for the matter to be dealt with by a straightforward valuation. In this case, however, the effect of the alleged improprieties on the valuation of the shares in the company is likely to be minimal. What the valuer will be concerned with is applying a suitable multiple to the profits which the company appears to be likely to earn in the future. Furthermore, the respondent has said that the valuer should be free, if he felt it fair to do so, to write back into the accounts any sums which he considered to have been improperly disbursed.

A similar contention was made to Millett J in Re a company (No 003843 of 1986) [1987] BCLC 562, where the judge said that counsel had argued that, because there was suspicion of misfeasance and misappropriation, it was not possible that the petitioners, who had offered to submit to an independent valuation, had made a fair offer. The judge said (at 571):

'In my judgment, there is nothing in that point. The terms of the offer that I have read ensure that both sides will have an opportunity to have access to all the company's books and papers and make whatever representations they wish to make to the independent accountants. In case there is any doubt, I should make it absolutely clear that, in my judgment, if the accountants have any reason to think that there has been any misappropriation or misapplication of the company's assets which would have the effect of depreciating the value of the petitioner's interest, then they will have to take that into account in valuing the company.'"

57. Fourth, Mr Raswant expresses his concern as to whether he will be able to obtain all the relevant information from CVL for the purposes of the valuation. CGL and Mr McGowan point out that Mr Raswant has been provided with all documents,

communications, offers to purchase CVL's creditor claim in OCM, draft agreements, business rescue plan and associated schedules, and pleadings in real time and has received approximately 1000 emails/records/documents/agreements. They also point out that Mr Raswant has not provided a single comment or had a single question in relation to any of this information.

58. I am satisfied that Mr Raswant will be provided with all relevant information for the purposes of valuation of CVL. If there is any difficulty in this regard, Mr Raswant will be able to seek the assistance of the Court under the liberty to apply provision.

59. Fifth, Mr Raswant raises the concern that he has not been provided with evidence relating to CGL's or Mr McGowan's ability to pay for the shares. On the other hand, Mr McGowan has confirmed under oath that the Respondents will be in a position to fund the acquisition of Mr Raswant's shares once it is confirmed that Mr Raswant will be removed as a shareholder. Counsel points out that CGL and Mr McGowan have already collectively invested (and paid) US $943,980 into CVL at short notice, the proceeds of which were used to pay CVL's liability to IMR.

60. Counsel for Mr Raswant made the same points in his oral presentation and emphasised that this was an exceptional case on the facts. Counsel emphasised that the CVL's assets consist of the OCM claim and other claims for the recovery of loans made by CVL to its shareholders and third parties. Counsel argues that there is an inherent risk that the value of these assets might be depressed given that CGL and Mr McGowan have all the information in relation to these assets. Counsel argues that, in these exceptional circumstances, it is reasonable that Mr Raswant should not accept the offer to purchase his shares and it is reasonable for him to take the position that CVL should be formally wound up and the independent liquidators should realise the assets.

61. Counsel for Mr Raswant relies upon the Court of Appeal decision in *Virdi v Abbey Leisure Ltd* [1990] 342, where the Court refused to strike out a petition where the

winding up order was sought in the face of an offer to purchase the minority's shareholding. However, it seems to me, that the facts in *Virdi* were exceptional.

62. First, it was Mr Virdi's case, as alleged in the petition, that at the time of the formation of the company, and at the time when the present shareholders acquired their interests, it was understood between them that the sole project to be undertaken by the company was the acquisition, refurbishment and management of a nightclub called the Pavilion. That project had come to an end and Mr Virdi contended that the only outstanding item was the distribution of the assets of the company which were entirely in cash.

63. Second, the offer made by the other shareholders to Mr Virdi was made on the basis that the valuation of Mr Virdi's shares would be calculated pursuant to article 27 of the company's articles. The Court found that there was a risk that an accountant carrying out the valuation pursuant to the company's articles might value Mr Virdi's shares at a discount because he was a minority shareholder and in the circumstances there was nothing unreasonable in Mr Virdi refusing to take this risk. In a winding up the liquidator would be in a better position than a valuer to determine the value of Mr Virdi's claim and to ensure that the price paid to Mr Virdi for his stake was similar to that paid to another shareholder for a similar stake.

