In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
CONSOLIDATED ACTIONS
2017 : No. 467
2018 : No. 38
2018 : No. 66

IN THE MATTER OF CLEARWATER DEVELOPMENT LTD.
AND IN THE MATTER OF THE COMPANIES ACT 1981

BETWEEN:

PAUL AND TERESA RODRIGUES
(Trading as Rodrigues Pools)

Petitioners/Plaintiffs

-and-

CLEARWATER DEVELOPMENT LTD.

Respondent/Defendant

JUDGMENT

Respondent's application to strike out the Petition on the ground that the Respondent is willing to purchase the Petitioners'/Plaintiffs' shares for fair value; scope of section 111 and principles to be applied. Petitioners' application to re-amend the Petition.

Date of Hearing: **8 December 2020**
Date of Judgment: **13 January 2021**

Appearances: **Mark Pettingill of Chancery Legal Ltd, for the Petitioner/Plaintiffs**

Richard Horseman of Wakefield Quin limited, for the Defendant/Respondent

JUDGMENT of Mussenden J

Introduction

1. By Summons dated 1 October 2019, the Respondent/Defendant Clearwater Development Ltd ("CDL") applied to strike out the Petition dated 20 February 2018 presented by Mr. Paul Rodrigues ("Mr. Rodrigues") and his wife Mrs. Teresa Rodrigues, the Petitioners/Plaintiffs in this consolidated action, ("the Petitioners"). The application is made on the basis that CDL is willing to consent to an Order requiring it to purchase the Petitioners' shares at fair market value, based on the Petitioners being minority shareholders and CDL's willingness to make a reasonable offer and agreements with the Petitioners for such a share purchase. CDL's primary point is that there is now no need for a trial of any issues; the Court should order the share purchase based on an independent valuation of the shares which would be binding on the parties.

2. The strike out application is supported by the Fourth, Fifth and Seventh Affidavits of Mr. John Bush III, a director of the Respondent ("Mr. Bush") dated 1 October 2019, 30 October 2019 and 30 November 2020. The application is opposed by the Petitioners who rely on the Sixth Affidavit of Mr. Rodrigues dated 20 November 2019.

3. By Summons dated 11 October 2019, the Petitioners applied for leave to re-amend their Amended Petition. It is supported by the Fourth Affidavit of Mr. Rodrigues dated 11 October 2019. CDL relies on the Fifth Affidavit of Mr. Bush, but has submitted that if the Court refuses to strike out the Petition, then the application for leave to amend can be granted subject to the usual order as to costs.

Other applications before the Court

4. There are a number of other applications within the Petition before the Court.

    a. The Petitioners' application for leave to appeal the Ruling of the Learned Justice Subair Williams dated 6 September 2019. This application falls away if the Petition is struck out.

    b. The Petitioners' application for further disclosure by Summons dated 30 January 2020. This application falls away if the Petition is struck out.

Company Background and Initial Agreement Background

5. CDL was incorporated in September 2016 as a company in Bermuda under the Companies Act 1981 ("the Act"). The objects of CDL were to acquire the property known as Surf Side Beach Club situated at 90 South Road, Warwick Parish, Bermuda ("the Property") and to redevelop it in accordance with the site plan and budget that was appended to a Subscription and Shareholder Agreement dated 16 September 2016 ("the Shareholder Agreement") as well as other objects set forth in the Memorandum of Association. The development project became known as the "Azura Project".

6. CDL has an ordinary authorised share capital of BD$10,000 divided into 3,000 Class A Shares of par value BD$1.00 each, 5,750 Class B Shares of par value BD$1.00 each and 1,250 Class C Shares of par value BD$1.00 each.

7. Pursuant to the Shareholder Agreement, the shares were allocated as follows: Mr. Bush held all 3,000 Class "A" Shares and became the President of CDL while the Petitioners held 1,583 Class B Shares. Island Furnisher Holdings Ltd held 609 Class B Shares. Four other shareholders held Class B Shares and one other shareholder held Class C Shares. The voting shares were only the Class A Shares and the Class B Shares. The Class C shareholders did not carry voting rights.

8. The Shareholder Agreement was subject to and provided that by a Deed dated 16 September 2016, Clarien Bank Limited having provided a Facility Agreement for loan facilities to CDL, would register a Charge over all the issued shares of the Company.

9. The Shareholder Agreement provided for a maximum of three (3) directors holding office at any given time. Mr. Bush as holder of the Class A Shares would be entitled to nominate two directors and an alternate to each such director and also he could require the removal or substitution of any director nominated by him.

10. The Petitioners initial investment was $250,000 when CDL was incorporated. An Agreement Letter dated 27 October 2016 ("the Agreement Letter") evidenced an increase in investment by the Petitioners of $400,000 to bring their investment to $650,000. In consideration of that increase, Mr. Rodrigues through his trading entity Rodrigues Pools ("RP"), would become 'a preferred pool construction contractor and insulated concrete forms supplier and contractor, and supplier of other construction services and finish materials as appropriate; provided the contractor services, products, quality and pricing were competitive with those that the developer could obtain through any and all options available to it.[1]'.

11. In or about May 2017 the shareholders agreed for a restructuring of CDL. A Deed of Amendment to the Shareholders' Agreement ("DAS Agreement") was finalized and executed in or about July 2017. It included a provision that Mr. Rodrigues would be appointed to the Board of Directors of CDL and that a Management Committee was to be established by the Board of Directors.

[1] There is now a dispute about whether the word 'services' should be in the Agreement Letter arising out of different wording in the final draft of the Agreement Letter and in the executed Agreement Letter. According to the Second Affidavit of Mr. Bush, Mr. Rodrigues would become 'a supplier of construction and finish materials' per the final draft of the Agreement Letter but that the word 'services' was deceitfully inserted without CDL being made aware of such insertion before signature.

Project Development Background

12. Sometime after March 2017, RP commenced construction development on the Azura Project, namely the foreshore construction works which were completed.

13. During July to September 2017 RP commenced work on Buildings 2 and 3. Disputes arose between RP and CDL, including over non-payment to RP for the July to September 2017 construction work. On 21 September 2017, RP suspended work on Buildings 2 and 3 pending payment of monies due. In turn, on 3 October 2017, CDL terminated RP from doing any further construction work on Buildings 2 and 3. Thereafter, PR was not involved in the construction of Buildings 2 and 3 and was not invited to bid for any other work at the Azura Project.

14. However, as the bricks and mortar were being built up at the Property, the corporate relationship between the Parties was falling down. During the construction of the foreshore works and Buildings 2 and 3, there were various events and disputes between the Parties including about roles, participation, conduct, corporate decisions, directorships and documentation, which eventually led to a deterioration of the relationship between the Parties.

Related Actions before the Court

15. Two Writ actions and the Petition flowed from the disputes between the Parties, with Mr. and Mrs. Rodrigues as the Plaintiffs/Petitioners in all three (3) actions. By previous Order of the Court the following actions were consolidated on 27 April 2018:

(i) Writ Action #1: (Case no. 467 of 2017) This matter was commenced by way of a Specially Indorse Writ of Summons dated 19 December 2017 seeking damages in the sum of $412,527.62 arising out of a claim for monies due for (contractual) work undertaken and materials supplied by the Plaintiff to the Defendant in respect of Buildings 2 and 3 of the Azura Project.

(ii) Writ Action #2: (Case No. 66 of 2018) This matter was commenced by way of a Generally Indorsed Writ of Summons dated 5 March 2018 seeking an unspecified sum of damages (to be assessed) and the delivery of all bid, tender and contract documents in relation to the development and construction of Buildings 7 and 8 of the Azura Project.

(iii) The Petition Action: (Case No. 38 of 2018) – The Petition was originally filed on 2 March 2018 and amended with leave of the Court on 16 May 2019 for the Court to proceed under section 111 of the Companies Act 1981 (alternative remedy to a winding up in cases of oppressive or prejudicial conduct). As stated previously, there is currently an application before the Court for leave to re-amend the Petition.

Basic Agreement between the Parties that CDL should purchase the Petitioners' Shares

16. It is important to note at this early stage that the Petitioners wished for CDL to purchase their shares, and in response, CDL has agreed to purchase the Petitioners' shares submitting their willingness to make various agreements as part of their offer for such a purchase.

17. From that basic agreement between the Parties arise various issues including the method of valuation of the shares, who should be the independent valuer, whether there is or will be adequate discovery from CDL for use by an independent valuer, whether the audited accounts can be relied upon for the independent valuation, any impact of any oppressive and prejudicial conduct on the independent valuation, whether there should be discovery from the Construction Manager and General Contractor Greymane, what becomes of CDL's counterclaim in the Petition and ultimately whether there should be a trial on the issues before any valuation.

Relief Sought by the Amended Petition and draft Re-Amended Petition

18. The Amended Petition sets out the details of the dispute and the requested relief. However, in the strike out application, the Court was invited by Mr. Horseman to consider the application to strike out the Amended Petition keeping in mind the draft Re-Amended Petition. Mr. Rodrigues stated in his Fourth Affidavit sworn on 11 October 2019 that the re-amendment to the Petition was necessary "to clarify and amplify the allegations contained therein, to add two major shareholders as parties[2] (namely Mr. Bush and Island Furniture Holdings Limited ("IFHL")) and reply to the assertions made that there should be an independent share valuation carried out which the Petitioners maintained is impossible to properly undertake until all the evidence has been presented to the court". As Mr. Horseman was not objecting to the re-amendment of the Petition if it was not struck out, then I will consider the strike-out application keeping in mind the draft Re-Amended Petition.

19. The Amended Petition seeks relief under two separate provisions of the Act.

20. First, the Petitioners seeks relief under Section 111 of the Act, the alternative remedy to winding up in cases of oppressive or prejudicial conduct. The effect of the relief sought under section 111 is to bring an end to the matters complained of by the Petitioner, in particular:

    a. CDL should purchase the Petitioners' shares on a valuation to be ordered by the Court, such valuation to be conducted on the basis of the market value of the assets of the Company. The draft Re-Amended Petition adds that "CDL and/or First Respondent (Mr. Bush) and or the Second Respondent (IFHL) purchase the

[2] The draft Re-Amended Petition adds two major shareholders as parties (Paragraph 3 of the Fourth Affidavit of Paul Rodrigues sworn 11 October 2019 and Exhibit "PR A"). The said draft lists Mr. Bush as First Respondent, Island Furniture Holdings Limited as Second Respondent and CDL as Third Respondent. I note that in the prayer paragraph 1 to the draft Re-Amended Petition, there is an error in the reference to the "Second and/or Third Respondents" which I take to mean "First and/or Second Respondents".