64. Third, the Court made it clear that the real objection to the offer was that Mr Virdi was exposed to the risk of a valuation at a discount. There would have been no objection to the offer if the offer eliminated any risk of valuation at a discount. This is made clear in the judgment of Balcombe LJ at 346b:

> *"Counsel for Mr Virdi… was unwilling before us to abandon his claim under s 461 [minority oppression]; as he put it Mr Virdi wants in one way or another to have his proper share of the fruits of this joint venture. <u>Either the company should be wound up or Mr Virdi should be bought out on a proper basis</u>"* (emphasis added).

65. Fourth, the Court expressed the view that in relation to certain disputes the accountant nominated to value the shares may not have the machinery available to evaluate those disputes and claims which, in the context of the total value of the company's assets, could have a very significant effect on the value of the shares. However, the nature of the claims needs to be kept in mind. The claims referred to were (a) a claim by some builders against the company in the sum of GBP 50,000 which was disputed by the company; (b) a claim by Mr Virdi himself against the company for fees and remuneration which he alleged was due to him; and (c) a claim by the company against Mr Virdi for damages for his wrongful retention of the proceeds of the sale of the Pavilion.

66. In the present case, there is no risk that Mr Raswant's shares might be valued at a discount by the independent accountant valuer. The parties will expressly instruct the accountant that the valuation of Mr Raswant's shares is to be arrived at without applying any minority discount.

67. Second, the assets of CVL consist entirely of the OCM claim and the loans receivables due to the company from its shareholders and third parties. As far as the OCM claim is concerned it is being pursued by Tabacks in South Africa. I noted in my Ruling of 26 August 2019 that, as of that date, Tabacks had assembled a team of no less than 10 legal professionals, four directors and four advocates, working an equivalent of 284 full working days with CVL. There is no suggestion that the claim is not being pursued appropriately or that Tabacks are not in a position to provide appropriate evaluation of the claim. The independent accountant valuer will have access to all relevant material produced by Tabacks and indeed to the law firm itself. As far as the other loans made to shareholders and third parties are concerned, there is no reason to suppose that a professional valuer would be unable to evaluate the current value of those assets. Valuing loans receivables is a standard part of the professional expertise of a professional valuer.

68. Third, unlike the position in the Virdi case where all the assets were in cash, the making of a winding up order and the appointment of provisional liquidators of CVL is likely to have a devastating effect on the collectability of CVL's assets. As noted earlier, it is the professional opinion of Tabacks that the appointment of provisional liquidators "*will not only completely and finally remove <u>any chance of recovery</u> of CVL's funds given the delays it will occasion, it would completely halt the sales and rescue process of OCM*". To restate, the OCM claim is entered in the amount of US $74,575,285 in the management accounts of CVL, as at February 2018, and represents over 50% of the entire assets of CVL.

69. Counsel for Mr Raswant also relies upon *Harborne Road Nominees Ltd v Kavarski and another* [2012] BCLC 420 in support of his submissions that (i) refusal to accept an offer by the majority shareholder to purchase the shares of a minority shareholder does not apply to a case of equal 50% shareholders; (ii) a minority shareholder is not bound to accept the offer to purchase shares in circumstances where there are issues in the petition relating to allegations of breach of duty owed to the company by one or other party; and (iii) a minority shareholder is not bound to accept the offer made by the majority shareholder in circumstances where the minority shareholder does not have full access to all the relevant information. In light of these submissions it is clearly necessary to consider with some care the decision of HH Judge David Cooke in *Harborne Road Nominees.*

70. In *Harborne Road Nominees*, M and K set up a joint venture company in 2001 for the supply and installation of alarms and security services for building projects. In November 2010, without any prior warning, K's solicitors wrote to M stating that since M no longer appear to have any active involvement in the company it would be in the company's best interests if M was no longer a shareholder. The letter contained an offer to purchase M's shareholding at a price to be agreed or failing agreement price determined by a jointly appointed independent expert. M filed a petition alleging unfair prejudice affecting his shareholding in the company, claiming that he had been an equal partner in the business, he had fully participated

in and then been excluded from its management, he was likely to be deprived of the very substantial dividends he had received from the company, and K intended to switch the company's business to another company wholly owned by him. It was in this context that HH Judge Cooke stated that the principle that an unfair prejudice petition filed by shareholder would be struck out as an abuse of process if he had refused an offer by a majority shareholder to purchase shares at a fair value did not apply where the members in dispute were equal shareholders, particularly if they were quasi partners, since the principle was not intended to permit one partner to seize control of the company to the exclusion of the other partner.