Petitioners' shares. It deletes the reference to being in accordance with the terms of the Agreement Letter dated 27 October 2016.

b. CDL produce management and/or audited accounts for the company since its inception. The draft Re-Amended Petition adds that CDL also produce 'all financial information in its possession relevant to the valuation of it and of its shares'.

c. CDL produce a copy of a list of CDL's assets including the Azura Project works which have been undertaken to date and in the absence of a list, then produce a list with asset valuations. The draft Re-Amended Petition adds that the list of assets should have their values and that producing any such list should be at the Respondent's cost.

d. All necessary accounts and inquiries.

"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."

21. Second, alternatively to the first requested relief, the Petitioners seek an order that CDL be wound up under the provisions of the Companies Act 1981. Whilst no specific section of the Act was relied upon, it appears that the Petitioner seeks such winding up on the basis that it is just and equitable that CDL 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*."

22. Third, the Amended Petition seeks such other order as may be made in the premises as shall be just and equitable.

23. Fourth, the draft Re-Amended Petition seeks costs.

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

24. Both Parties cited the judgment of the Learned Chief Justice in the case of *Deepak Raswant v Centaur Ventures Ltd and others* [2020] SC (Bda) 25 Com. In that case the Learned Chief Justice set out the conditions to be satisfied for relief under section 111 of the Act:

"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 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.

Section 111 of the Act is based upon the 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 sunder section 222(f).

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 Bermuda 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. If 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

25. Mr. Rodrigues in his Sixth Affidavit craves leave to refer to his Fourth Affidavit which exhibits the proposed re-amendments to the Petition which he states are necessary to enable the Court to make a fair and proper determination of the various issues raised to support the oppressive and prejudicial behavior of the Defendants towards him and his wife pursuant to the provisions of Section 111 of the Companies Act 1981. He complains that CDL, Mr. Bush and Mr. DeCouto have acted inappropriately as set out below.

26. First, Mr. Rodrigues complains that CDL failed to provide a proper and adequate contract of engagement for the work undertaken by RP at Buildings 2 and 3 in accordance with the terms and conditions of the Bid and Tender documents. He contends that CDL later sought to implement a contract document inconsistent with the same which was oppressive to the Petitioners as shareholders and which was a breach of the Agreement Letter.

27. Second, Mr. Rodrigues complains that CDL failed to make payments to RP for work undertaken by them at Buildings 2 and 3 under the terms of the Construction Agreement, in spite of repeated written and verbal requests to do so thus harming his interest in his capacity as a shareholder and contractor. He further complains that his interest as a shareholder was further harmed when CDL removed RP as the main contractors for the site work without justification and transferred responsibility to Greymane. This act and conduct was inconsistent with the Bid and Tender documents appointing RP to do the work as well not being in compliance with the Agreement Letter dated 27 September 2016 between the Petitioners and CDL.

28. Third, Mr. Rodrigues complains that CDL and Mr. Bush breached the Agreement Letter dated 27 September 2016 between CDL and the Petitioners as shareholders when they failed to allow RP to bid for further work to be undertaken on Buildings 7 and 8 and various other phases of the project which was fundamental to the Petitioners investing a further $400,000 into CDL.

29. Fourth, Mr. Rodrigues complains that Mr. Bush and Mr. DeCouto have caused CDL to enter into certain contracts and implemented certain contractual documents as Owners with the Construction Manager, Greymane, resulting in Greymane receiving certain benefits and advantages which were detrimental to CDL, and the Petitioners as shareholders, which were not in the best interests of CDL and which were oppressive to the Petitioners as shareholders.

    a. Mr. Rodrigues further contends that as Greymane was allowed to act as Construction Manager and Main Contractor, the bid and tender process for obtaining independent fixed price contracts was eliminated as well as RP's ability to match such bids and prices. This conduct had an adverse effect on competitive pricing of the phases of work, did not reduce the time to undertake the works and served to increase the costs of and associated with financing the Azure Project.

b. Mr. Rodrigues also contends that Greymane was permitted to benefit wrongly from and be over-rewarded as a consequence of being appointed both Construction Manager and Main Contractor with the result that CDL and the shareholders including the Petitioners have suffered detriment and loss, particulars of which would be provided following discovery.

30. Fifth, Mr. Rodrigues complains that despite his repeated requests for CDL to adopt and implement the terms of the DAS Agreement, CDL has failed to implement the DAS Agreement whereby he would have personally become a director of CDL and be a participating member of the Development Management Committee. Mr. Rodrigues states that he was never appointed to the Board of Directors and was never given notice of or invited to attend any meetings of the Board of Directors. He further states that he was appointed to serve on the newly formed Management Committee however, on 3 October 2017, the Directors of CDL at a meeting of the Board of Directors wrongly resolved that Mr. Rodrigues be removed from the Management Committee on the basis that his relations with other members of the Management Committee had broken down irrevocably and that Mr. Rodrigues' continued presence at such Management Committee meetings was not in the best interests of the company.

31. Sixth, Mr. Rodrigues complains that CDL paid $350,000 to the previous owner of the property as part payment of the costs of acquisition of the property in breach of representations to the Petitioners by Mr. Bush that the investment funds would be used to fund the development costs of the Azure Project. This act resulted in a cash flow problem from the outset which further delayed the commencement and completion of the development.

32. Seventh, Mr. Rodrigues makes several complaints in respect of Greymane:

a. Having appointed Greymane as Construction Manager, then Greymane should not have been appointed or purportedly appointed as General Contractor;

b. CDL has failed to cause Greymane to account for the costs of the Azure Project including the costs which Greymane has charged in respect of its own work on the project;

c. CDL, Mr. Bush and Mr. DeCouto have failed to procure CDL to obtain copies of and audit Greymane's records and accounts relating to the Azure Project as permitted by clause 6.11 of the relevant contract between CDL and Greymane.

33. Eighth, Mr. Rodrigues complains that CDL, Mr. Bush and Mr. DeCouto have wrongly accused and/or wrongly acquiesced in the accusation that the Petitioners have acted deceitfully by allegedly altering the terms of the Agreement Letter without the knowledge of Mr. Bush and CDL. They have also wrongly accused Mr. Rodrigues of aggressive behavior towards other persons involved with CDL including Mr. Bush and Mr. DeCouto.

34. Ninth, Mr. Rodrigues complains that no Annual General Meeting of the CDL was ever held and that CDL has never declared a dividend.

35. Tenth, Mr. Rodrigues, in his Sixth Affidavit, complains that the prejudicial and oppressive actions of the Defendants in dealing with the Petitioners and then administering and managing CDL and the construction project have materially reduced the value of the company and thus the Petitioners' shareholding as evidenced by an audit produced in September 2019 covering the period from the date of inception of the company through to September 2018.

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

36. It is to be noted that the Amended Petition prays, in the alternative to other relief, that the Company be wound up under the provisions of the Act.

37. However, in the Petitioners' written submissions, it was stated that 'the Petitioners are not seeking winding up although it has been suggested as one of the alternatives by the Petitioners'[3]. The written submissions also set out that (a) it was not the case that the Petitioner wanted to liquidate the company[4] and (b) the Petitioners 'have tried to compromise, stating that they do not wish to wind up the company'[5]. During submissions at the hearing, Mr. Pettingill made brief submissions about the possibility that CVL could 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". When challenged by the Court if it was a serious contention that CDL be wound up on this basis, in light of the fact that the Azure Project was a commercial hotel development underway in Bermuda, that Clarien Bank had funded the development with millions of dollars in loans and Mr. Bush had given a personal security of over $10 million dollars, Mr. Pettingill conceded that the Petitioners were not seeking an order that the company should be wound up.

The Respondent's application to strike out the Petition

38. For some time prior to the strike-out hearing, there were open offers from CDL to purchase the Petitioners' shares and there were counter-offers in reply. There was extensive correspondence in respect of the open offers and counter-offers. At the start of the hearing on 8 December 2020 the Court, noting that there was some progress in the open offers, encouraged and allowed further time for discussions to reach an agreement on the offers. However, the Parties did not reach an agreement and the hearing as listed took place.

39. In the Fourth Affidavit of Mr. Bush sworn on 1 October 2019, he exhibits the letter dated 13 August 2019 wherein CVL made an open offer to purchase the Petitioners' shares for $800,000 based on the formula in the Letter of Agreement for 973 shares as well as an additional premium for the remaining 609 shares. If the offer was not acceptable then CDL

[3] Plaintiff's Submissions para 60
[4] Plaintiff's Submissions para 40
[5] Plaintiff's Submissions para 85

would agree to purchase the shares at a price based on an independent valuation. That offer remained open until 31 August 2019. The letter also noted that if the offer was accepted then it would resolve the Petition proceedings leaving the two Writ actions to be determined. Also, he set out some of the terms of the offer that CDL would undertake.

40. In the Fourth Affidavit of Mr. Rodrigues sworn on 11 October 2019, he stated that he made the affidavit in support of the Petitioners' application for leave to re-amend the Petition. He further stated that the amendments were needed to clarify and amplify the allegations contained therein, to add two major shareholders as parties and reply to the assertions made that there should be an independent share valuation carried out which he maintained was impossible to properly undertake until all the evidence was presented to the court. I note that the exhibited draft Re-Amended Petition at paragraphs 17 – 20 purports to address various issues about the open offer.

41. In the Fifth Affidavit of Mr. Bush sworn on 30 October 2019 he stated that he made the affidavit in response to the Fourth Affidavit of Mr. Rodrigues in order to address some concerns raised by Mr. Rodrigues and set out in the draft Re-Amended Petition regarding CDL's offer to purchase the Plaintiffs' shares. He further stated that he had been advised by his counsel of the need to clarify issues raised by the Petitioners in order to give them comfort that they will receive proper compensation for their shares. Mr. Bush set out and further clarified terms of the offer.

42. In the Sixth Affidavit of Mr. Rodrigues sworn on 20 November 2019, he stated that in respect of the Fifth Affidavit of Mr. Bush, the Petitioners were not adverse to their shares being purchased as part of the relief sought in the Petition but it was a question of how and upon what methodology was to be used by an expert in properly valuing those shares. He stated that an expert can only properly value the shares following direction of the Court after it has had an opportunity of hearing and reviewing all the evidence relating to numerous issues alluded to in the draft Re-Amended Petition. He further stated that in a nutshell, the Petitioners case was that prejudicial and oppressive actions of the Defendants in dealing with the Petitioners, CDL and the Azure Project have materially reduced the value of the Petitioners' shareholding as evidenced by the audit produced in September

2019. He exhibited an open letter dated 5 November 2019 to counsel for CDL setting out an offer to sell the shares to CVL along with the reasons and the basis for such offer. The offer amount requested by the Petitioners was $1.3 million on the basis that the Petition would be wholly discontinued with no order as to costs. The offer was open for the next 14 days.