71. HH Judge Cooke emphasised that the fundamental issue for the court in each case remains whether the continued prosecution of the petition after the making of the offer amounts to an abuse of process. He said at [26]:

> *"The question for the court is always whether in all the circumstances of the case the applicant has satisfied the conditions required to have the petition struck out, or summary judgment in his favour given on it. These Mr Shaw accurately summarised as being that it must be shown that the continued prosecution of the petition after the making of the offer amounts to an abuse of process, or was bound to fail. The issue is highly sensitive to the facts and circumstances of each case, and consideration of the nature and terms of any offer made can only ever be an intermediate step in the process."*

72. Even in the case of equal shareholders, the continued prosecution of the petition after the making of the offer may amount to an abuse of process. HH judge Cooke stated at [35]:

> *"I accept that if it is the case that he has been offered a sale on terms that gave him all the advantages he could reasonably expect to achieve from the petition proceedings, it would be an abuse to continue those proceedings in the face of such an offer, and that he should not be able to play fast and loose*

by continuing the proceedings but insisting on having the fallback of an offer on the most advantageous terms remaining open throughout. The real question therefore is whether the various offers made had that effect."

73. HH Judge Cooke concluded that it was not unreasonable for M to refuse to accept the offer for the following reasons. First, the offer always preserved the position that the company retained the option to allege a failure to refer business on the part of M and take proceedings against him for that failure. In his final offer K agreed to give up any claims he might make personally against M, but not those of the company. HH judge Cooke took the view that this was *"a substantial objection*" and it can hardly be the case that Lord Hoffmann in *O'Neill v Phillips* envisaged that a (presumed) wrongdoer could avoid claims against him by acquiring the company while at the same time leaving him clear to pursue his own counter allegations.

74. Second, HH judge Cooke accepted that the terms of the final offer as to dividends left substantial ambiguity as to the dividends M would receive, and the scope for K to manipulate matters against him. The relevant wording provided that "our client will accept… That your client will be paid a dividend *should they be declared*, subject to usual requirements of declaring dividends as discussed above".

75. In the present case, CVL is not a joint venture between CGL and Mr McGowan on the one hand and Mr Raswant on the other hand. Mr Raswant's association with CVL arises as a result of his purchase of 50% shareholding previously owned by Mr Garg. He was also appointed a director of CVL. In his Eighth affidavit, Mr McGowan states that during the six and half months since CGL and Mr McGowan made the open offer on 2 August 2019, Mr Raswant has refused or failed to attend a further 10 board meetings (28 August 2019, 9 October 2019, 12 November 2019, 15 November 2019, 19 November 2019, 22 November 2019, 26 November 2019, 28 November 2019, 3 December 2019 and 6 December 2019). In total, Mr Raswant has refused or failed to attend 19 out of 22 board meetings since 18 January 2019.

76. The day-to-day affairs of CVL have been conducted by Mr McGowan. In relation to the OCM claim it is being handled by Mr McGowan and Ms. Willoughby-Foster on behalf of CVL without any meaningful input from Mr Raswant.

77. Mr Raswant appears to have taken an unconventional view of his responsibilities as a director of CVL. Thus, by way of an example, one of the complaints made by Mr Raswant in paragraph 33 of the Amended Petition is that Mr McGowan failed to take any prompt recovery or enforcement action to obtain payment of certain loans immediately due and payable to CVL including:

> *"a shareholder loan facility agreement dated 10 April 2017 from CVL to Garg that was due and payable on 9 April 2018. McGowan took no recovery action for more than a year until he calls CVL to send a first demand letter on 30 April 2019, and on 27 May 2019 sought leave from the Supreme Court of Bermuda to serve proceedings against Garg outside the jurisdiction claiming $1,085,151.43".*

78. Mr Raswant makes the same complaint in relation to a further loan made by CVL to Mr Garg on 13 November 2017 which was due and payable on 12 November 2018 in the amount of $106,137.60.