43. In the Seventh Affidavit of Mr. Rodrigues sworn on 27 November 2020 he stated that in a further attempt to reach a compromise he instructed his counsel to send a letter dated 24 November 2020 to counsel for CDL setting out proposed terms: (1) The offer amount requested by the Petitioners was $1 million; (2) to be paid into an escrow account pending determination of the two Writ actions by court order or settlement; (3) the Parties using best endeavours to reach a compromise; (4) the Petitioners staying the Petition; (5) releasing the funds and transferring the shares on conclusion of the Writ proceedings; and (6) discontinuing the Petition with no order for costs. The letter set out an alternative resolution that the Petitioners stay the Petition per (1) to (4) aforementioned, save that an independent valuer conduct a valuation of the shareholding following completion of the Azure Project and a final audit of CDL. Meanwhile, the Petitioners would remain as shareholders and would not act in a manner that may interfere with the completion of the project.

44. In the Seventh Affidavit of Mr. Bush sworn on 30 November 2020 he stated that CDL has declined the most recent offer as the shares were not worth $1 million and no investor would risk putting up $1 million for it to sit in escrow while the two Writ actions were being determined. In reply, CDL made an offer of $1 million to settle all three actions subject to the terms of payment being agreed. He requested that the Petition should be struck out, an independent expert should be appointed to give a share valuation giving an undertaking of full access to CDL's books and records with a valuation date at the date of commencement of the litigation or the close of the financial 2018 year or the such other date as the Court may order, but preferably an earlier date.

45. From the Petitioner's draft Re-Amended Petition, affidavits and correspondence, the Petitioners' concerns about the offers are that it is not possible for the Petitioners to

determine whether or not the offer(s) were fair and reasonable offer(s) and/or represented fair value of their shares or was an offer that provided the Petitioners with all that they could argue for at trial. Further, the Petitioners submit that there are matters which it is only appropriate for the Court and not an expert valuer to determine: (a) whether, and to what extent, the conduct complained of by the Respondents constitutes conduct which has been oppressive and prejudicial to the interests of the Petitioners within the meaning of S.111 of the Act; (b) whether, and to what extent, the conduct complained of has caused a diminution in the value of CDL and the shares; (c) the date at which the valuation should be taken; (d) the nature and basis upon which any valuation should proceed; (e) whether, and to what extent, the Agreement Letter is relevant; (f) whether or not interest on the value of the shares can and should be applied and if so, from what date; (g) the offer made no provision that any valuation should not be at a discount; (h) a valuer employed at KPMG would not be independent and is not acceptable to the Petitioners; (i) suitability of a proposed valuer; (j) no provision had been made for payment of the Petitioners' costs of and occasioned by the Petition; (k) there has been no identity of any purchasers or whether they have agreed to be bound by the proposed valuation or purchase; (l) it is not clear whether, and to what extent, the proposed valuation is to take account of the allegations of wrongdoing made by the Petitioners; (m) it is not clear whether, and to what extent, the proposed valuation is to take account of the amounts which are alleged to be owed to RP.

46. In reply to the Petitioners' concerns set out above, Mr. Bush in his Fifth Affidavit states that CDL has proposed to address them by agreement or undertakings as follows: (a) confirmation that offer to purchase is not intended to be discounted because the Petitioners hold a minority interest – the shares will be purchased for full fair value on a pro rata basis to be determined by a competent expert; (b) CDL is willing to use any reputable firm acceptable to the Parties; (c) CDL have invited the Petitioners to suggest a competent expert valuer or alternatively the Institute of Chartered Accountants can be requested to appoint an independent expert to value CDL; (d) confirmation that CDL will pay the costs of and occasioned by the Petition subject to a deduction for any costs made in the company's favour particularly if the Petitioners continue on with the litigation; In the Respondent's written submissions, the Respondent states that it agrees to pay the costs of

and occasioned by the Petition up to the date of the offer; (e) confirmation that once a purchase price has been determined, CDL will raise the necessary capital through existing shareholders or by outside investment or borrowing and that CDL will be bound by the valuation; (f) CDL welcomes the Petitioners' view on the effective date of the valuation whilst CDL proposes a date as of the 30 September 2018 which is the end of the financial year for CDL or alternatively the end of the 2019 financial year as he doesn't anticipate any appreciable difference;

47. Throughout the litigation of the Petition and the two Writ actions, there has been extensive correspondence about the Petitioners' access to CDL's books, records and other information. There have also been hearings before the Court with orders in respect of disclosure, a pending application for leave to appeal a Ruling on disclosure and a further pending application for disclosure. In general, the Petitioners argue that they are constantly being denied access to financial or other information and documents, voluntarily or by order of the Court. In turn, CDL replies that it has always provided the information as requested, that the Petitioner's accountants do not always understand the information provided, that the Petitioners' accountants have had access to the books and records at the express invitation of CDL and that generally they have been extremely cooperative at every turn in respect of disclosure.

48. There has been extensive affidavit evidence by Mr. Rodrigues and Mr. Bush concerning disclosure. In particular, the Seventh Affidavit of Mr. Bush lists in great detail some of the history of the requests for and provision of disclosure. Additionally, there has been affidavit evidence of counsel of the parties including by Mr. Horseman and Mr. Pettingill about the disclosure. The Petitioners submit that due to the history of the difficulty of accessing information held by CDL, any expert valuer will have similar issues and will not be able to have proper access to CDL's records and books. Mr. Bush in his Seventh Affidavit undertakes on behalf of CDL and its Directors to the Court that the independent expert will be granted full access to CDL's books and records. Further he submits that if the Petitioners can demonstrate any wrongdoing, the independent expert would be free to factor any of those findings into the final valuation of the shares.

49. The main contentious points for which the Parties did not agree in respect of the open offer are as follows:

    a. Books, records and information of CDL being made available to an independent valuer.

    b. Amounts owing to CDL – Mr. Bush in his Fourth Affidavit submits that there are no other amounts owed to the Petitioners as alleged by the Petitioners. He states that any such disputes are contractual disputes which are the subject of the two Writ actions and which do not have an impact on the value of the shares;

    c. Allegations of wrongdoing by CDL and others – Mr. Bush in his Fourth Affidavit submits that the Petitioners continue to allege that there has been misconduct by him and Mr. DeCouto of Greymane, which the Petitioners always knew Greymane was going to be the lead construction partner on the Azure Project, but they have not made clear how or why this has caused loss to CDL. Further, Mr. Bush states that all the other shareholders support the contractual structure for the project, that there are many effective costing controls in place including contract reviews by himself, the project architect, CDL's independent quantity surveyor and Clarien Bank, who is financing the project and approves every payment and contract, as well as having retained its own quantity surveyor who reviews the pricing of each contract at every stage of development. Also, CDL has to account to Clarien for all payments made prior to accessing further drawdowns on the loan. He exhibited the Memorandum of Understanding between CDL and Clarien Bank. Having set out the role of Mr. DeCouto's and Greymane's role in the Azure Project and the Petitioners' knowledge of it, Mr. Bush stated that there has been no loss to CDL by reason of Greymane acting as primary construction partner, whether labelled as "Construction Manager" or "General Contractor" or both, which could affect the valuation.

50. In *Deepak Raswant v Centaur Ventures Ltd and others* [2020] SC (Bda) 25 Com the Learned Chief Justice made reference to *O'Neil and another v Phillips and others* [199] UKHL 24 wherein Lord Hoffman "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" and where Lord Hoffman set out the basic ingredients of such an open offer to purchase the shares:

> *"But I think the 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 to 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 reasonably, 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 ordinary 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 experts, though the form (written 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 the 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 reasonable time."

51. CDL and Mr. Bush submit that their open offer which they have made to the Petitioners to purchase their shareholding in CDL complies with the requirements set out by Lord Hoffman in *O'Neil v Phillips*.

52. 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 for it being a minority holding. CDL and Mr. Bush submit that the offer to purchase is not intended to be discounted because the Petitioners hold a minority interest – the shares will be purchased for full fair value on a pro rata basis to be determined by a competent expert.

53. The second requirement relates to the appointment of an independent competent expert. CDL and Mr. Bush are willing to use any reputable firm acceptable to the Parties and they have invited the Petitioners to suggest a competent expert valuer or alternatively the Institute of Chartered Accountants can be requested to appoint an independent expert to value CDL. In Mr. Horseman's oral submission and draft order attached to his written submissions, he sets out that the costs of the valuation should be shared equally by the Petitioners and the Defendant.

54. The third requirement relates to the mode of the valuation. CDL and Mr. Bush submit that the valuation should be determined by an independent competent expert and that the valuation would be binding on the CDL.

55. The fourth requirement relates to equality of arms between the parties. Mr. Bush in his Seventh Affidavit undertakes on behalf of CDL and its Directors to the Court that the independent expert will be granted full access to CDL's books and records. Additionally, in the Defendants' written submissions, Mr. Horseman undertakes that both Parties would have the right to make submissions to the expert[6].

56. The fifth requirement relates to the issue of costs of the proceedings. CDL and Mr. Bush submit that CDL will pay the costs of and occasioned by the Petition subject to a deduction for any costs made in the company's favour particularly if the Petitioners continue on with the litigation. In the Defendants' written submissions, it is requested that the Petitioners should be made liable for any costs incurred subsequently to the date of the Defendant's offer to purchase the Petitioners shares including the strike out application and that the issue of costs be reserved pending the final valuation and purchase of the Petitioners' shares. In the hearing before me, Mr. Horseman clarified that the Defendant is offering to pay costs of the Petition up to the strike out application but was asking for the costs of the strike out application as the offer should have been accepted.

57. CDL and Mr. Bush submit that their offer to purchase the shares satisfies the requirements set out in *O'Neil v Phillips* and in all the circumstances the Court should strike out the Petition and give directions for the shares to be valued. A draft order with the various consequential terms has been provided in the Defendants' written submissions. Having considered the terms of the open offer as set out above, I accept the submission that it complies with the requirements set out by Lord Hoffman in *O'Neil v Phillips*. However, it is necessary to consider why the Petitioners submit that the Petition should proceed to a full hearing.

[6] Defendant's Submissions para 30

58. First, the Petitioners submit that they are concerned as to whether they will be able to obtain all the relevant information from CDL for the purposes of the valuation. They state that there has been a history of not providing the information to them. However, CDL and Mr. Bush state that the Petitioners have been provided all the information that they have requested. They have also made their accountants available to the Petitioners' accountants. I am satisfied that the Petitioners will be provided with all the relevant information for the purposes of valuation of CDL. If there is any difficulty in this regard, the Petitioners will be able to seek the assistance of the Court under the liberty to apply provision.