79. By summons dated 27 May 2019, CVL made an application for summary judgment against Mr Garg in relation to these two loans due under the loan agreements. In his Defence, filed on 3 October 2019, Mr Garg for the first time that took the position that in August 2018, he agreed to sell his shares in CVL to Mr Raswant and that in light of the existence of the loans, Mr Raswant refused to purchase the shares unless the loans were repaid or waived. Mr Garg further asserted that at a meeting on 13 August 2018 in Dubai, attended by Mr Garg, Mr Raswant and (on behalf of CVL) Mr McGowan, CVL jointly promised Mr Garg and Mr Raswant that CVL did not require repayment and that the loans were waived by CVL. Mr Garg further alleged

that on the basis of this waiver by CVL, Mr Raswant agreed to buy and Mr Garg agreed to sell the 50% shares in CVL.

80. Not surprisingly CVL sought the assistance of Mr Raswant in relation to this extraordinary allegation made by Mr Garg in opposition to the application for summary judgment. At paragraph 13 of his Eighth affidavit, Mr McGowan states that despite CVL's Bermuda attorneys and himself collectively requesting Mr Raswant to confirm or deny Mr Garg's version of events in a sworn affidavit on eight separate occasions (04, 10, 17 October, 11, 15, 26 November 2019 and 6 December 2019), and in a Board meeting which took place on 19 December 2019, Mr Raswant refuses to confirm or deny Mr Garg's allegations, or provide any assistance to CVL.

81. In his Sixth affidavit Mr Raswant states under oath that "*McGowan seeks to criticise me for purportedly failing to provide any information to CVL acquired as a former director of AGEV Investments Ltd. I have not provided CVL any information acquired in that capacity as I entered into a non-disclosure agreement with AGEV Investments Ltd dated 15 January 2018".* The non-disclosure agreement is governed by the laws of the United Arab Emirates and its precise effect may well depend upon the niceties of UAE law, but on the face of the document it is difficult to see how that agreement prevents Mr Raswant from confirming whether he represented to Mr Garg that he would only be interested in purchasing his shares in CVL if the two shareholder loans were waived by CVL and whether at a meeting attended by him on 13 August 2018 in Dubai, this was so agreed by Mr McGowan. Assuming what Mr Garg says is correct, Mr Raswant clearly needs to explain on what basis he is making the allegations in paragraph 33 of the Amended Petition that Mr McGowan's failure to collect the two shareholder loans on behalf of CVL from Mr Garg constitutes oppressive and prejudicial conduct entitling him to relief under section 111 of the Act. Mr Raswant also needs to explain on what basis he was able to confirm to this Court under oath that the statements made in the Petition (which include the statement that monies are due from Mr Garg to CVL under the two loan agreements) were true.

82. In the circumstances, I am satisfied that this case is far removed from the facts and the findings in *Harborne Road Nominees*. This is not a case of a joint venture between CGL and Mr McGowan on one hand and Mr Raswant on the other hand. Mr Raswant, since the acquisition of his shareholding in August 2018, has played no role in the management of CVL despite the fact that he is elected as one of the two directors of the company. Indeed, Mr Raswant has elected not to provide any assistance to CVL in circumstances where he clearly should have done so.

83. HH Judge Cooke did state that if the assets of the company consist of certain claims either against third parties or against the other shareholders, an expert may not be able to value those claim. Thus, as an example, if the petitioner alleges that his co-shareholder has diverted business or misapplied assets, it would not be just to require him to accept a price for his shares determined by an expert without authoritative determination of the claim. I accept that there may be such cases but it does not appear to me that this case is in that territory. For the purposes of the valuation, CGL and Mr McGowan appear to have conceded all the claims made against them as giving rise to oppressive or prejudicial conduct. Mr McGowan has stated that to the extent that CVL has in the past indicated that it may have claims against Mr Raswant, in his capacity as a director of CVL, those claims will not be pursued in the event his shares are acquired by CGL and Mr McGowan pursuant to the open offer.

84. It is indeed the case that in *Harborne Road Nominees* HH Judge Cook referred to the fact that if a party has been excluded from information about the company's affairs, he may be poorly placed to anticipate and cater for every means and mechanism by which the affairs of the company might be managed so as to disadvantage him in the valuation process. The learned Judge accepted: "*That difficulty may fall away if the offeree is given a sufficient opportunity to inspect books and records before he has to decide whether to accept or reject any offer".* In the present case, it is accepted by CGL and Mr McGowan that Mr Raswant and the accountant expert would be provided any and all relevant information to the

valuation. Indeed, Mr Raswant will have access to the Court in the event there are any difficulties in relation to obtaining all relevant information.

85. In all the circumstances, I have come to the view that Mr Raswant is indeed acting unreasonably in proceeding with this Amended Petition in light of the offer made by CGL and Mr McGowan to purchase shares and that this conduct constitutes an abuse of process. To insist upon a winding up order in the circumstances of this case appears to be contrary to Mr Raswant's own interests. First, there is the uncontradicted evidence from Tabacks that the making of a winding up order and the appointment of the provisional liquidators is likely to remove any chance of recovery in respect of the OCM claim, which constitutes over 50% of the assets of CVL. Furthermore, if the Court concludes that it is appropriate to make a winding up order, such a conclusion must necessarily mean that the Court is precluded from granting any relief to Mr Raswant under section 111 of the Act. These two outcomes are not in the interest of Mr Raswant.

86. At its core this is a contributory's petition to wind up the company. Section 164 (2) of the Act provides:

> *"(2) Where the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court, if it is of opinion,—*
>
> *(a) that the petitioners are entitled to relief either by winding up the company or by some other means; and*
>
> *(b) that in the absence of any other remedy it would be just and equitable that the company should be wound up,*
>
> *shall make a winding-up order, unless it is also of the opinion both that some other remedy is available to the petitioners and that they are acting*

unreasonably in seeking to have the company wound up instead of pursuing that other remedy."

87. It seems to me that in this case "*some other remedy*" is clearly available to Mr Raswant. In a formal liquidation Mr Raswant would be able to obtain 50% of the value of the net assets less the expenses of the liquidation. He is able to achieve the same object by obtaining a valuation of the net assets of CVL and receiving 50% of that valuation from CGL and Mr McGowan. This course also avoids the great expense which will be incurred by all parties in contested winding up proceedings including the trial of the allegations of oppression and prejudicial conduct under section 111 of the Act. This course also avoids the potentially devastating effects of a winding up order on CVL's main asset, the OCM claim.

88. Finally, I must deal with the statutory demand served in the amount of $142,881.79 representing taxed costs in separate proceedings. CVL maintains that, but for the existence of these proceedings and the Order made in these proceedings, CVL would have discharged this liability. CVL points to paragraph 5 (c) of the Order dated 10 September 2019 prohibiting CVL from raising any further capital through the issuance of the shares. CVL represents that it will be in a position to discharge this indebtedness promptly after the Amended Petition has been struck out. I accept that CVL should be given an opportunity to discharge this indebtedness within a short period of time.

89. In all the circumstances I take the view that to continue with the Amended Petition in light of the open offer made by CGL and Mr McGowan to purchase Mr Raswant's shareholding is unreasonable and constitutes an abuse of process. Accordingly, it is appropriate that the Amended Petition should be struck out and I so order.

90. I also order that CVL should discharge its liability in relation to taxed costs in the amount of $142,881.79, which forms the basis of the statutory demand, within six weeks of the date of this judgment.

91. I also grant liberty to apply to the Court in relation to any issue relating to the valuation process generally envisaged in the open offer and in particular in relation to (i) the appointment of the expert valuer; and (ii) provision of information from CVL and/or Mr McGowan to Mr Raswant and the expert valuer.

92. I will hear the parties in relation to the issue of costs, if required.

Dated 29 April 2020

NARINDER K HARGUN

CHIEF JUSTICE