59. Second, the Petitioners submit that the Defendants have filed a counterclaim to the Petition which would have to be determined if the Petition is struck out. In the Defendant's written Rebuttal Bullet Points on Strike Out, Mr. Horseman states that the primary objective of the Counterclaim is to remove the Petitioners from the CDL. Further, he submits that the Defendant is in agreement for the Counterclaim to 'go out' subject to the proviso of CDL not being barred from raising relevant matters in Writ Action 2. In the hearing, Mr. Horseman adjusted the position somewhat to say there was no need for the proviso. On this basis, I am satisfied that on any order to strike out the Petition, there can be a further order that the Counterclaim will be struck out.

60. Third, the Petitioners submit that there are amounts owing to them as a result of the two writ actions. They point out that the Petition is consolidated with a claim for damages in Case No. 66 of 2018 whereby access to CDL information is required to make it possible to make an assessment of damages for lost opportunity. They submit that such an issue is for determination by the Court, not by the valuer who does not have the tools to make such determinations. The Petitioners also submit that the valuer may also value the Petitioners' shares at a discount, they being a minority shareholder. The Defendant submits that there are no funds owing to the Petitioners arising from the Petition and that the two writ actions are based in contract and their determination will have no bearing on the value of the shares. They add that those two Writ actions can be determined separately from the Petition and CDL would be liable for any damages found against it.

61. Counsel for the Petitioners rely upon the Chief Justice's findings in *Raswant v Centaur* where he considered 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 shareholding. They reference that the Chief Justice found that the facts in *Virdi v Abbey* were exceptional. They now submit that the facts in the present case are also 'unusual and exceptional'.

62. The Chief Justice considered the facts in *Virdi v Abbey* as follows: First, at the material times it was understood between the parties 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; Second, the offer made by the other shareholders was on the basis that the valuation of Mr. Virdi's shares would be calculated pursuant to article 27 of the company's articles and that 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; 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.

63. The Chief Justice then dealt with the facts of *Raswant v Centaur* in turn. First, there was no risk that Mr. Raswant's shares might be valued at a discount by the independent accountant valuer as that valuer would be expressly instructed that the valuation was to be arrived at without applying any minority discount. Second, the assets of CVL consist entirely of the OCM claims and loans receivables due to the company from its shareholders and third parties. He noted there was an extensive legal team pursuing the OCM claim and the independent accountant valuer would have access to all the relevant material produced by the legal team and to the legal team itself. He noted that in respect to the other loans that valuing loans receivables is a standard part of the professional expertise of a professional valuer. 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.

64. In my view, the facts in the present case are not 'unusual and exceptional'. First, whereas in Virdi where the project had come to an end and the only assets were cash waiting to be distributed, in the present case the project is well underway with finance, contracts, contractors, construction and where the assets of the company are more than just cash. Second, the two Writ actions, based as they are in contract, can continue until determination independent of the Petition, whether it is struck out or not, with any damages to be claimed against CDL. I do not agree that those claims will have an effect on the valuation of the shareholding. Third, as already stated, CDL and Mr. Bush submit that the offer to purchase is not intended to be discounted because the Petitioners hold a minority interest – the shares will be purchased for full fair value on a pro rata basis to be determined by a competent expert. Further, the independent valuer could be given express instructions that the valuation was to be arrived at without applying any minority discount. Therefore, there is no risk to the Petitioners that a discount will be applied because they are a minority shareholder. Fourth, any concerns about access to information by the valuer can be addressed by way of liberty to apply. Finally, Mr. Pettingill emphasised upon his written submissions the points that in *Raswant v Centaur* the company was paralyzed and insolvent but that in the present case, CDL was not paralyzed, continues to operate and was not insolvent. I find no merit in the arguments about these particular circumstances of each company to undermine my views.

65. Counsel for the Petitioners also relies on *Harborne Road Nominees Ltd v Kavarski and another* [2012] BCLC 420 stating only that the decision is consistent with the facts in the present case. In *Raswant and Centaur* the Chief Justice made reference to *Harborne v Kavarski*:

> *'70. In that case, 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 them stating that since M no longer appears to have any active involvement in the company it would be in the*

company's best interest 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 to be 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 intended to switch the company's business to another company wholly owned by him. …

71. HH Judge Cooke emphasised that the fundamental issue for the courts 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 summarized 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 Cook 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 reasonable 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 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 to 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 Coke took the view that this was 'a substantial objection' and it can be hardly the case that Lord Hoffman in O'Neil 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 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."

66. In my view, the decision in *Harborne v Karvashi* is not consistent with the facts in the present case. First, the Petitioners are not equal partners with others in the business, they are minority shareholders. There are other shareholders and other classes of shareholders, indeed Mr. Bush is the holder of Class A shares with additional powers to nominate and remove two of the three directors. As a result of their investment as minority shareholders the Petitioners, as RP, were engaged to perform work on the foreshore and renovate Buildings 2 and 3. They also claim they had options in respect of further work, specific terms which are in dispute and which form the basis of Writ Action 2. Second, CDL seek to sever all ties and have a clean cut with the Petitioners by purchasing their shares outright in their desire to have no further dealings with the Petitioners. They also agree that their

counterclaim to the Petition will fall away if the Petition is struck out. In recognition that there has been a breakdown in relationships, Mr. Bush in his Seventh Affidavit submits "*The Petitioners are a detriment to the welfare of the company and they need to go"*[7]*, "In response to the Petitioners' offer, the Defendant did reply that it would consider settling all three actions for $1,000,000 however terms of payment would need to be agreed"*[8]*, "This litigation and in particular this petition needs to come to an end"*[9]. In my view, CDL and Mr. Bush are seeking to not have any issues left hanging on between the Parties. Third, time has moved on. RP last worked on the Azure Project on 21 September 2017 and was terminated from doing any further construction work on Buildings 2 and 3 on 3 October 2017 whilst the Petition is dated 20 February 2018. Therefore, Mr. Rodrigues and RP have had no involvement in the business for over three years whilst Mr. Bush in his Seventh Affidavit states that "*CDL and the Directors continue to execute the development of Bermuda's newest hotel development…*". In oral submissions, Mr. Pettingill conceded that it was not a serious contention that Mr. Rodrigues be now made a director of CDL although he emphasised that it could be considered as Mr. Rodrigues had put a lot of money into the project, is an expert and is qualified to be there. For these reasons, I do not find that *Harborne v Karvashi* supports the position that the Petition should not be struck out but should proceed to trial. On the other hand, I do find enormous support where HH Judge Cooke emphasised *"that the fundamental issue for the courts in each case remains whether the continued prosecution of the petition after the making of the offer amounts to an abuse of process."*

67. Fourth, the Petitioners make allegations of prejudicial and oppressive actions of the Defendants which are set out in the draft Re-Amended Petition and set out above as ten (10) points in the section entitled 'Factual basis for claim to an alternative remedy to winding up for oppressive or prejudicial conduct under section 111 of the Act'. CDL and Mr. Bush deny the allegations. In the Sixth Affidavit of Mr. Rodrigues, he submits that an expert can only value the shares following directions of the Court after they have had an

[7] Seventh Affidavit of John Bush para 33
[8] Seventh Affidavit of John Bush para 34
[9] Seventh Affidavit of John Bush para 37

opportunity of hearing and reviewing all the evidence relating to the numerous issues alluded to and specified in the proposed Re-Amended Petition. He stated that in a nutshell the Petitioners' case is 'that the prejudicial and oppressive actions of the Defendants in dealing with Petitioners and then administering and managing the Defendant Company and the construction project for which it is established have materially reduced the value of the company and thus the value of our shareholding as evidence by the recent audit produced in September 2019, covering the period from the date of inception of the Company through tot September 2018.'

68. However, it is open to the Petitioners to make submissions about the allegations to the valuer who is entitled to take them into account if founded, in coming to the appropriate valuation. Thus in *Re a Company, ex parte Kremer* [1989] BCLC 365 Hoffman J held that any allegations of impropriety could be taken into account in valuing the company.

> *"Counsel for the petitioners 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 Millet 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 malfeasance 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 to 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.'"

69. In my view, the allegations by the Petitioners about the actions of the Defendant can be dealt with by the valuer. There will be equality of arms where the Parties will be able to make submissions to the valuer who will be a competent expert in addressing the allegations.

Conclusion

70. In all the circumstances, I find that the Petitioners are acting unreasonably in pressing on for a trial of this Amended Petition and draft Re-Amended Petition in light of the offer made by CDL to purchase the shares and that this conduct constitutes an abuse of process. Accordingly, it is appropriate that the Amended Petition should be struck out and I so order.

71. In my view, the date of the valuation should be the date of the close of CDL's financial year 2018, which is 30 September 2018, taking into account any subsequent restatements of the 2018 audited accounts. This is on the basis that RP last worked on the Azure Project on 21 September 2017 and was terminated from doing any further construction work on Buildings 2 and 3 on 3 October 2017.

72. I have reviewed the draft order attached to Mr. Horseman's written submissions. I will follow that draft order in making the necessary decisions as follows:

1. The Amended Petition should be struck out.

2. The Defendant and/or its shareholders shall purchase the Petitioners' shares in Clearwater Development Limited at fair value, to be determined by an independent expert.

3. The purchase price shall be payable to the Petitioner within 90 days of the independent expert issuing his or her final valuation. The Petitioners shall execute and provide a share transfer form to the purchaser(s) concurrently with receiving payment for their shares in the Defendant.

4. For the purposes of the valuation, the terms of the valuation shall be as follows:

    a. The valuation date shall be as of 30 September 2018;

    b. The identity of the independent expert shall be agreed by the Parties, failing which it is to be determined by the Institute of Chartered Accountants of Bermuda;

    c. The Petitioners and the Defendant shall have the right to make submissions to the expert, with the form of the submissions (whether written or oral) to be left to the discretion of the expert;

    d. The independent expert shall provide a draft valuation to the Petitioners and the Defendant and provide them with an opportunity to ask questions and make submissions before rendering his or her final valuation;

    e. No discount shall be applied to the Petitioners' shareholding; and

f. The Defendant shall make available to the Petitioners complete access to the books, records and documents of the Defendant;

5. The costs of the independent expert shall be shared equally with the Petitioners on the one hand and the Defendant on the other hand each paying half of the costs of the independent expert.

6. Liberty to apply in relation to any issue relating to the valuation process generally.

7. Costs reserved pending receipt of the final valuation and the purchase of the Petitioners' shares at which time the issue of costs will be considered if the Parties are unable to agree costs.

73. I also order that:

a. the Petitioners' application dated 11 October 2019 for leave to re-amend their Amended Petition be dismissed.

b. the Defendant's Counterclaim be struck out, the Defendant having given an undertaken that if the Petition was struck out, then the Counterclaim would not proceed.

Dated 13 January 2021

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT