[2015] SC (Bda) 76 Com (10 November 2015)

In The Supreme Court of Bermuda

CIVIL JURISDICTION

COMMERCIAL COURT

2011: No. 255

IN THE MATTER OF KINGBOARD COPPER FOIL HOLDINGS LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 1981, SECTION 111

BETWEEN:

ANNUITY & LIFE REASSURANCE LTD

Petitioner

-v-

(1) KINGBOARD CHEMICAL HOLDINGS LIMITED

(2) JAMPLAN (BVI) LIMITED

(3) KINGBOARD LAMINATES HOLDINGS LIMITED

(4) EXCEL FIRST INVESTMENT LIMITED

(5) KINGBOARD COPPER FOIL HOLDINGS LIMITED

Respondents

JUDGMENT

(in Court)

Date of Trial: September 9-11, 14-16, 18, 2015
Date of Ruling: November 10, 2015

Mr. Jan Woloniecki and Mr. Shannon Dyer, ASW Law Limited,
for the Petitioner

Mr. William Wong SC of counsel and Mr. Jeffrey Elkinson, Conyers Dill & Pearman Limited, for the Respondents

Introductory

1. The present action is brought by a minority shareholder which complains that the affairs of the Company, the 5th Respondent, have been conducted in an unfairly prejudicial manner. It is believed to be only the second such local proceeding brought in respect of a publically listed company. What amounts to unfair prejudice in legal and factual terms has to be determined against the background of an elaborate, vigorous and protracted battle for commercial justice. It is a battle in which the combatants not only have conflicting commercial interests and have defined commercial justice in contrasting ways; they come from diverse backgrounds as well.

2. The Petitioner is incorporated in Bermuda but is a subsidiary of a Delaware company. A prominent director is based in (and possibly from) Memphis, Tennessee. The Company is incorporated in Bermuda, but managed principally from Hong Kong. Its shares are listed on the Singapore Stock Exchange but its key commercial activities take place in China. The majority shareholders of the Company, although variously incorporated in the British Virgin Islands and the Cayman Islands, are ultimately controlled by a closely-knit group of individuals related by blood or marriage who are based in (and possibly from) Hong Kong.

3. The 1st Respondent is the ultimate holding company in the Kingboard Group, which is a leading producer of printed circuit boards ("PCBs"). The Company manufactured copper foil which was an essential 'raw' material for the production of PCBs and other copper-based products. The Company was incorporated on September 10, 1999. An Initial Public Offering Prospectus dated December 6, 1999 ("the Prospectus") was issued and resulted in a listing on the Singapore Stock Exchange ("SGX"). The Company's business model involved selling almost all of its copper foil to an indirect majority shareholder, the 3rd Respondent ("Laminates"). The shares of Laminates were listed on the Hong Kong Stock Exchange in 2007.

4. From the outset, there was an inherent and admitted tension between the Company's interest in maximising its own profits and reducing its dependence on a key customer forming part of the Kingboard Group and the majority shareholders' interest in maximising Group profits by benefitting from a 'bulk discount' cosily negotiated with a 'captive' supplier of the main raw material required for its products. The SGX Listing Rules addressed this tension by requiring what qualified as an Interested

Person Transaction (IPT) to be approved by the minority shareholders whenever a new Supplies Agreement was entered into between the Company (through its operating subsidiary) and Laminates. The Supplies Agreement was approved by the minority shareholders from time to time until 2011. The Petitioner characterised the terms on which the Company sold its products to Laminates and the alleged negative impact on the Company's profit margins as (unfair) "transfer-pricing". The Respondents characterised the pricing system as nothing more than a "volume discount".

5. The Petitioner is a subsidiary of Pope Investments II LLC ("Pope II), a Delaware company. The Petitioner acquired its shares in the Company as a nominee and became a registered shareholder on April 7, 2011 in contemplation of the present proceedings. Pope II, a pooled investment vehicle which invests on behalf its clients, made its initial investment in the Company in July 2009. Its investment advisor, Pope Asset Management LLC ("Pope Management"). The Petitioner's holdings together with those of the other two Pope entities amounted to 80,251,528 shares or more than 10% of the Company's shares by July 18, 2011 (the "Pope Holdings"). In practical voting power terms, the Pope Holdings by the date of the Petition were able to control the minority shareholder approval of any IPT mandate. The Pope Holdings were expanded by further share purchases, not just after concerns were first identified about the management of the Company but even after the presentation of the Petition.

6. The Petition was presented on August 3, 2011 against the following background described in the Petition. On February 21, 2011, the Petitioner requisitioned a Special General Meeting ("SGM") of the Company (which was held on April 21, 2011) to consider a resolution that an independent auditor be appointed to audit and review historical transfer pricing and whether the Company had complied with commitments made in its Prospectus. At the SGM the resolution proposed by the Petitioner was defeated. At the AGM subsequently held on April 29, 2011, minority shareholders refused to approve an IPT resolution required by Chapter 9 of the Listing Manual which would have renewed the mandate previously given in relation to related party transactions (the "IPT Mandate"). On August 3, 2011, the Company announced that its subsidiary Hong Kong Copper Foil Limited ("the Licensor") had granted Harvest Resource Management Limited ("Harvest") the exclusive right to use the Company's copper foil producing business in return for a monthly fee which, controversially, was alleged to be "*wholly uncommercial*".

7. On January 16, 2012 in dismissing the Respondents' strike-out Summons, I summarised the complaints made by the Petitioner as follows:

> "
>
> *(a) as set out in the original Petition filed on August 3, 2011, the Company's management (acting on behalf of the majority shareholders) failed to honour or confirm that it was honouring representations made in the*

IPO Prospectus designed to ensure that the business conducted with related parties was not prejudicial to the rights of minority shareholders. These broad allegations were found to be too speculative to warrant pre-action discovery in support of a minority shareholder prejudice claim by the High Court of Singapore in 2010; and

(b) *as set out in the draft Amended Petition, by way of amendment, the Company's management (acting on behalf of the majority shareholders) caused a wholly-owned subsidiary to subvert the minority shareholders' right to approve major related-party transactions through the Harvest License Agreement of August 2011. Under the License Agreement, the Company's entire assets and operations were transferred to Harvest on uncommercial terms. This transaction had the effect of sidestepping the resolution passed by minority shareholders including the Petitioner and Pope to terminate the Company's mandate to sell the vast majority of its products to the Kingboard Group.*"[1]

8. At the end of seven days of trial, the critical question appeared to me to remain whether the Petitioner could establish what I adjudged to be the crucial question at the strike-out stage, namely whether the majority shareholders had acted oppressively in the requisite technical sense by:

> "*respond*[ing] *to the* [minority shareholders'] *legitimate blocking of a mandate seeking their approval of the terms upon which the Company would contract with the majority's Group to rearrange the Company's operations, without the minority's assent, so that such approval was no longer required.*"[2]

Legal findings: the requirements for seeking relief under section 111

<u>Section 111</u>

9. Section 111of the Companies Act 1981 ("*Alternative remedy to winding up in cases of oppressive or prejudicial conduct*"*)* provides as follows:

> "*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.*

[1] *Re Kingboard Copper Foil Holdings Limited* [2012] Bda LR [] at paragraph 3.
[2] Ibid, paragraph 23.

(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. A section 111 petitioner who does not seek a winding-up order is only entitled to relief under the section if he demonstrates that:

    (a) "*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*" (section 111(1)); <u>and</u>

    (b) "*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*" (section 111(2)(b)).

11. Mr. Wong SC for the Respondents relied heavily on this latter requirement, namely that the facts "*would justify the making of a winding up order*". He submitted that even if the Petitioner proved all of the key averments in its case, the facts did not reach the high threshold required by section 111(2)(b). Mr. Woloniecki did not shirk from the need to meet this requirement. What these statutory words mean in their context is nevertheless an important element of the task of determining what legal test the Petitioner must satisfy to confer upon the Court the jurisdiction to consider whether or not to grant relief. However, the primary legal question is whether or not the conduct complained of is "*oppressive or prejudicial*", and what those terms mean.

<u>**The nature of the remedy and the legal policy underpinning it**</u>

12. Although the Respondents' counsel placed the *New Zealand* Court of Appeal authority of *Latimer Holdings Ltd. and Powell-v-Sea Holdings Ltd.* [2004] NZCA 226 before the Court, the Petitioner's counsel concurred that the Court's analysis of the

history of the minority shareholder oppression remedy was instructive. Hammond J firstly noted as follows:

> "*[57] The oppression remedy originated in Britain in s210 of the Companies Act 1948 (UK), as an alternative to winding up on the just and equitable ground. The argument was that winding up was much too drastic a remedy to utilise in many cases, and that it would be desirable to give courts wider powers to intervene to set matters to right, whether by ordering one party to buy the other out or otherwise regulating the affairs of a company. The current UK provision is s459 of the Companies Act 1985.*"

13. This confirms, consistently with the heading to section 111[3], that the remedy created is intended to be an alternative to winding-up on the just and equitable ground, available for use in circumstances where the discretion to wind-up might not be exercised, even though (as section 111(2)(b) makes clear) the grounds for winding-up must still be made out. This gives rise to the need to keep in mind a very nuanced distinction between (1) what type of conduct would potentially justify winding-up on the just and equitable ground, and (2) what circumstances would justify exercising the discretion to actually make a winding-up order. The Petitioner is only required to meet the first standard, but not the second. Hammond J proceeds to note that:

> "*[61] The early British cases took a narrow line. The remedy was confined to cover only conduct which was 'burdensome, harsh and wrongful' or showed 'a lack of probity and fair dealing' (see for instance Scottish Co-operative Wholesale Society Ltd v Meyer [1959] AC 324 at 342 and 364). From those early beginnings, the section has been applied much more widely, both in Britain, and throughout the common law world.*"

14. However, Hammond J also points out the challenge of adopting coherent and commercially predictable principles governing the scope of the remedy:

> *"[64] There was always going to be a distinct problem for courts in evolving a principled approach to this section. On the one hand, the section was of a remedial and enabling variety: the jurisdiction was deliberately designed to transcend the limitations of the former law. At the same time, it is appropriate that there be a principled approach to the section, against which the commercial world, and its advisors, can measure conduct. The evolution of such principles has proved to be an enterprise which has latterly attracted some controversy.*"

[3] Headings are relevant unless inconsistent with the governing statutory text: '*Bennion on Statutory Interpretation: A Code* ', 5th edition (Lexis Nexis: London, 2008), section 255.

15. Finally, at the beginning of a review of the approach of various Commonwealth courts to deciding what conduct potentially triggers entitlement to statutory relief, Hammond J cites with apparent approval the New Zealand Court of Appeal's own prior decision in *Thomas v H W Thomas Ltd* [1984] 1 NZLR 686.The principle adopted in this case is described by Hammond J as follows:

> "*[66] This Court held that fairness is not to be assessed in a vacuum, or from the point of view of one member of a company, and that all the interests involved must be balanced against each other, including the policies underlying the Act and those underlying s174. For unfairness in this broad sense to be grounded, there must be a "visible departure" from the standards of fair dealing, 'viewed in the light of the history and structure of the particular company, and the reasonable expectations of [its] members' (at 695).*"

16. This Court (Ground J, as he then was) has previously held that there is no material difference between the concepts of "*oppressive or prejudicial*" conduct in section 111 of the Bermudian Act and the concept of "unfair prejudice" subsequently introduced into section 459 of the English Companies Act 1985[4]. Unfairness is inherent in the Bermudian statutory language. This analysis was affirmed by the Judicial Committee of the Privy Council in *Bermuda Cablevision Ltd.-v- Colica Trust Co. Ltd.* [1998] AC 198 at 211 C-F where Lord Steyn opined as follows:

> "*Section 459 of the United Kingdom Act contains the expression '<u>unfairly</u> prejudicial'. In section 111(1) of the Bermudian Act the word unfairly is omitted. Section 111 gave effect to the recommendations contained in the Law Reform Committee's Interim Report on Company Law in Bermuda including a Draft Bill, February 1979, Part VIII. This report shows that the words 'prejudicial to the interests' have been inserted on the recommendation contained in the White Paper 'The Conduct of Company Directors'. The latter reference is to the White Paper, namely Cmnd. 7037, November 1977, para. 18, which recommended a power to petition where the affairs of the company are being conducted in a manner '<u>unfairly</u> prejudicial' to shareholders. Given this background the judge observed:-*
>
> > *'It is said, as it often is in the case of such omissions, that it must have been deliberate and intended by the legislature to make a distinction between the Bermudian provision and the U.K. model. Such an argument can be very forceful in an appropriate context, but I do not think that it is here. It is in my view just as likely that the legislature, or in reality the draftsman adapting the overseas precedent, has proceeded on the basis that unfairness is inherent in the concept of prejudice. That it is so inherent, in this context*

[4] Section 994 of the Companies Act 2006 appears to be the current English provision.

at least, can also be seen from the conjunction with `oppressive'. Oppression and prejudice are linked because, if they are not the same thing, they are at least of the same nature and unfairness is inherent in that nature. To hold otherwise would allow petitioners to embroil the courts in a whole range of matters where there was perceived detriment to some member's interests in the ordinary operation of the Company.'

18. Their Lordships are in agreement with this reasoning and conclusion"[5]

17. The final sentence in the extract from the judgment of Ground J which is approved by the Privy Council alludes to another important general policy principle upon which the Respondents' counsel placed heavy reliance. Section 111 is not designed to provide minority shareholders with a platform from which to launch attacks on the ordinary business judgment of the management of a company. In the *Latimer Holdings Ltd* case, the New Zealand Court of Appeal made the following further legal policy pronouncements which I adopt:

[70] First, errors of judgment by management, inefficiencies, and poor business management without distinct elements of bad faith or self interest cannot amount to oppression. The cases under this head go back at least as far as Re Five Minute Car Wash Service Ltd [1996] 1 WLR 745 (Ch D).

[71] Secondly, in any event, Judges are ill-equipped to evaluate business strategies, and have accordingly exercised self restraint. See Howard Smith Ltd v Ampol Petroleum Ltd [1974] AC 821 per Lord Wilberforce, "…it would be wrong for the court to substitute its opinion for that of management, or indeed to question the correctness of management's decision, on [questions of this character] if bona fide arrived at" (at 832). And see also the case concerning the dismissal of Mr Venables as chief executive of Tottenham Hotspur (Re Tottenham Hotspur plc [1994] 1 BCLC 655) (Nicolls V-C). This is sometimes called the "business judgment" rule. Judges, on the other hand do have training and expertise in dealing, for instance, with fraud, illegality, or conflicts of interest.

[72] Thirdly, the remedy is not (without more) appropriate for the facilitation of exit from a company where there are straight out disagreements over company strategy. This point was distinctly reinforced by this Court recently in Yovich & Sons Ltd v Yovich (2001) 9 NZCLC 262, 490 where, in delivering the judgment of this Court McGrath J said:

[5] Without seemingly having been referred to this binding authority, Hellman J reached a similar conclusion in *Thomas and Swan-v-Fort Knox Bermuda Ltd.* [2014] SC (Bda) 15 Com (26 February 2014) at paragraphs 57-58.

'The statutory protection for prejudiced shareholders is not intended to facilitate exit from the company in all cases where minority shareholders differ from the majority on the policy and direction of a company which they see as being to their disadvantage (at [31]).'"

Factual matrices capable of constituting oppressive or prejudicial conduct and the distinctive context of a listed company

18. Mr. Woloniecki relied heavily on the case of *Scottish Co-operative Wholesale Society Ltd.-v- Meyer* [1959] A.C. 324 as illustrative of a factually similar complaint being held to constitute oppressive or prejudicial conduct under the precise statutory provision upon which section 111 of the Bermudian Act is based. In the present case, it is alleged that after an uncommercial privatization offer was rejected by the Petitioner, the Respondents caused the Company to transfer its business so as to further depress the value of the Petitioner's shares. The facts in the *Scottish Co-operative Wholesale Society Ltd.* case were described in the headnote of the report (at page 325) as follows:

"*In 1951 the society sought to purchase from the respondents their shares at less than their true value but the suggestion was rejected. The society dropped the attempt but adopted a policy of transferring the company's business to a new department within its own organisation, thereby forcing down the value of the company's shares. The nominee directors, though aware of this policy, did not inform the respondents but promoted the society's plans. In consequence, the company's business came virtually to a standstill and the value of its shares was greatly reduced….*"

19. In that case, although it was common ground that it was just and equitable that the company be wound up, oppressive and prejudicial conduct was contested. The House of Lords unanimously held that the petitioner was entitled to relief under section 210 of the Companies Act 1948. This conclusion does lend some forensic support to the proposition that if the complaints advanced by the Petitioner in the present case are made out, the legal requirements for obtaining relief would be met. However the legal principle which I also extract from this case is found in the following passage in the speech of Viscount Simonds (at 343):

"*I do not think that my own views could be stated better than the late Lord President Cooper's words on the first hearing of this case. 'In my view', he said, 'the section warrants the court in looking at the business realities of the situation and does not confine them to a narrow legalistic view. The truth is that, whenever a subsidiary is formed as in this case with an independent minority of shareholders, the parent company must, if it is engaged in the same class of business, accept as a result of having formed such a subsidiary*

an obligation so to conduct what are in a sense its own affairs as to deal fairly with its subsidiary."'

20. Mr. Wong SC, on the other hand, relied heavily on the fact that the Company was a listed company. This Court has never granted section 111 relief in relation to a listed company before. He referred the Court to the approach adopted in *Latimer Holdings Ltd. and Powell-v-Sea Holdings Ltd.* [2004] NZCA 226 and the decision of Ground CJ in *Re Orient-Express Hotels Ltd.*[2010] Bda LR 32. In the Respondents' Closing Submissions, the following argument was advanced:

"50. *In **Latimer Holdings Ltd v. Sea Holdings New Zealand Ltd** [2004] NZCA 226, the Court of Appeal of New Zealand considered a petition for a 'buy out' order in relation to the shares of a listed company, under section 174 of the New Zealand Companies Act 1993. Although different in form, it can be seen that section 174 (as reproduced at [58] of the judgment) also introduces a "just and equitable" requirement before any remedy is to be granted under this section for, inter alia, 'unfairly prejudicial' conduct.*

51.Most relevantly, it is useful to set out the reasons for the Court of Appeal's decision to affirm the lower court's judgment, which are set out at [114]-[123] of the judgment. Insofar as they are relevant (with emphasis added):

*(1)'On that footing, these are very recent shareholders - they have not been long-term holders of shares - and their motivations for purchase could even have been **strategic, or opportunistic behaviour on their part, in the expectation there might well be a buy out of which they could take advantage**' [116].*

*(2)'…[T]he appellants knowingly **bought into the very situation** they now complain of and the company has **consistently been proceeding** in a particular direction from an investment point of view' [118].*

(3)'In the result, that direction has proved to be adverse to shareholders, and the share price has sagged. The appellants at least have the advantage, which would not be so in a private company that they can exit, via the exchange. In that sense, the appellants are not in

anything like as bad a situation as entirely locked-in minorities in a private company. ***But the situation in which the appellants find themselves is recent, and was known to them from the outset**" [119].*

(4)'…As a general proposition courts cannot appropriately be involved in second-guessing decisions by boards and shareholders as to the more appropriate direction and management of a company. ***This Court cannot correct poor strategic decisions, if such they be**" [120].*

(5)'Finally, there is the extraordinary feature of this case that the appellants seek not just exit, but exit conferring upon them a handsome profit (in a relatively short time) for their investment. ***What they are really seeking, is to achieve through the Court what they cannot achieve through the market. Such a remedy under s174 against a listed company is not only unprecedented, but entirely inappropriate**" [122].*

(6)' Unfair detriment has not been demonstrated by these appellants. They entered into their position with their eyes wide open. ***They cannot legitimately look to this Court to generate their profit for them**. We are not unsympathetic to the plight of the unspecified minority shareholders - most likely in the small investor class - who have been locked in for a long time. But we are in no position, in this proceeding, to consider their interests. And even if this Court were so placed, there is still the* ***formidable difficulty that they too were aware of the direction this Company proposed to take. Shareholding involves risk, and the market must be allowed to reflect that risk**' [123].*

52.Moreover, the Court of Appeal, at [44], referred to the following [98]-[111] highlighted the significance that this was a listed company. In arriving at the view that there was no necessary bar, the Court noted that 'there are considerations which may well make it more difficult for plaintiffs to succeed in the case of listed companies' [102], including:

(1)The availability of an 'exit strategy' [103];

(2)The need for certainty in promoting the orderly trading of shares on stock markets [104];

(3)The availability of protection, termed 'the added layer of regulation', provided by the relevant listing rules (in that case, the New Zealand Exchange Listing Rules) [105].

53.These would also coincide with the sentiments expressed by Ground CJ in ***Re Orient-Express Hotels Limited*** *(R's Opening Authority), namely that, on the facts, 'no court, properly considering the matter, could wind-up a large public company, which is* ***solvent and trading****, on the just and equitable ground on the basis of those allegations on the petition of a shareholder who purchased its shares in* ***full knowledge*** *of the structure of which it complains' [65] (emphasis added).*"

21. The Respondents' counsel also relied on the following passages in the judgment of Hammond J (on behalf of the New Zealand Court of Appeal) in *Latimer* which I find to be instructive on the distinctive considerations applicable to listed companies:

"*[102]That said, there are considerations which may well make it more difficult for plaintiffs to succeed in the case of listed companies.*

[103] The first and most obvious point is that the exit strategy for an investor in a listed company (as an alternative to litigation) is to sell his or her shares. There is a continuous market in the shares of listed companies, save in extraordinary circumstances which create an illiquid market. This exit strategy is more cost effective than litigation. However it must be said - and it is part of what Mr Rennie said in this case - that a shareholder may, in a company which is being run in a manner that is prejudicial to members, face a share price which has fallen before the shareholder decides to, or can, liquidate his or her investment.

[104] Then too there is distinct force in Mr Latimour's submission that there is a need for certainty in promoting the orderly trading of shares on stock markets.

[105] There was also force in Mr Latimour's submission that the interests of minority shareholders are to some extent protected by what Mr Latimour termed "the added layer of regulation" provided by the NZX Listing Rules.

[106] The more difficult problems in the area of listed companies arise in the area of what are, or can be, the relevant "reasonable expectations". Jonathan Parker J observed in Re Astec (BSR) plc [1998] 2 BCLC 556 at 589 that the introduction of what that Judge termed "equitable considerations" in relation to the business of listed companies "would ... in all probability prove to be a recipe for chaos". Notwithstanding that that decision was approved of by the House of Lords in O'Neill v Phillips (above), these concerns appear to be distinctly overdrawn.

[107] In settling expectations and understandings for the purpose of this section Judges will necessarily have to focus on the formal nexus of understandings in the firm which the parties have themselves established. These might be termed the "formal" or "internal" understandings. But sometimes courts (in our view legitimately) focus also on external standards in identifying reasonable expectations and understandings (see, for instance, Re A Company [1986] BCLC 382 (Ch D) at 389 (per Hoffman J); and, Re A Company, ex parte Burr [1992] BCLC 724 (Ch D) at 727 (per Vinelott J)). However in settling reasonable expectations, Chancery Judges have not strayed into the quagmire of attempting to imply terms into more formal expectations.

[108] Taken to its logical conclusion, given that reviewing courts are not restricted to internal expectations, there may (consistent with efficiency principles) be some room for a hypothetical bargaining approach to be resorted to even in listed company litigation. This would involve focusing on the position of the litigants, and giving effect to what amounts to a best estimate of what the parties would have agreed to, had they turned their minds to the issue in question. In a 1985 judgment, the UK Court of Appeal approached a case in just such a manner (Tett v Phoenix Property and Investment Company Limited [1986] BCLC 149).

[109] The short point is that, even in a listed company, a corporate constitution and the related nexus of agreements may not address all pertinent issues. There may be considerations that give rise to reasonable expectations that are not reflected in strict legal documentation. However, clearly the forensic burden on an applicant will be considerably more difficult in the case of a listed company."

22. The authorities relied upon by Mr. Wong SC are supported by the analysis of local lawyer Peter Martin, who considers that the scope of relief available under section 111 in relation to listed companies is too narrow by virtue of the requirement that the

prejudice complained of reach the threshold of constituting grounds for a just and equitable winding up[6]. According to Martin:

> "*The claim of the Petitioner will be struck out unless it can be established that there has been a breach of the petitioner's contractual rights or that the directors have exercised their powers for an improper purpose.*"

23. This analysis in my judgment is an accurate articulation of the Bermudian law position adumbrated by Ground CJ in *Re Orient-Express Hotels Ltd.* [2009] Bda LR. In that case Ground CJ essentially held that, in relation to a listed company, an oppression petitioner could not validly complain of commercial unfairness that fell within the parameters of the corporate constitution. A breach of contractual rights or a misuse of the powers conferred by the company's constitution (broadly construed to include any applicable listing rules) would be required to constitute unfair prejudice of a gravity sufficient to justify winding up on the just and equitable ground.

24. In my judgment this Court should not necessarily insist upon a somewhat higher evidential threshold in the case of a public company than in the case of a private company when determining whether a petitioner has proved that it is just and equitable to wind up a listed company which has not ceased to trade altogether. More importantly, the question of whether or not the reasonable expectations of the minority shareholders as to the fundamental principles upon which the Company would be managed have been frustrated to a legally sufficient degree must be answered with the character of the Company as a listed one being kept very clearly in mind.

25. Viewed through this lens, it will most likely require unusual circumstances to make out a valid case under section 111 of the Companies Act 1981. Such will particularly be the case where the complaints seek to impugn the business judgment of the management rather than their failure to adhere to the listed company's governing rules.

Scope of the remedy: can shares acquired by the Petitioner post-Petition be taken into account?

26. The Respondents highlighted the apparent pattern of the Petitioner acquiring more shares after events of which it now complains as indicia of oppression and prejudice as a general objection to the grant of relief. The submissions made on the Petitioner's buying pattern in the Respondents' Closing Submissions included the following points:

[6] '*Shareholders*' in Kawaley (ed.), '*Offshore Commercial Law in Bermuda*' (Wildy Simmonds & Hill: London, 2013) paragraph s 7.82-7.84.

"63. *an overview of P's pattern of acquisition is also demonstrative:*

(1)Voting of the privatisation took place on 11 August 2009 and prior to that, P was holding less than 10% of the Company's shareholding, but it was able to block the Privatisation; i.e. it did not acquire 10%, and did not seek to reach the 10% threshold in order to prevent the privatisation.

(2)Strangely, after voting down the Privatisation, P actually went on to buy even more shares – in fact the largest purchase during this period (2.3million) was 14 days after the vote-down, i.e. 25 August 2009.

(3)Indeed, more shares were bought (i) on 9 May 2011, i.e. after the loss of the IPT Mandate; and (ii) on 8 August 2011, i.e. 5 days after the announcement of the Harvest Licence Agreement[7] *and, even more strangely, 2 weeks after P had been disposing some shares.*

(4)Thus, clearly P's complaints did not deter its further investment in the Company, and certainly did not affect Mr. Wells' share purchase decision.

64.Accordingly, while on one hand making a series of complaints regarding the way the Company was run (even though there has not been a change to its operation or structure since the very beginning), P was also accumulating further shares in the Company all this time. This militates against seeing these complaints as genuine. R submits that these were all a series of steps taken to exert pressure on the Company, so as to secure for himself and his investors what he would consider as a 'fair price'."

[7] [I/17/1130-1135]

27. The narrower aspect of this broad complaint, the prior knowledge point, will be considered below and is governed by the principles addressed, *inter alia*, by the Judicial Committee in the *Bermuda Cablevision Ltd.* case. In the course of the hearing I expressed the strong provisional view that it ought not to be permissible to file a section 111 petition and then acquire more shares, with a view to increasing the gross price to be recovered if the Court orders the Company to purchase the Petitioner's shares at a fair price. This aspect of the Petitioner's investment strategy in my judgment raises a discrete issue which can conveniently be dealt with at this juncture.

28. At first blush, this brought to mind a notorious early 1990's case of loss adjusters inflating insurance claims by making property damage worse by inflicting further damage themselves[8]. This is in literal terms admittedly a very unfair and inaccurate analogy; the Petitioner's post-Petition share purchases have been entirely legal and openly transacted, without any hint of subterfuge or deceit. It was nevertheless impossible to ignore the strong instinctive feeling that it ought not to be possible to commence proceedings seeking monetary compensation for an alleged injury and to increase the potential award by putting oneself in a 'worse' position than one was in when the suit was filed. It ought to be an abuse of process for a litigant to use legal proceedings designed to afford relief for a legally defined injury as an event with an uncertain outcome upon which one also places a post-filing 'bet', with a view to inflating the award to which the claimant would otherwise have been entitled. At the very least, the timing of such share acquisitions must constitute grounds for this Court, in the exercise of its discretion, declining to grant relief.

29. Although he went on to deny considering the post-Petition purchases as "gambling", Mr Wells explained these purchases in his own words as follows:

> "*And, so -- anyway, we probably*
> *25 continued to buy, betting on that this would be*
>
> *2 shown to be oppression.*"[9] [emphasis added]

30. Mr. Woloniecki sought, perhaps relying on a fleeting reference by Mr Wells to litigation costs in the course of a somewhat rambling explanation of these peculiar late purchases, to justify what clearly amounted to betting on litigation as merely an extension of the litigation funding concept. It may well be the case that funding litigation costs formed part of the motivation for the post-Petition investments in the Company's shares. I acknowledge that the tide of history is flowing away from traditional antipathy towards champerty towards a more pragmatic and liberal approach to funding arrangements designed to enhance access to the courts. But in the

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[8] Ralph Blumenthal, '*22 Charged with Faking or Inflating Insurance Damage*', The New York Times, December 22, 1992: www.newyorktimes.com.
[9] Transcript, September 10, 2015, pages 293-294.

British common law world, such arrangements are presently only recognised if they fit into regulated categories.

31. Mr Wells himself perhaps best (and unwittingly) explained the rationale for the Petitioner's distinctive investment patterns by admitting, when discussing investment motivations in broad theoretical terms, that investment decisions were influenced by various irrational human impulses, including greed:

> *"And, so, Warren Buffet, who's a*
> *6 value investor, would argue that the efficient*
> *7 market theory does not apply because people*
> *8 don't -- aren't always rational, you've got*
> *9 fear. You've got greed…*"[10]

32. Mr Wells' subjective motivations for these purchases are, ultimately, beside the point from a legal perspective. The relevant legal question is whether a minority shareholder seeking discretionary financial relief on ultimately discretionary grounds ought to be permitted, at its own volition, to increase its 'loss' and quantum of compensation after filing an oppression/prejudice petition. In my judgment the answer to this question must be a decisive 'no'. The Petitioner must, in a general sense, have been subject to a duty to mitigate its loss once the point was clearly passed beyond which it was realistic to hope for a negotiated resolution of its commercial concerns. The Petitioner formulated the belief that the Company's affairs had been conducted in an oppressive or prejudicial manner to such an extent which triggered an entitlement to relief under section 111 at the very latest on August 3, 2011, when the Petition was presented. With this prior knowledge, it is inherently illogical for the Petitioner to be able to purchase further shares in the Company and assert, in relation to these shares, a valid oppression or prejudice claim. I accept the submission of Mr. Wong SC that the governing principles on this issue can best be found in the words of Lord Steyn in the *Bermuda Cablevision Ltd* case ([1998] A.C. 198 at 212G):

> "*A cautionary note must be entered. Prior knowledge of the matters complained of in a petition will always be a most relevant consideration in deciding cases under section 111. Sometimes it will be decisive. But there may be cases, perhaps relatively rare, where this fact may be outweighed by sufficiently cogent countervailing factors. The fact that shareholders are locked into a position where a company is continuing to carry on business unlawfully may be such a factor. In the present case it will be a matter for the trial judge to decide how this tension between competing considerations should be resolved.*"[emphasis added]

[10] Transcript, September 9, 2015, page 254.

33. I find that in all the circumstances of the present case, prior knowledge of the matters complained of in the Petition constitutes a decisive ground for declining to grant relief to the Petitioner as regards its shareholdings which were acquired after the presentation of the Petition.

34. The position prior to the presentation of the Petition is, to my mind, distinctly different. The nature of the commercial prejudice complained of was not dependent on facts and matters which were cast in stone. Each year, minority shareholders were required to approve a Supplies Agreement which symbolized a 'constitutional' right to review the fairness of the IPT sales on an annual basis. As an evidential matter, the credibility of the Petitioner's case that the entire basis on which these sales took place was unfair is diminished somewhat, but not altogether, by the fact that it was not until 2011 that complaint was first formally raised by way of the February 21, 2011 SGM Requisition. But having commenced an overt out of court campaign to remedy the perceived grievances in February 21, purchasing more shares in the hope that an elevated share price or a profitable exit might be negotiated (if necessary through blocking the IPT Mandate) was not inconsistent with subsequently seeking unfair prejudice relief from the Court when that strategy failed.

35. It would only have been clear that the negotiation strategy had failed in terms of generating reasonably prompt resolution to the Petitioner's concerns, at the earliest, when the Harvest License Agreement was announced. After all, the case which survived strike out on January 16, 2012 was a consolidated complaint about transfer pricing <u>and</u> an improper attempt to avoid the consequences of the IPT Mandate veto through the Harvest License Agreement. And, coincidentally, the Harvest License Agreement was only announced on the same date the Petition was filed. I accept entirely that the complaints about the Harvest License Agreement were only formally pleaded well after the last purchases were made. But in my judgment it is wrong as a matter of general principle and common sense to permit a petitioner for quasi-equitable relief to seek enhanced compensation for losses incurred at their own sole election after presenting their petition.

Legal findings: evidential matters

<u>The failure to verify the Petition</u>

36. The Respondents' counsel complained that the Petitioner had failed to verify the truth of the contents of the Amended or Re-Amended versions of the Petition as required by the Companies (Winding Up) Rules 1982:

> "***Verification of petition***
> *21 Every petition shall be verified by an affidavit referring thereto. Such affidavit [Forms 7 and 8] shall be made by the petitioner, or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by some person who has been concerned in the matter on behalf of the corporation, and shall be sworn after and filed within four days after the petition is presented, and such affidavit shall be sufficient prima facie evidence of the statements in the petition.*"

37. It is a matter of record that the Petitioner has neither entitled the present proceedings as a winding-up matter, sought a winding-up order nor followed any of the other requirements of the Winding Up Rules (e.g. advertisement of petition, appearing before the Registrar to show compliance with the Rules-rules 19, 24). It is clear that the Winding Up Rules expressly appear to contemplate their application to section 111 petitions. Rule 2 (1) contains the following definitions:

> "*'the company' means a company which is being wound up, or against which proceedings to have it wound up or proceedings under section 111 of the Act have been commenced…*
>
> *'proceedings' means the proceedings in the winding-up of a company under the Act, or proceedings under section 111 of the Act…*"

38. These definitions must be read with the following substantive rule:

> "***Copy of petition to be furnished to creditor or contributory***
> *22 Every contributory, <u>and in the case of a petition for the winding-up of a company every creditor</u>, of the company shall be entitled to be furnished by the attorney of the petitioner with a copy of the petition within two days after requiring same, on paying the reasonable costs of the copy.*" [emphasis added]

39. The modern practice in section 111 petitions, as far as I have an accurate apprehension of it, has been based on the assumption that the Winding Up Rules are only engaged where a petition under section 111 is coupled with a prayer for, in the alternative, a winding-up order on the just and equitable ground under section 161(g) of the Act. If the Winding Up Rules do purport to apply to all section 111 petitions, it must be doubted that this is a valid exercise of the Chief Justice's rule-making power under section 288 of the Companies Act. It is certainly inconsistent with the general scheme of the Act which contemplates two discrete remedies, one under section 111, and one for winding-up. In *Re Full Apex Holdings Limited* [2012] Bda LR 9, I

rejected the argument that the standing requirements of section 163 of the Act applied to proceedings under section 111:

> "12… *The Judicial Committee of the Privy Council first considered section 111 of the Act in Bermuda Cablevision Ltd.-v- Colica Trust co. Ltd [1998] A.C. 198 and Lord Steyn (at page 210D) stated: "Section 111 is a self-contained remedial measure with its own in-built safeguards". In Kistefos Investments Holdings Ltd.-v-Lily Chiang and Pacific Investments Holdings Limited, Supreme Court of Bermuda 2001: 86, Judgment dated October 18, 2001, Storr J (Acting) struck-out the prayer for winding-up included in a section 111 petition following an analysis based on the hypothesis that section 111 constituted an entirely discrete legal remedy. This decision was upheld by the Court of Appeal: [2002] Bda LR 50.*"

40. Where the Court or a respondent considers that some or all of the requirements of the Winding Up Rules ought properly to be followed in relation to a section 111 petition, the issue ought properly to be raised at or prior to the first hearing of the petition. If the issue arises in relation to an amended petition, the point should be raised at the first hearing after the relevant amendment. This is because where the 1982 Rules do properly apply to any petition the petitioner is required to appear before the Registrar to show compliance with the Rules. If compliance with the advertisement requirements have not been met, the petition should not even be heard and if other irregularities occur (e.g. a failure to verify the petition) no order should be made on it:

> "19…..
>
> *(3)If the petitioner does not advertise the petition in the manner prescribed by this rule the appointment of the time and place at which the petition is to be heard shall be cancelled by the Registrar and the petition shall be removed from the file unless a Judge or the Registrar shall otherwise direct.*
>
> ***Attendance before hearing to show compliance with rules***
>
> 24 *After a petition has been presented, the petitioner, shall on a day to be appointed by the Registrar, attend before the Registrar and satisfy him that the petition has been duly advertised, that the prescribed affidavit verifying the statement therein and the affidavit of service, if any, have been duly filed, and that the provisions of the rules as to petitions have been duly complied with by the petitioner. No order shall be made on the petition of any petitioner who has not, prior to the hearing of the petition, attended before the Registrar at the time appointed, and satisfied him in manner required by this rule.*

41. The original Petition presented on August 3, 2011 was in fact verified by paragraph 2 of Mr. Wells' First Affirmation. The form of the Affidavit was not in the simple form contemplated by the Winding Up Rules; the main function of it was to support the Petitioner's Summons for leave to serve the 1st to 4th Respondents out of the jurisdiction. The Petition was presented by the Petitioner's initial attorneys, Appleby, on August 3, 2011 and the following day it was issued by the Registrar with a hearing date of September 2, 2011. An Ex Parte Summons seeking to leave to serve the 1st to 4th Respondents abroad was issued on August 11, 2011 and heard by Ground CJ on August 18, 2011 when an Order was granted in terms of the Summons. On August 31, 2011, the Respondents' issued a strike-out Summons returnable for the first return date of the Petition. There was no hearing before the Registrar to show compliance with the Rules and no proof of advertisement of the Petition.

42. No point was taken that these formalities were required when the Petition was first heard before me on September 2, 2011. The Petition was adjourned to September 23, 2011 when I ordered directions in relation to the strike-out Summons. The strike-out application was allowed in part and dismissed in part on January 12, 2012. The Petition was heard on October 4, 2012 when directions were ordered on a consensual basis for the further conduct of the Petition. Leave to Re-Amend was granted on November 7, 2014. And various orders have made, all of which arguably ought not to have taken place if rules 19 and 21 applied to the present proceedings.

43. Rule 159 provides as follows:

> "***Formal defect not to invalidate proceedings***
> *158 (1) No proceedings under the Act or the rules shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court.*"

44. In fairness to Mr. Wong SC, the complaint advanced takes into account rule 159 and relies on the fact that Mr. Wells, in the witness box, was unwilling to cure the defect by verifying the Petition. But the validity of this complaint still hinges on the soundness of the argument that the Petition is defective because the Amended and Re-Amended versions were not verified on oath. The short answer to this argument is that assuming that any defect occurred when Mr. Wells failed to verify the Amended and Re-Amended versions of the Petition, no substantial injustice has occurred because no substantive order will be made without an assessment following a full trial of whether or not the Petitioner has adduced sufficient evidence to prove the essential averments contained in the Petition. In addition:

(a) the main evidential function served by the requirement that winding up petitions be verified is to ensure that on the first return date of the petition there is *prima facie* evidence of a case for making a winding-up order. A subsidiary function may well be to discourage the filing of frivolous petitions;

(b) in a great many cases winding-up orders are made on an unopposed basis on the first return date of the petition, with the only evidence before the court being the affidavit verifying the petition. Where winding-up petitions are opposed, the petitioner invariably files more substantive evidence in support of the petition and the evidential significance of the verifying affidavit falls away altogether by the time of the effective hearing of the opposed petition;

(c) unless a section 111 petition includes an alternative prayer for a winding up order under section 161(g) of the Act, it makes no sense that the requirements of the Winding Up Rules (and particularly the need to verify the petition) should be regarded as having mandatory force. Section 111 provides an alternative remedy to winding up, the very nature of which is antithetical to a final order being made on an unopposed basis on the strength of the verifying affidavit. While it may be desirable to consider the need for advertising to give notice to other shareholders of the hearing of a section 111 petition, this will probably be the exception rather than the rule. In closely held companies, which most commonly give rise to section 111 claims, the main protagonists will typically be actively involved as parties to the petition;

(d) the fact that the need to comply with the Winding Up Rules is being asserted by the Respondents at the last possible opportunity rather than at the earliest opportunity, combined with the fact there is no established practice of section 111 petitioners being required to comply with the Rules, fortifies the conclusion that this evidential complaint is wholly lacking in substance[11].

Hearsay

45. The Petitioner's counsel prepared in advance of trial a comprehensive submission on the Bermuda hearsay rule. This was primarily directed at excluding documentary

[11] It is noteworthy that although the English Companies (Winding-up) Rules 1949 did purport to apply to minority shareholder oppression petitions, such petitions were decoupled from the winding up regime when the Insolvency Rules 1986 were made. The Companies (Unfair Prejudice Applications) Rules 2009 do not require a verifying affidavit and merely require the court to consider the need for advertisement on the first return date of the petition. The Bermuda modern practice in relation to section 111 petitions does not in strict terms comply with the 1982 Rules. But it does conform to the modern English practice, common sense and the requirements of justice.

evidence filed by the Respondents in answer to the belatedly raised charge that the principal behind Harvest, a Mr. Lin, was an employee of the Kingboard Group. As a result of evidential developments in the course of the trial, the significance of these documents fell away quite sharply by the end of the trial.

46. Subsidiary objections to the PRC legal opinion and two tendering documents, all exhibited to the First Lo Affirmation, were also made. I reject these objections as misconceived. These documents were relied upon simply to establish that advice had been received and that tenders had been received. No question of hearsay arises.

47. The accuracy of the submissions in abstract terms was not challenged. However Mr. Wong SC rightly reminded me that on the last occasion when I gave detailed attention to broadly similar submissions, the utility of this forensic exercise was doubted by the Court of Appeal. In *Knight-v-Warren* [2010] Bda LR 73, Evans JA stated:

> "*25. This barren argument should have found no place in civil proceedings of this sort, but the Appellant… insisted on raising it before the Judge, who devoted no less than 8 pages of his judgment to it, and he has raised it again as an issue in this appeal.*"

48. In brief therefore, I accept Mr. Woloniecki's central thesis that civil hearsay rules in Bermuda are far narrower than their modern English counterparts. In *Shawn Knight v. Warren and another* [2010] Bda LR 27, I essentially concluded as follows:

> "*71. Under Bermuda law there is a presumption that documentary evidence relied on for the truth of the statements contained therein is not admissible unless the party seeking to adduce it can bring the relevant material within the statutory exceptions. This is to be contrasted with the modern English position under section 1(1) of the Evidence Act 1995: 'In civil proceedings evidence shall not be excluded on the grounds that it is hearsay.' In recent times Bermudian civil practitioners appear often to have agreed bundles of documents as if the hearsay rule had been abolished in Bermuda as well…*"

49. In addition, however, the Petitioner's counsel invoked the common law exception to the hearsay rule, namely admissions, which is preserved by section 27H(2)(a) of the Evidence Act 1905. This was relied upon with respect to the Respondents' website statements to the alleged effect that Mr. Lim was an employee. In this regard, Mr. Woloniecki referred to the following passage in my judgment in *Fidelity Advisor Series VIII et al-v-APP China Group Ltd.* [2009] Bda LR 35:

"56. *The Defendant's Counsel firstly referred to section 27H of the Evidence Act 1905, which preserves the common law rule on admissions. One potential exception to the hearsay rule was admissions made by agents as BCG were contended to be. These rules were summarised in 'Bowstead on Agency', Sixteenth Edition, Article 96:*

> *'(1) An admission or representation made by an agent may be received in evidence as an admission binding on the principal only in the following cases:*
>
> > *(a) Where it was made as part of a communication expressly authorised by the principal;*
> >
> > *(b) Where it has reference to some matter or transaction upon which the agent was engaged on the principal's behalf at the time when the admission or representation was made, and the making thereof was in the ordinary course of that activity;*
> >
> > *(c) Where it has a reference to some matter or transaction respecting which the person to whom the admission or representation was made had been expressly referred by the principal to the agent for information…'"*

50. By the end of the trial, however, it was effectively conceded that even if the 'admissions' on the website were taken into account, they did not really establish an employment link between Mr Lin and the Group in 2011. However, I am guided by the said principles on admissions in reviewing the evidence generally in this case.

<u>Inferences</u>

51. The Respondents submitted that the Petitioner's case in relation to the Harvest License amounted to an allegation of fraud or at least misconduct which was not inherently probable. The following approach to drawing inferences in cases of fraud and more generally was commended to the Court in their counsel's Closing Submissions:

"38. *Moreover, insofar as P is asking the Court to infer fraud from circumstantial evidence, Street CJ of the High Court of Australia observed in* ***<u>Gurnett v. Macquarie Stevedoring Co Pty Ltd</u>*** *(1955) 75 WN(NSW) 261 at 264 that:*

> *'… The plaintiff must prove his case; and although he may establish a state of facts which leads one to think that his version is quite a possible version of what took place, **he must do something more than show a state of facts which is consistent with one view or with another view** … [a] guess is a mere opinion or a judgment formed at random and based on slight or uncertain grounds. In contradistinction to such a conjectural opinion, an inference is a reasonable conclusion drawn as a matter of strict logical deduction from known or assumed facts. **It must be something which follows from given premises as certainly or probably true, and the mere possibility of truth is not sufficient to justify an inference to that effect.**' (emphasis added)*

*39.There is thus a need for caution when one is basing its case on inferences. In the Hong Kong Court of Final Appeal's decision in **Nina Kung v Wang Din Shin** (2005) 8 HKCFAR 387, Ribeiro PJ, at [185], in citing relevant decisions in the High Court of Australia, said the following:*

> *'Where, as in the present case, the court is invited to reach a conclusion of forgery as an inference to be drawn on the basis of circumstantial evidence, any such inference must be properly grounded in the primary facts found. The court **guards against indulging in conjecture under the guise of drawing an inference** where the primary evidence does not logically and reasonably justify the particular inference in question."*

*40.In particular, the inference must be "a compelling inference … sufficient to overcome the inherent improbability" of the serious wrongdoing having occurred: **HKSAR v Lee Ming Tee** (2003) 6 HKCFAR 336 at [72] per Sir Anthony Mason NPJ.*

*41.Further, in the unreported decision in **Creditcorp Limited v. King, Kingston, Stevens and Flood** (the Independent, 4 September 1992), although accepting that a fraud case may be pleaded on inferences, the English Court of Appeal is noted to have remarked as follows:*

'...A court must always be ***conscious of the risk of piling inference upon inference****, that being on manifestation of the drawing of illegitimate inferences.*

...

It was essential to look at the cumulative effect of the facts and circumstances. On the other hand, ***a number of makeweights did not usually add up to an arguable case. So it was here****.'*

42.Moreover, the Court may also find useful the following guidance and summary of the law by the President of the Court of Appeal of New South Wales in ***Guest v. The Nominal Defendant*** *[2006] NSWCA 77:*

'[108] A valuable guide in cases such as the present is provided by Jones v Dunkel (1959) 101 CLR 298 per Dixon CJ at 304 to 305 where the Chief Justice said (albeit in dissent):

In an action of negligence for death or personal injuries the plaintiff must fail unless he offers evidence supporting some positive inference implying negligence and it must be an inference which arises as an affirmative conclusion from the circumstances proved in evidence and one which they establish to the reasonable satisfaction of a judicial mind. It is true that 'you need only circumstances raising a more probable inference in favour of what is alleged'. But 'they must do more than give rise to conflicting inferences of equal degree of probability so that the choice between them is mere matter of conjecture'. These phrases are taken from an unreported judgment of this Court in Bradshaw v McEwans Pty Ltd (unreported, delivered 27 April 1951) which is referred to in Holloway v McFeeters (1956) 94 CLR 470), by Williams, Webb and Taylor JJ. The passage continues:

'All that is necessary is that according to the course of common experience the more probable inference from the circumstances

that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood.' (at pp 480, 481).

But the law which this passage attempts to explain does not authorise a court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the tribunal of fact may reasonably be satisfied.

…

[109] See also Rhesa Shipping Co SA v Edmunds ("The Popi M") [1985] 1 WLR 948, where the trial judge wrongly regarded himself as compelled to make a choice between a theory which he regarded as extremely improbable and a theory which he regarded as being "one in respect of which any mechanism by which it could have operated was in doubt" (at 955). Lord Brandon (with whom the other members of the House of Lords agreed) said at 955 to 956:

My Lords, the late Sir Arthur Conan Doyle in his book The Sign of Four, describes his hero, Mr Sherlock Holmes, as saying to the latter's friend, Dr Watson: 'How often have I said to you that, when you have eliminated the impossible, whatever remains, however improbable, must be the truth?' It is, no doubt, on the basis of this well-known but unjudicial dictum that Bingham J decided to accept the shipowners' submarine theory, even though he regarded it, for seven cogent reasons, as extremely improbable.

In my view there are three reasons why it is inappropriate to apply the dictum of Mr Sherlock Holmes, to which I have just referred, to the process of fact-finding which a judge of first instance has to perform at the conclusion of a case of the kind here concerned.

The first reason is one which I have already sought to emphasise as being of great importance, namely, that ***the judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties.*** *He has open to him the third alternative of saying that* ***the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden****. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.*

The second reason is that the ***dictum can only apply when all relevant facts are known, so that all possible explanations, except a single extremely improbable one, can properly be eliminated****. That state of affairs does not exist in the present case: to take but one example, the ship sank in such deep water that a diver's examination of the nature of the aperture, which might well have thrown light on its cause, could not be carried out.*

The third reason is that ***the legal concept of proof of a case on a balance of probabilities must be applied with common sense.*** *It requires a judge of first instance, before he finds that a particular event occurred, to be satisfied on the evidence that it is more likely to have occurred than not. If such a judge concludes, on a whole series of cogent grounds,* ***that the occurrence of an event is extremely improbable, a finding by him that it is nevertheless more likely to have occurred than not, does not accord with common sense.*** *This is especially so when it is open to the judge to* ***say simply that the evidence leaves him in doubt whether the event occurred or not, and***

that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden*.' (emphasis added)*"

52. I accept the quoted passages as setting out useful guidance on the approach to the evidence generally in this case, in which Mr. Woloniecki expressly invited the Court to draw inferences on most key issues. It is interesting to note that Bingham J (as he then was) appears ultimately to have accepted Lord Brandon's chastening observation, in *Rhesa Shipping Co SA v Edmunds ("The Popi M")* [1985] 1 WLR 948 at 955-956, that assessing the inherent probabilities of the evidence was more appropriate than adopting a Sherlock Holmes approach to judicial fact finding. As I have previously observed[12]:

> "93. *The reliability of demeanour, particularly in cross-cultural contexts, as a primary guide to determining the truthfulness of a witness is much to be doubted. Lord Bingham, writing extra-judicially, has sagely observed[13]:*
>
> > *'If too much attention has over the years been paid to the demeanour of the witness in guiding the trial judge to the truth, to little has perhaps been paid to probability. I do not use that word in any mathematical or philosophical sense, but simply as indicating in a general way that one thing may be regarded as more likely to have happened than another, with the result that the judge will reject the evidence in favour of the less likely ... a judge must of course bear in mind that the improbable account may nonetheless be the true one ...'*"

Findings: credibility and demeanour of witnesses who were orally examined

<u>The Fact witnesses</u>

53. Only one of the Petitioner's factual witnesses was required to be cross-examined, William P. Wells. He is a director of the Petitioner based in Memphis, Tennessee, USA. I found him to be both a generally credible witness and an intelligent one. Understandably, he was also often an argumentative and partisan witness. A brief illustration of the sort of responses I regarded as partisan are reflected in the following exchanges:

> "*Q. Again, I put it to you that it is*
> *19 also unreasonable for you to rely on the*

[12] *Fidelity Advisor Series VIII et al-v-APP China Group Ltd.* [2009] Bda LR 35.
[13] '*The Judge as Juror*' in '*The Business of Judging*' (Oxford University Press: Oxford, 2000), page 13.

20 so-called commitments when you knew clearly the
21 company has adopted what we call a volume
22 discount and what you say a transfer pricing.
23 Do you agree or not?
24 A. I don't agree.
25 Q. Okay. Now, thirdly, I also put it

to you that you knew full well that the
3 company's diversification has not reached the
4 30 percent target as set out in the prospectus.
5 And with that knowledge you still buy into the
6 company's shares. So it's unreasonable for you
7 to rely on the so-called representation and
8 commitments? Do you agree or not?
9 A. I don't agree. You know, again, I
10 don't know when we knew what we knew and even
11 if we had known it from the beginning, I think
12 the company had an obligation to maintain fair
13 pricing." [14]

54. On the other hand, in response to a purely factual question, Mr. Wells answered in a fair and balanced way without any apparent attempt to 'massage' the facts:

"*17 Q. Okay. And is it fair to suggest*
18 that Mr. Wa did not at any stage during this
19 conversation or this meeting threaten you that
20 if you don't take this offer the company will
21 squeeze minority shareholders? Nothing of that
22 sort. He was simply stating the facts,
23 correct?
24 A. Well, I think the facts as he saw
25 them were a threat that the company, Kingboard

Copper, wouldn't be making very good returns,
3 if any, if we didn't take the Laminates offer.
4 So I took it -- I don't know if
5 threat is the right word, but I took it -- I
6 took it as a very tough position that we
7 weren't going to make any money if we -- we
8 were at risk."[15]

55. Mr. Wells nevertheless appeared to be wholly convinced of the righteousness of his cause. Courts always approach the controversial aspects of such witnesses with care.

[14] Transcript, September 10, 2015, pages 390-391.
[15] Transcript, September 10, 2015, pages 355-356.

56. Mr. Lo Ka Leong was the first of three fact witnesses orally examined on behalf of the Respondents. He was Financial Controller of the Company since July 1999, and Assistant to the Chairman since 2009. He is also a non-executive director of Laminates. Mr. Lo, over Mr. Woloniecki's objections, was permitted to give oral evidence (in what I believe was Cantonese) through a Chinese language interpreter. I found him to be a mostly credible witness. Not unlike Mr. Wells, he was an intelligent witness who was understandably argumentative and partisan when responding to questions which were based on assumptions which were inconsistent with the central theses underpinning the Respondents' case. For instance:

> "21Q. *Well, I'm going to suggest to you*
> *22 that there are two obvious alternatives.*
> *23 Mr. Lo, the first was to offer the minority*
> *24 shareholders a fair price for their shares.*
> *25 Do you agree that that was an*
>
> *alternative?*
> *3 A. Under the situation of a veto at*
> *4 that time, I disagreed that that was a viable*
> *5 alternative.*
> *6 Q. I see. And another alternative was*
> *7 to change the pricing formula for intragroup*
> *8 sales so that the profit margins that the*
> *9 company had in relation to group sales was*
> *10 similar to the profit margins it had on*
> *11 third-party sales. That was another*
> *12 alternative, wasn't it?*
> *13 A. I disagree…*"[16]

57. On the other hand, he often answered what were purely factual questions in a straightforward and unvarnished way. For example:

> "13 Q. *Now what I'm going to suggest,*
> *14 Mr. Lo, is while management including you may*
> *15 have had discussions about the concept of*
> *16 licensing, who was approached, who was allowed*
> *17 to tender for the license was solely the*
> *18 decision of Mr. Cheung Kwok Wing?*
> *19 A. Yes, we have discussed among*
> *20 management about the potential licensing but*
> *21 since Mr. Cheung Kwok Wing at the time was the*
> *22 chairman of the company and he was the highest*
> *23 in the management, so he was the one that*
> *24 decide on this.*"[17]

[16] Transcript, September 14, 2015, pages 784-785.
[17] Transcript, September 11, 2015, page 665.

58. The need to approach the controversial aspects of Mr. Lo's evidence with care flowed from two considerations. Firstly, and more generally, when confronted with evidence that appeared to undermine the Respondents' case, he appeared to consider himself duty bound to avoid making any concessions. Secondly, his request to answer one not uncomplicated question in English combined with his occasional correction of the interpreter's English translations of his answers cast some doubt on his professed oral English limitations. In fairness, when he requested permission to give an answer in English in relation to accounting matters (with which he was presumably most familiar). Nevertheless he spoke quite fluently indeed[18].

59. The second fact witness for the Respondents was Mr. Ong Tiong Wee, who gave evidence remotely from Singapore via Skype. He is a retired Chartered Accountant, an independent director of the Company and a member of the Company's Audit Committee. Mr. Ong gave his evidence in a straightforward manner and I found him to be a credible witness.

60. The third fact witness for the Respondents was Mr. Zhou Pei Feng, an Executive Director of Laminates. He gave evidence in Mandarin through an interpreter. Overall, he gave his evidence in a straightforward way and I found him to be a generally credible witness.

<u>The expert witnesses</u>

61. The expert witnesses, as one would expect, both gave their evidence in a balanced and straightforward manner and were entirely credible. Mr. John Berry, with years of industry experience, gave evidence as an expert on the pricing of copper (and other commodities) for the Petitioner. The younger Mr. Fanshaw Tan, a Chartered Financial Analyst, gave evidence as a valuation expert for the Respondents.

Findings: the pleadings and the main issues in controversy

<u>Background</u>

62. The Petition's averments about the Company's business are largely uncontroversial. The Company is said to have four operating subsidiaries and is described as "*the largest and most advanced manufacturer of copper foil in the People's Republic of China ('PRC')*" (paragraph 18). A majority of revenues are generated from sales to related companies in the Kingboard Group. Reliance is then placed (at paragraph 23c,d) on the following two statements found in the Prospectus:

[18] Transcript, September 14, 2015, pages 703-705.

> "*The price at which any copper foil is to be sold to the Kingboard Group after the listing…shall not be lower than that at which the [Company Group] would have at the relevant point of time sold to other customers generally…*
>
> *The gross profit margin achieved from sales to the Kingboard Group after the listing…shall not be lower than that currently achieved…until [the Company] meaningfully diversifies its sales…*"

63. The Petition (paragraphs 24-32) proceeds to describe various Shareholder Mandates (2006, 2007, 2008, 2009) sought and obtained by the Company pursuant to Chapter 9 of the SGX Listing Manual. The mandates sought approval from shareholders for Supplies Agreement pursuant to which the Company and its subsidiaries sold copper foil to the Kingboard Group, an "interested person". It was common ground at trial that only (disinterested) minority shareholders could vote to approve the relevant mandates in accordance with the SGX requirements. The 2006 Mandate included a clause which was not reproduced in subsequent Mandates which empowered the Audit Committee of the Company to amend the Supplies Agreement in response to market conditions to include such modifications which were:

> "*…necessary so as to enable the parties to continue to transact on an arm's length commercial basis and not be prejudicial to the Company and its minority shareholders.*"

64. It is averred that the Petitioner's shareholding was acquired by Pope as a result of representations about the Prospectus and the 2006 Circular which preceded the 2006 Mandate (paragraph 28). It is further averred (paragraph 33) that it was represented through these various Mandates that prior to 2007 and after 2007 that sales of copper foil to the Kingboard Group were at prevailing market rates.

65. Against this background, the Petitioner then sets out two broad complaints of conduct said to be oppressive or prejudicial to the Petitioner as a minority shareholder. The first is that in breach of the representations the Company has engaged in preferential transfer pricing in its sales of copper foil to Laminates, in addition to taking no meaningful steps to diversify its customer base. The second is that the Harvest License Agreement was an impermissible way of evading the minority shareholder's legitimate decision not to approve the 2011 Shareholder Mandate.

<u>The "Preferential Transfer Pricing" complaint</u>

66. The case that the Company has breached the representations made in the Prospectus and the various Mandates is based on the following main pillars:

(a) the gross profit margin between 2000 and 2010 has been lower than the 46.5% described in the Prospectus;

(b) from 2003 to 2010, the gross profit margins of the Company have been markedly lower than those of Laminates and the 1st Respondent, the parent of the Kingboard Group;

(c) the gross profit margins of the Company have fallen from 46.5 % in 2000 to 8.25% in 2010. Meanwhile, inter-group sales have remained at around 89% with no evidence of any meaningful diversification movement;

(d) Laminates has through these commercial arrangements with the Company achieved a competitive advantage while the Company's stock has been artificially lowered.

The 2011 SGM and the 2011 AGM

67. On February 21, 2011, the Petitioner requisitioned a Special General Meeting which was held on April 21, 2011 ("the 2011 SGM"). On April 29, 2011 the 2011 annual general meeting took place ("the 2011 AGM"). The Petition pleads the occurrence of the two uncontroverted events:

    (a) at the 2011 SGM the majority shareholders voted against the Petitioner's two proposed resolutions:

        (i) the appointment of an independent auditor to investigate historical internal transfer pricing;

        (ii) obtaining a report from an independent auditor on whether or not the Company has fulfilled commitments made in its prospectus;

    (b) at the 2011 AGM, the minority shareholders voted against the resolution seeking the renewal of the mandate in respect of interested persons transactions.

The Harvest License Agreement

68. The 2011 SGM and the 2011AGM are pleaded as the back-drop against which the attack on the Harvest License Agreement of August 3, 2011 is made. The complaints advanced include the following:

- "*58.The License Agreement has not been entered into at arms length or on usual or commercial terms…*"

- "*59. In return* [for the lease of all of the Company's equipment, machinery and properties], *the Company is merely entitled to HKD 120,000,000 per year which is insufficient to cover even the annual depreciation of the property, plant and machinery, being HKD 190,000,000 as provided in the Company's 2010 financial statements. As a consequence, the transaction represents a very real loss for the minority shareholders, such as the Petitioner, who unlike the Respondents are unable to benefit from the sale by Harvest of copper foil to the Kingboard Group."*

- "*60. Further, the purported effect of the License Agreement is to circumvent the consequences of the refusal by minority shareholders to vote to pass Resolution 8 and enable transactions with interested persons to continue without a Shareholders Mandate pursuant to Chapter 9 of the Listing Rules…*"

- "*61. It is implicit in the Announcement that Harvest will sell the copper foil it produces with the Licensor's Properties, the Machinery and Inventory to the Kingboard Group. There is no indication that Harvest has any other customers…*"

- "*62. The License Agreement is a device to transfer the value of the Company away from its minority shareholders and to continue the practice of preferential transfer pricing. This benefits the Kingboard Group, and therefore the Respondents, at the expense of the minority shareholders such as the Petitioner…* "

- "*78. The Petitioner will further rely at trial for its full terms and effect upon the legal opinion dated 4 May 2011 received by the Company which advised that because entering into the License Agreement would be a significant change in the current business model of the Company that the Company should consult with the SGX-S before entering into the License Agreement. Contrary to the legal advice it had received the Company failed to do so.*"

69. Further complaints that the Harvest License Agreement was unlawful in that it required SGX approval were not pursued at trial.

Findings: Preferential Transfer Pricing as Oppressive or Prejudicial Conduct

70. The first main limb of the Petitioner's case had the following key elements:

(a) the assertion that the impugned interested persons transactions were being conducted in a manner which was inconsistent with representations made in the Prospectus and the subsequent Shareholder Mandates;

(b) the assertion that the terms on which the copper foil was being sold to Laminates constituted impermissible preferential transfer pricing which was prejudicial to minority shareholders either because:

   (i) the sales were not conducted on arms' length terms; and/or

   (ii) the gross profit margins achieved by the Company were disproportionate with those enjoyed by Laminates and/or copper foil manufacturers comparable to the Company.

71. The Prospectus dealt extensively with the fact that the Company's main customer was the Kingboard Group. The value of sales to third parties was described as no more than 5% (page 39). The Petitioner relied upon what the Respondents' counsel said was merely a statement of intention:

> "*The KBCF Group will expand its sales team as and when required to meet its sales and marketing needs, particularly as the KBCF Group intends to gradually increase its market sales to customers (other than the Kingboard Group) in the next few years….*" (page 35)

72. On balance, I find that a representation was made to the effect that the Company would endeavour to an indefinite extent to reduce its dependence on the Kingboard Group. The "*Close Relationship with Main Customer*" section of the Prospectus (at page 38) further made it clear that:

> "*The Directors are of the view that the KBCF Group would continue to benefit from the synergistic relationship between the two groups, as it is assured of a reliable and stable customer base on which it can develop its future expansion plans.*"

73. The Prospectus also explained the "*Supply of Copper Foil to the Kingboard Group*" (pages 41-42). It was stated that in relation to inter-Group sales, "*the transaction prices were normally at a bulk purchase discounts of between 5% and 10% compared to prices of copper foil which the Kingboard Group purchased from other third party copper foil suppliers*". It was then asserted that future sales would be regulated by a Supplies Agreement, the terms of which were summarised. The Petitioner relied on the assertions that (a) related party sales would not be at prices less than third party sales, and that (b) until the Company's Group had meaningfully diversified its sales to third parties (threshold set at 30%), gross profit margins post-

listing would not be less than those currently achieved. Mr. Lo agreed under cross-examination that gross profit margins in 1999 were around 45-50%.

74. The Respondents relied upon the important *caveat* that the Audit Committee (which would periodically review the Supplies Agreement to ensure the maintenance of arm's length terms for related party sales) could in response to market conditions modify the terms of the Supplies Agreement. I find that one unqualified representation about the post-listing approach to sales to the Kingboard Group was the following passage in the Prospectus, upon which the Respondents' counsel relied:

> "*All transactions involving the sale of products of the KBCF Group to the Kingboard Group will be summarised and submitted to the Audit Committee for regular periodic review to ensure that the terms of the Supplies Agreement , including those relating to the determination of the price of copper foil to be sold to the Kingboard Group, are adhered to.*"

75. The Prospectus in general but explicit terms more significantly represented that the Company post-listing dealings with the Kingboard Group on terms that did not prejudice the Company's shareholders:

> "*The Audit Committee will review all existing and future related party transactions on a quarterly basis to ensure that they are carried out on normal commercial terms and not prejudicial to the interests of the Company's shareholders. The Audit Committee will also review all the related party transactions to ensure that the then prevailing rules and regulations of the SESTL (in particular, Chapter 9A of the Listing Manual) are duly complied with…*"[19]

76. On the same page of the Prospectus, the four member Audit Committee was described as comprising three independent directors. Accordingly the *modus operandi* of the Company post-listing was clearly represented as being heavily dependent on related party sales, with the fairness of the pricing levels being modified and regulated through a Supplies Agreement vetted by the Audit Committee. No firm commitments to any specific sales diversification targets or gross profit margin levels were made.

77. Be that as it may, I accept the evidence of Mr. Ong, the independent director and Audit Committee member who gave evidence via Skype, that:

    (a) prior to his appointment on November 16, 2001, "*then members of the Audit Committee had already considered that it was not commercially viable to adhere strictly to the conditions imposed by the Supplies*

[19] Page 43.

Agreement due to the changes in the commercial operation environment" (Affirmation, paragraph 8);

(b) he himself formed the view that rigid profit margin commitments could not be adhered to;

(c) the gross profit margin requirements in the November 29, 1999 Supplies Agreement were deleted by the Supplemental Agreements of November 5, 2006 and December 13, 2008;

(d) the Audit Committee understood its role was to form an objective view of the fairness of Independent Persons Transactions ("ITPs"). That it met on a quarterly basis and considered, amongst other things:

(i) the difference in profit margins between IPTs and external sales;

(ii) the commercial logic of maintaining good relations with the Company's largest customer;

(iii) costs savings on transportation expenses by delivery to adjacent factories;

(iv) the impact of economic slowdowns in or about 2001 (when the copper price fell 30-40%) and in 2009 following the 2008 collapse of Lehman Brothers;

(v) the creditworthiness of the Kingboard Group; and

(vi) in 2003 the advice of an Independent Financial Advisor on the IPT Mandate procedure was obtained;

(vii) a KPMG entity was retained to advise on the IPT Mandate procedures in 2006, 2007 and 2010.

78. In light of Mr. Ong's oral evidence, I find that these generic issues were considered from time to time and not necessarily at every meeting. Mr. Ong agreed that the Audit Committee Minutes recorded IPT discussion in formulaic terms and that what was routinely done was to review comparative gross profit margin figures:

"*Q. And I'm going to read to you*
6 paragraph 6.1.

7 "The interested parties'
8 transactions entered between the company and
9 the Kingboard Group for the first quarter of
10 financial year 2009 was tabled and reviewed.
11 After much discussion, reviews and briefings by
12 the management, it was noted that the related
13 parties' transactions were carried out at arm's
14 length and on normal commercial terms. See the
15 attached summary on interested parties'
16 transactions."
17 Now, I believe we've established
18 that this language in paragraph 6.1 is a
19 formula that is repeated from minute to minute.
20 In this form it appears in all the minutes
21 going forward. Will you agree with that?
22 A. I'm sorry, can you repeat your
23 question?
24 Q. Yes, I'm putting to you that this
25 particular language is repeated in different

2 minutes, the same language, "after much

3 discussion, reviews and briefings by
4 management," that is always in the minutes.
5 A. Yes.
6 Q. Yes. Now my question to you, sir,
7 is, in any particular meeting if you have a
8 recollection of actually how much discussion
9 there would typically be in a meeting of the
10 audit committee about interested person
11 transactions; ten minutes, 20 minutes, half an
12 hour, an hour?
13 A. Okay. In the audit committee
14 meeting we are provided with figures.
15 Q. Yes.
16 A. All right. And we have to go
17 through each individual figures. We have to go
18 through the figures and if I see anything that
19 is out of the ordinary, I would have asked
20 questions.
21 Q. Right.
22 A. And this is repeated every quarter.
23 So normally you would expect the same result if
24 the circumstances are the same. Normally I
25 have to report the same thing unless something

2 happens. Something unusual. Then I will query
3 why is there such a variation? If not, if

4 everything is standardized and going on normal,
5 then it would be repeated every quarter. What
6 else can I say?
7 Q. That's a perfectly satisfactory
8 answer.
9 Now, the next language I'm going to
10 ask you about is this, where it said it was
11 noted that "The related parties' transactions
12 were carried out at arm's length and on normal
13 commercial terms."
14 On what basis do you believe, what
15 is the basis for your belief that there were
16 arm's length commercial transactions going on
17 between Kingboard Copper Foil and Kingboard
18 Laminates?
19 A. Yes, we have considered various
20 factors. When the company fix the gross
21 profit, the selling price and they were able to
22 show the price differences between related
23 parties and non-related parties.
24 If there's a big variance, then it
25 will be abnormal. Then you will go into it and

2 ask the management to explain why, what causes
3 this big variance.
4 If there are, in our opinion, in my
5 opinion, that the gross profit difference is
6 reasonable, reasonable after taking into
7 consideration certain factors, there are
8 various factors that fits that causes these
9 differences and when we are satisfied, then we
10 say that there is a normal commercial terms.
11 Q. Sir, if I can summarize your answer
12 just so as I understand it, you look at the
13 numbers management give you, the calculations
14 of gross profit margins for interested party
15 transactions and transactions with third
16 parties.
17 A. Yes.
18 Q. And unless there's something
19 unusual about the differences between the gross
20 profit margins, that satisfies you that these
21 are arm's-length commercial transactions.
22 Is that a fair summary of your
23 evidence?
24 A. Right, yes.
25 Q. Yes, thank you…"[20]

[20] Transcript, September 14, 2015, pages 812-815.

79. In broad terms, therefore, the sweeping complaints that the Company was acting in a prejudicial manner by failing to comply with representations made in the Prospectus appeared to lack substance. Mr. Wells under cross-examination admitted that he had not necessarily even read the Prospectus and that the Petitioner's initial investment decision in 2006 was influenced by its own researches and in particular the OUB Report of November 17, 2006 ("the OUB Report"). This Report referred to the related party transactions and concluded that they were adequately regulated by a "Supply Agreement". He stated that the purchase decision was actually made because of the following statement at page 10:

> "*KCF is trading at a huge discount to fair value….a huge discount to that of other listed entities within the Kingboard Chemical Group…and is unjustified given KCF's consistent earning track record.*"

80. The OUB Report in effect described the way the Company was policing the fairness of IPTs without suggesting there was any cause for concern about the way in which the Company was being run during the post-1999 listing period. It described sales to related parties as representing 84% of total sales in 2005, a modest percentage decrease from the 95% described in the Prospectus. Mr. Lo calculated the sales to the Kingboard Group as ranging between 83-84% and 89% during the 2000 to 2011 period[21]. He admitted that in the short term, the fact that the Kingboard Group had acquired some of the Company's external customers had a negative impact on diversification efforts. It seems obvious that the Company did not make strenuous diversification efforts, but I am unable to find that this was primarily due to an improper privileging of the interests of the majority over those of the minority. It is noteworthy that the Petitioner did not seemingly vote against any Mandate in 2007, 2008, 2009, or 2010.

81. At the heart of the preferential transfer pricing complaint asserted in the present proceedings was the thesis that the gross profit margins were far lower than if a more arm's length pricing policy was in play. However, Mr. Wells was unable to plausibly deny that by 2006 when the Petitioner began its investments it knew or ought to have known that these margins had already fallen well below the highs trumpeted in the Prospectus:

> "*Q. So let's not talk about 2006.*
> *20 2005, 17.9 percent; 2004, 10.8 percent; 2003,*
> *21 12.1 percent. So it's a huge drop from the 50*
> *22 percent, 46 percent pre-listing, correct?*
> *23 A. Yes.*
> *24 Q. And with that sort of figure in*
> *25 2006 you decided to invest, to buy the shares*

[21] Transcript, September 14 2015, page 681 lines 2-9.

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2 of the company?
3 A. We decided to buy the shares in
4 2006, yes.
5 Q. And now you complain that the
6 company failed to maintain its profit margin?
7 A. Yes.
8 Q. All right. I put to you that that
9 is disingenuous and it is an unfair complaint.
10 Do you agree or not?
11 A. No."[22]

82. Mr. Wong SC's suggestion, which Mr. Wells denied, that the Petitioner had no cause for complaint about how the Company was run prior to 2011 was a very compelling one in the context of the present proceedings. While it was clearly possible to quibble with the commercial minutiae of the various business judgments the Company's management had made in the post-listing era, Mr. Wells himself could present no convincing case that the Company's affairs during this period were being managed in a way which was inconsistent with the reasonable expectations of minority shareholders to such an extent as to justify winding up the Company on just and equitable grounds. Rather, it seems most probable that the investment decision was made with a generalised sense of why the share value was low in the hope that either a privatization offer might be made or pressure could be brought to bear with a view to increasing the Company's profitability:

"*Q. And I put it to you that you kept*
5 on buying the shares of Kingboard Copper Foil
6 because it -- simply because the share price
7 was cheap?
8 A. That's a large part of the reason,
9 you know, is it's cheap and it appeared to be a
10 reasonable opportunity. And we wanted to, you
11 know, protect our interest. And so there were
12 numerous reasons why we would buy the shares.
13 Q. And it was cheap because it has a
14 low profit margin over the years after listing?
15 A. That could be one explanation. You
16 know, again, as we talked about before, you
17 know, it's oftentimes hard to know in the
18 market exactly why a stock is cheap, you know.
19 And as, you know, the UOB report discusses, it
20 doesn't say the stock is cheap because the --
21 that the parent is not allowing the subsidiary
22 to make any money. You know, they were
23 referring to market forces that we think were

[22] Transcript, September 10, 2015, pages 278-279.

24 proved incorrect."[23]

83. Investing in undervalued stock made sense in the context of the possibility of being bought out at fair value. A 'headline' item on page 1 of the OUB Report was "*KCF is a potential candidate for privatization, especially after the listing of Kingboard Laminates on Hong Kong Exchanges…which can provide an alternative means of investing in the copper foil business…*" And in 2009 a privatization offer was made at a price not simply below the price the Petitioner had largely purchased at, but also at a price which Mr. Wells understandably considered was unfair. He effectively (and very honestly) admitted that the perceived unfairness of this offer is what prompted a more active interest in the Company's affairs on his part and the transfer pricing complaint had yet to crystallize in his mind:

> "*Q. All right, fair enough. But by*
> *8 March of 2009, you already knew about the*
> *9 alleged transfer pricing. You already knew*
> *10 that the company has a huge internal customer*
> *11 which got a volume discount. You know about*
> *12 its practice in 2009, if not in 2006; correct?*
> *13 A. What I told you before, again, I*
> *14 want to be consistent. Between 2006 and the*
> *15 privatization attempt, you know, there was a*
> *16 gradual realization. The seminal event, if I*
> *17 had to pick one, was this privatization offer*
> *18 and that -- and then particularly when they --*
> *19 it came forward with such a low price that, you*
> *20 know, as far as what was offered.*
> *21 Then we, I think, became more*
> *22 aware, much more aware of what was going on.*
> *23 And so at what time -- at this particular time*
> *24 I can't say exactly what I knew or didn't know*
> *25 because it was such a gradual process…*"[24]

84. The preferential transfer pricing complaint emerged, I find, more as an instrument of commercial pressure to prevent an investment going bad rather than as a full-blown minority shareholder oppression complaint. Mr. Wells admitted that prior to the August 11, 2009 vote on the privatization offer Pope did not control enough shares to unilaterally block the offer. It acquired more than 10% after that date[25]. His purported vagueness about why further purchases were made to take Pope over the 10% threshold was unconvincing. He admitted Pope would have wished to be able to block a privatization offer, but not that Pope would wish to be able to press the

[23] Transcript, September 10, 2015, page 463.
[24] Transcript, September 12, 2015, page 315.
[25] Transcript, September 12, 2015, pages 392-394.

nuclear button of blocking the IPT Mandate. This partial denial was, in all the circumstances, simply incredible.

85. The governance structure of the Company entitled minority shareholders to vote on IPTs and bock them if they did not meet their approval. This was the obvious next step after the privatization offer was blocked as the minority shareholders had, commercial diplomacy apart, no other weapons to deploy with a view to encouraging the Company and/or the Respondents to make a more generous offer. The Petitioner, I find, in the course of 2009 took well-judged strategic steps to put itself in a position to be able to block the IPT Mandate, if necessary.

86. Against this background the expert evidence of Mr. Berry upon which the preferential transfer pricing complaint was centrally based seemed in part somewhat detached from the commercial realities of the present case. He described a standard business practice of pass-through pricing according to which the price for the copper being sold is based on the price at the shipment date to protect operating margins in light of price changes after shipment. It was not clear that these principles had the same commercial logic in the context of bulk sales between supplier and customers with adjacent factories. And he accepted that some form of pass-through pricing was deployed by the Company in dealing with external customers. Mr. Lo agreed that a different approach was taken to pricing in the context of internal and external sales. Although he insisted that negotiations took place in both contexts he was unable to convincingly explain what negotiations actually took place because he was not involved in this process[26].

87. However, the most important part of his evidence was his explanation for the variance between the gross profit margins for Laminates and the Company during a period of price volatility for copper, 2003-2011: "*Notwithstanding the rise and fall of copper pricing, Laminate's gross margins remained constant within 33% to 17% while the company's margins degraded dramatically from 17% to 4%*" (Expert Report of Dwight Berry, paragraph 5.8). These figures were not disputed. To my mind this disparity in and of itself does at first blush suggest that whatever pricing mechanism was being deployed, Laminates was more likely than not benefitting more than the Company in commercial terms. However, the further opinion that Laminates was able to "*selectively take copper from the Company's inventory when the pricing differential for its products was most favourable*" was based on information supplied on behalf of the Petitioner by Angel Liu. The witness did not personally examine the underlying documentation.

88. Mr. Berry provided a very high-level analysis which did not in all respects appear to me to take into account to a sufficient extent the operational realities of the specific business activities of the Company and Laminates on the ground. I accept the

[26] Transcript, September 14, 2015, pages 710-711, 713-715.

evidence of Mr. Tan that it is comparing apples and oranges to simply compare the profit margins of a company supplying copper foil (like the Company) and the profit margins of a company supplying finished products (like Laminates). He opined that if one compared the net profit margins of the Company and "Comparable Companies", the Company was consistently placed "*within the region of low to average*" (Expert Witness Statement of Farnshaw Tan, paragraph 17.1). I accept this conclusion. I also accept in general terms his opinion which was not undermined, that the Company's opportunities for diversification are hampered by the market reality than "*major market players are often vertically integrated* [like the Kingboard Group] *and often find themselves heavily dependent on their 'internal' supplier, through a stable supplier customer relationship*" (paragraph 26).

89. While there was undoubtedly room for the Petitioner and other minority shareholders to seek enhanced returns and to criticise the commercial fairness of the pricing arrangements, these arrangements were not unfair in the sense required to trigger an entitlement to relief for oppressive or prejudicial conduct under section 111 of the Companies Act 1981. There was no fundamental breach of the terms upon which such shareholders reasonably expected the Company to operate. The pivotal mechanism afforded to minority shareholders to police the commercial fairness of related party transactions was the SGX Listing Manual's requirements for IPTs to be approved by minority shareholders. The pricing system the Petitioner sought to attack in the present proceedings based on information which was not previously concealed was approved by minority shareholders between 2006 and 2010.

90. The preferential transfer pricing limb of the Petition accordingly fails as a freestanding basis for relief.

Findings: The Harvest License Transaction

<u>Overview</u>

91. The main legal question raised by this limb of the Petition is whether the Company's decision to cause its subsidiary to enter into the Harvest License Agreement on August 3, 2011 as a result of the Petitioner's refusal to approve the ITP Mandate on April 29, 2011 was in all the circumstances oppressive or prejudicial conduct. This question can in my judgment only be answered after two factual issues are resolved:

    (a) did the License arrangements cause demonstrable commercial prejudice; and

    (b) was the Company's response to the minority's refusal to approve the IPT Mandate a "*visible departure from the standards of fair dealing*" which would reasonably be expected to be adhered to on the part of the Company's management in all the circumstances?

Did the Harvest License Agreement cause the Petitioner as a minority shareholder demonstrable commercial prejudice?

92. As noted above, the main commercial complaint made in the Petition is the following assertion:

> "*59. In return* [for the lease of all of the Company's equipment, machinery and properties]*, the Company is merely entitled to HKD 120,000,000 per year which is insufficient to cover even the annual depreciation of the property, plant and machinery, being HKD 190,000,000 as provided in the Company's 2010 financial statements. As a consequence, the transaction represents a very real loss for the minority shareholders, such as the Petitioner, who unlike the Respondents are unable to benefit from the sale by Harvest of copper foil to the Kingboard Group."*

93. Mr. Tan, the Respondents' valuation expert, calculated the five year pre-License gross profit margins of the Company (Table 3, based on its annual reports) as follows:

- 2007: 11%
- 2008: 7%
- 2009: 4%
- 2010: 8%
- 2011: 6% (8 months of sales and 4 months of License income).

94. Mr Tan then calculated (Table 10, based on the Company's annual reports) the gross profit margins for the subsequent years as follows:

- 2012: 10%
- 2013: 12%
- 2014: 14%.

95. In net profit terms, he opined that although there was a net loss of HK$2.6 million in 2012, this was converted into significant profits of HK$8.3 million in 2013 and HK$23.4 million in 2014. This was because the License Agreement was beneficial in cash flow terms, with overheads such as distribution costs and administrative expenses decreasing from 2012 onwards by more than 60%. He accepted that in net profit terms, if the License-derived income is looked at as a segment, it has been running at a loss over the 2012 to 2014 period. However, he insisted that this was not out of line with the performance of similar segments in Comparable Companies. Mr. Tan made the case that the License Agreement is not a commercially outrageous or irrational agreement in a convincing manner. The Agreement provides steady income and has important safeguards in terms of the Licensor's broad termination power. It was a better reaction than, in effect, doing nothing with no IPT Mandate.

96. Analysing three scenarios, (1) if the IPT Mandate had been approved, (2) no IPT Mandate and no License Agreement, and (3) the License Agreement position, by every measure continuing the business operations without the IPT Mandate or the License Agreement is the worst financial outcome. However, his analysis also shows that:

    (a) Scenario 3 obviously generates less cash than Scenario 1, although the deficit is not so great when you factor in operational expenses absent under Scenario 3;

    (b) Scenario 3 clearly generates a dramatically worse segment net profit margin position in years 2012 to 2014 than Scenario 1:

	FY2012	**FY2013**	**FY2014**
Scenario 1	80.2	87.5	106.4
Scenario 3	(31.1)	(23.9)	(6.9)

97. Mr. Tan seeks to minimize the impact of this adverse net profit picture by arguing that these figures only result from taking into account depreciation: "*Depreciation and amortization are accounting concepts imposed which do not necessarily provide any direct or accurate reflection of the true position*" (paragraph 34.5). He commended an Adjusted EBITDA[27] and Net Cash Generated from Operating Activities analysis according to which the Licensing Transaction actually could be viewed as generating a net profit over the pre-existing position. At first blush, it seemed implausible that a

[27] 'Earnings Before Interest, Taxes, Depreciation and Amortization'.

purely cash flow analysis was likely to be as relevant to share value and the interests of minority shareholders as a net profit measure. Understandably, an important part of the cross-examination of Mr. Tan sought to discredit this aspect of his expert opinion.

98. Mr. Tan was able to find one example of a broadly similar license agreement involving a subsidiary of Meiyan Jinxiang, but he fairly admitted that the licensee was a related party (paragraph 34.11).

99. I infer from Mr. Tan's evidence as a whole that the Harvest License Agreement was a response to a crisis which mitigated the far worse damage which might have been suffered by the Company if it had simply lost its major customer and not taken any immediate steps to fill the void. It was nevertheless a response that left the Company worse off than before the blocking of the IPT Mandate in April 2011than before from the standpoint of its minority shareholders. The transaction was in a general sense commercially prejudicial to the Petitioner as a minority shareholder.

100. Mr. Ong also admitted under cross-examination that the License fee was insufficient to generate a profit on the equipment which the Company rented if one took depreciation into account[28]. I accept the force of the Respondents' contention that depreciation need not be taken into account if one is merely conducting a cash flow analysis. However, I find that an arrangement which was in accounting terms unprofitable was in a general commercial sense adverse to the interests of the Company's minority shareholders. I consider it to be self-evident that an adverse or negative overall accounting picture would be more impactful in terms of share value than a limited snapshot of the cash-flow position.

101. In any event Mr. Ong himself deposed in his Affirmation as follows:

> "*37. Finally, I would also indicate that at the most recent AGM at which I attended, many minority shareholders voiced the concern that, unlike previous years, there has not been any payment of dividend since the veto of the IPT Mandate in 2011. I remember some minority shareholders urged the Company to propose the IPT Mandate once again, and my impression is that they all wanted business to resume as normal, i.e. prior to the veto in 2011.*
>
> *38. My understanding is that without the Petitioner's and its supporters' consent, it would be difficult to get approval of the IPT Mandate again.*

[28] Transcript, September 14, 2015, page 827 lines 9-18.

39. I hope that the disputes between the Petitioner and the Company could be resolved soon and the interests of the independent shareholders could be best safeguarded."

102. Although the Company contends that the Petitioner is the author of its own misfortune, Mr. Ong's averments constitute an explicit admission that in objective commercial terms, minority shareholders generally have been commercially prejudiced by the status quo after the veto and, implicitly, by the License Agreement as well.

Was the Harvest License Agreement oppressive or prejudicial in the requisite legal sense? Overview

103. The central allegation made in the Petition is that the "*effect of the License Agreement is to circumvent the consequences of the refusal by minority shareholders to vote to pass Resolution 8 and enable transactions with interested persons to continue without a Shareholders Mandate pursuant to Chapter 9 of the Listing Rules*" (paragraph 60). If the License Agreement is found to have had this effect, the decision to enter into it in 2011 and to subsequently renew it (in 2013 and 2015 respectively) would in my judgment constitute oppressive or prejudicial conduct for the purposes of section 111 of the Companies Act 1981. It is worth recalling the complementary legal tests found in cases upon which Mr. Woloniecki and Mr. Wong SC respectively relied:

(1) *Scottish Co-operative Wholesale Society Ltd.-v- Meyer* [1959] A.C. 324 at 343:

"*I do not think that my own views could be stated better than the late Lord President Cooper's words on the first hearing of this case. 'In my view', he said, 'the section warrants the court in looking at the business realities of the situation and does not confine them to a narrow legalistic view. The truth is that, whenever a subsidiary is formed as in this case with an independent minority of shareholders, the parent company must, if it is engaged in the same class of business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with its subsidiary*" (Viscount Simonds);

(2) *Latimer Holdings Ltd. and Powell-v-Sea Holdings Ltd.* [2004] NZCA 226:

"*[66] This Court held that fairness is not to be assessed in a vacuum, or from the point of view of one member of a company, and that all the interests involved must be balanced against each other, including the policies underlying the Act and those underlying s174. For unfairness in this broad sense to be grounded, there must be a "visible*

departure" from the standards of fair dealing, 'viewed in the light of the history and structure of the particular company, and the reasonable expectations of [its] members' (at 695)." (Hammond J)

104. The central question is whether the decision of the Company to enter into the Harvest License Agreement and to continue renewing it without initiating any attempts to meet the concerns of minority shareholders in response to the rejection of the IPT Mandate by the minority shareholders is either:

(a) a proportionate business response which, although it may have caused collateral commercial damage to minority shareholders, falls within the class of business decision which courts are not competent to review; or

(b) a response which is fundamentally inconsistent with the policy of section 111 and the standards of fair dealing which minority shareholders such as the Petitioner were reasonably entitled to expect in all the circumstances.

105. At the end of closing submissions, I made the following observations about the general picture which had been painted for the Court:

"...this
11 case has reminded me a little bit of Mad
12 Magazine and the sketch called Spy Versus
13 Spy where these two spys are constantly
14 strategiz[ing] *against each other.*
15 It will be a challenge to sort of
16 untangle the facts and the law from the
17 commercial strategy when deployed on each
18 side."[29]

106. In terms of commercial strategy, both sides had clearly resolved after the filing of the Petition (coincidentally on the same date as the Harvest License Agreement) to make no open negotiation or settlement initiatives and to stand or fall by the outcome of the present proceedings. In terms of litigation strategy, both sides sought to conquer the moral high ground. The Petitioner's approach was as blunt as the Respondents' approach was beguiling. The crucial question remains whether the 'hardball' response of the majority shareholders to the blocking of the IPT Mandate by the Petitioner, which appears to assume the protagonists are comparably armed combatants engaged on a level playing field was a legally permissible stance to adopt in all the circumstances.

[29] Transcript, September 18, 2015, page 1406 lines 10-19; see www.Spy v Spy-wiki.org. for illustrative images.

107. I see no need to make formal findings on many of the peripheral issues which were canvassed beyond the boundary of the central terrain of the present case. For example, it matters not whether the Petitioner's investment approach prior to 2011 was excessively aggressive or, alternatively, whether the Company's privatization proposal was parsimonious and rightly rejected. Mr. Wong SC sought to characterise the conflict between the parties as a clash between different investment cultures, a crude short-term approach and a more enlightened long-term approach which took into account the interests of a broad spectrum of 'stakeholders'[30]. It is tempting to speculate that a clash between two business cultures partly underpins the present impasse, with an adversarial modern 'western' business approach clashing with a more consensual and collaborative traditional 'eastern approach to commercial relations. However courts should always scrupulously avoid being influenced by stereotypes and the evidence clearly demonstrates that both sides to the present shareholder dispute have displayed equal capacities for adopting tough and uncompromising positions.

108. So at the end of the day, all of the circumstantial evidence points to the roots of the present dispute being the inherent tension between the conflicting commercial and emotional interests of the majority shareholders, controlled by a family group, and those of the 'outside' minority. The need to develop institutional mechanisms to resolve these conflicting interests were very fairly disclosed in the Prospectus. The procedural mechanisms for addressing these conflicts were in general terms prescribed by the SGX Listing Rules on Interested Persons Transactions. And, the central mechanism adopted by the Company as part of its operational constitution was to seek an IPT Mandate from its independent minority shareholders on annual basis.

109. Mr. Woloniecki sought to characterise the majority shareholders as using the Harvest License Agreement as an instrument of illusion, with the Licensee being nothing more than a 'front' who was an employee of the Kingboard Group. This 'front' was selling the copper foil the Company used to produce to Laminates in any event. By the end of the case, however, it was clear that the Respondents' formal position was that it was accepted that Harvest was selling copper foil to Laminates and that although the man behind Harvest might be said to be a 'friend' of the Kingboard Group, he was not an interested or related person. The Petitioner had at the beginning of the trial abandoned any attempt to prove any of the breaches of the SGX Rules pleaded in paragraphs 69 to 78 of the Petition.

110. What nevertheless initially seemed odd about the Respondents' position overall was the insistence of Mr. Lo, giving evidence on behalf of the Company, that he had no idea (or no reason to know in his capacity as an assistant to the Company's

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[30] Counsel referred the Court in this regard to Mary Arden LJ, '*Regulating the Conduct of Directors*' Journal of Corporate Law Studies, 10:1, 1-15.

Chairman) to whom Harvest was selling the copper foil previously supplied by the Company to Laminates. Mr Ong also surprisingly did not consider it relevant to know whether the License Agreement was, in effect, a means of enabling the Kingboard Group to 'harvest' the same crop of copper foil the Company had produced in the pre-IPT veto era. Mr Zhou, however, giving evidence on behalf of Laminates, freely admitted that this company (Laminates) was purchasing copper foil from Harvest. The seemingly blissful ignorance of Mr. Lo as to who Harvest's main customer, it eventually emerged, was intended to encourage the Court <u>not to</u> find that the Company had any direct or indirect involvement with an arrangement under which Harvest had quite obviously and undeniably (in every practical sense) effectively stepped into the Company's shoes as a supplier of copper foil to the Kingboard Group, using most of the Company's equipment, plant and manpower.

111. The Petitioner relied heavily on the fact that the Company was advised by Allen & Gledhill in a May 4, 2011 '*Note on options available to Kingboard Copper Foil Holdings*' that, *inter alia*:

(a) leasing unused manufacturing equipment was an interim option which could pursued pending resolution of the substantive problem relating to the ITP Mandate;

(b) substantive options proposed included negotiating with minority shareholders, diluting the shares of existing minority shareholders and/or canvassing minority shareholders and privatization; and

(c) "*11.1 In a previous case where the IPT Mandate was not approved, the issuer considered the possibility of transacting with a third party who would in turn transact with the interested persons in question. The issuer was not able to persuade the SGX-ST to approve such an arrangement. The SGX-ST have indicated that it would scrutinise carefully any such third party arrangement and if the third party was essentially a middleman or mere conduit (i.e. the ultimate purchaser was still an interested person. It would view the transaction as an interested person transaction and accordingly, subject the transaction to the interested person requirements under the Listing Manual.*"

112. The following facts were ultimately not the subject of serious dispute. I find that :

(1) between when the IPT Mandate was blocked by the Petitioner on April 29, 2011 and the Harvest License Agreement was signed on August 3, 2011, neither the minority nor the majority shareholders initiated any (or any open) settlement proposals. Nevertheless, in an August 31 2011 Company

‘*Note in Response to SGX-ST Further Queries*’ in which the actions of “*certain minority shareholders*” were described as “*unfair and prejudicial to other shareholders*”, it was asserted that:

> “*The Board, together with the Management, has tried its best to find an alternative solution to keep the Company going…*”;

(2) no or no open proposals aimed at securing minority shareholder support for the IPT Mandate or otherwise resolving the impasse have been made post-Petition, either before or after the Respondents’ unsuccessful strike-out application on January 16, 2012. This is despite the fact that:

(a) even accepting that the affairs of the Company had not to that point been conducted in an oppressive or prejudicial manner, the Petitioner was (according to the Company’s own Singaporean lawyers) legally entitled to veto the IPT Mandate with a view to negotiating more favourable terms from a minority shareholder perspective;

(b) the effect of the Harvest License Agreement was to both enable Laminates to source the copper foil previously supplied by the Company and to significantly reduce the Company’s net profit margins,

(c) no dividends have been paid since the IPT Mandate veto on April 29, 2011, and

(d) Mr. Ong, an independent director, considered it to be desirable that the disputes between the Petitioner and the Respondents be resolved as soon as possible;

(3) the Harvest License Agreement was initially entered into for a two year period from September 1, 2011 to August 31, 2013. It was subsequently extended until August 31, 2015. And most recently, on August 28, 2015, the Company’s Board resolved to extend the License Agreement for a further period of two years to August 31, 2017;

(4) although Ernst & Young were retained by the Company’s Audit Committee on or about November 21 2011, with its mandate expanded on or about January 9, 2012 to report on interested party transactions and the Harvest License Agreement, the Company did not seek to rely on this Report (either in draft or final form) at trial. Through the Third Affirmation of Mr Cheung Kwok Ping dated March 5, 2013, the Company undertook to disclose the results of the independent review, which was

believed to be "*at an advanced stage*", when they became available (paragraphs 28, 30). Mr. Ong, under cross-examination 30 months later, was unable to explain why it had not been finalised, while the deponent did not attend for cross-examination;

(5) Harvest was incorporated on March 11, 2011 (less than a month after the Petitioner requisitioned the SGM) in BVI under the name of Wei Bo Limited and changed its name to Harvest on July 25, 2011. Its principal Mr. Lin Yuan had:

(a) (at the very least) close business ties to the Kingboard Group before the License Agreement was consummated,

(b) no pre-existing experience in the copper foil business, and

(c) no identifiable financial capacity to commence a freestanding manufacturing operation;

(6) Mr. Lin has been mentioned in at least one Kingboard Group company staff magazine as attending a mid-Autumn festival in 2014 in his capacity as (a) a special guest, and (b) as Vice-President of a fabric company. The accuracy of other 2014 Internet postings describing Mr. Lin as a manager of a Kingboard Group company was disputed;

(7) the Kingboard Group's Purchasing Department prepared a May 20, 2011 Report exhibited to Mr. Zhou's Affirmation which identified Mr. Lin as an ideal potential supplier to fill the gap created by the inability of the Company as a result of the IPT Mandate blockage (or any alternative copper foil manufacturers for capacity reasons) to continue meeting the Group's copper foil needs. He wanted to enter the copper foil business and had no customers while the Group needed the product;

(8) the Group's major copper foil suppliers are currently Harvest and Dong Qiang Copper Foil Co. Ltd, a subsidiary of Laminates[31]. However, the Group's long-term plans include the goal of increasing its internal manufacturing capacity[32].

113. It remains to consider whether those and other primary facts justify the further inferential findings that the Respondents have:

[31] Mr Zhou, Transcript, September 15, 2015, pages 914-915; Mr Zhou, Affirmation, Exhibit ZPF-6, page 3.
[32] Zhou Affirmation, paragraph 21.

(a) conducted the affairs of the Company since April 29, 2011 in an oppressive or prejudicial manner by achieving substantially the same commercial result through the Harvest License Agreement which they were prohibited from achieving by the IPT Mandate veto; and

(b) have further acted in such a manner as to give rise to grounds for winding up the Company on the just and equitable ground.

Findings: have the majority shareholders acted oppressively or unfairly by achieving substantially the same commercial result through the Harvest License Agreement which they were prohibited from achieving by the IPT Mandate Veto?

114. In his opening submissions, Mr Woloniecki cited the following literary 'authority' from Lewis Carroll's '*Through the Looking Glass*':

> "*Alice laughed. `There's no use trying,' she said: `one can't believe impossible things.' `I daresay you haven't had much practice,' said the Queen. `When I was your age, I always did it for half-an-hour a day. Why, sometimes I've believed as many as six impossible things before breakfast.'*"

115. This allusion is an apposite one in the context of the judicial task of analysing evidence in a civil case while being guided by Lord Bingham's wise counsel that, without forgetting that improbable things do occasionally occur, what is inherently probable (or believable) is the best truth-seeking tool of all. Following this approach, no findings can properly be based on facts which are impossible to believe. The Petitioner's counsel suggested that the Respondents' case required the Court to believe six impossible things. I do not find the first three matters identified impossible to believe at all, but regard the second three as crucial to the merits of the most seriously arguable limb of the Petition:

(1) the Company was properly run as an independent company (prior to April 29, 2011);

(2) the Company's ability to develop third party customers was impeded by market conditions;

(3) pre-2011 IPTs were negotiated on fair arms' length terms;

(4) after the IPT Mandate was vetoed, the Company faced a choice of liquidating or entering into the License Agreement and any detriment is the result of the Petitioner's own actions;

(5) Harvest is independent of the Kingboard Group and the License Agreement is a commercially sensible arms' length transaction;

(6) the website references to Mr Lin as an employee of the Group are mistaken.

116. Having regard to the way the evidence emerged at trial and the findings recorded earlier in the present Judgment (in particular in paragraph 100), the crucial questions may be re-framed as follows:

- was entering into the License Agreement as an 'interim' measure in 2011 without seeking to resolve the dispute outside the present proceedings for more than four years a fair response in circumstances in which the impugned arrangements:

  (i) preserved (if not improved) the pre-existing commercial position of the majority shareholders and worsened the commercial position of the minority shareholders including the Petitioner,

  (ii) rendered nugatory the IPT Mandate veto because the License Agreement had the practical effect of facilitating through an intermediary the interested person transactions which the IPT Mandate veto was intended to stop, and

  (iii) the Company to a material extent caused this result to occur?

- has the conduct of the majority shareholders been proven to be a sufficiently serious violation of the reasonable expectations of minority shareholders of the Company generally as to how the exercise of their IPT veto rights would be dealt with to potentially engage the Court's remedial jurisdiction under section 111 of the Companies Act 1981?

117. I have little difficulty in finding that the Respondents broad response to the IPT Mandate veto was unfair. They were under a general legal duty as majority shareholders dealing with matters which engaged a conflict between Kingboard Group commercial interests and the interests of minority shareholders to act fairly. This duty is not a wholly abstract philosophical concept detached from real-world moorings. It is very much grounded in the commercial reality that majority shareholders have the voting power to control companies and the human experience that commercial actors will likely be in most cases of conflict inclined to act in their own interests rather than for the benefit of other persons. This principled finding is

supported by the authorities cited in argument and particularly by those cases I have already referred to above. It is also pithily articulated in the following commentary on the corresponding Singaporean oppression provision[33]:

> "9.34…*The oppression remedy bolsters the protection of minority shareholders significantly as it provides them with a substantive right (which does not exist at common law) to be treated in a manner that is commercially fair, even if doing so places restrictions on the de facto norm of majority rule in companies.*"[34]

118. The *raison d'être* of the Listing requirement that minority shareholders be required to approve interested persons transactions in a vote which the majority are disqualified from participating is to impose an effective check on the power of the majority to, in effect, transact with themselves on unduly favourable terms. In the present context where the formerly private Company at the instance of the majority shareholders sought and obtained a public listing, being subject to this constitutional fetter on their controlling powers was the price to be paid for the public investment received from minority shareholders. The IPT Mandate in the present case did not relate to a one-off peripheral transaction; it related to the bread and butter of the Company's business activities. Accordingly, the majority shareholders as a practical matter were required on an ongoing basis to persuade the minority each year that the terms on which the copper foil was being sold to the Group, the Company's main customer, were commercially acceptable. In this business context, the requirements of fairness to the minority revolved around this legal and factual focal point. Moreover, the duty of the majority to be fair was an enduring one and did not disappear into thin air if the minority shareholders elected to exercise their veto power.

119. In my judgment, the general response of the Respondents to the blocking of the IPT Mandate on April 29, 2011 was based on a misconceived view of what their duties of fairness to the minority shareholders required in practical terms in all the circumstances. All of the evidence suggests that the duty of fairness was construed as restricted to demonstrating that the internal sales were being conducted on reasonable terms. This duty was viewed as having evaporated if the minority shareholders were foolish enough to light the IPT veto fuse. Such an act amounted to a declaration of war and exploded the previous compact between the protagonists pursuant to which the majority were subject to an ongoing duty to conduct the affairs of the company in a way which was fair to the shareholders as a whole. This framing of how the IPT Mandate mechanism was supposed to operate reduces the mechanism to a hollow shell which strips the veto power of any commercial efficacy. It also ignores the central fact that the minority and majority groups are not equal parties and the veto power is designed to impose a fetter on the majority's ability to run the Company at their own whim.

[33] Companies Act (CAP 50), section 216. The fact that this provision is somewhat broader than section 111 does not diminish the general pertinence of the commentary to the Bermudian legal context.
[34] Dan Puchniak and Tan Cheng Han SC, '*Company Law*'(2013) 14 SAL Ann Rev 179-193 at 190.

120. In my judgment, fairness in this distinctive context fundamentally required the majority shareholders to:

(a) promptly initiate negotiations with minority shareholders with a view to resolving the impasse; and

(b) generally have regard to the best interests of shareholders as a whole when considering how to respond to the IPT Mandate veto.

121. It may well be that the requirements of fairness in the context of responding to the blocking of an IPT Mandate which is central to the normal business functioning of a listed company have not previously been explicitly addressed in in any judicial or academic authority. I was not referred to any directly relevant authority and reach my instant findings on the basis of a straightforward practical application of the general legal principles which are largely agreed. This does not entirely explain why the Allen & Gledhill Note, apparently the principal written advice received by the Company's management about options for responding to the veto, is surprisingly silent on the duty of fairness issue itself. The heading and contents of the Note suggest that the Company's management only sought written advice as to what actions could be taken rather than what duties should inform which of the various options discussed should be selected.

122. The Note might be viewed as grounded in a view of the law shaped by the more familiar context of an interested person transaction of limited commercial significance which once blocked merely triggers the commercial need to consider alternative options. Its main drift is to advise that the sales cannot continue as before and to imply that it is up to management to decide how best to respond. The Note does not emphasise the duty of management to respond in a way that minimises prejudice to the minority shareholders for whose protection the IPT Mandate requirement exists. Having said that, it is impossible to believe that a reasonably prudent director, wishing to understand what their overriding legal duties were in selecting from a menu of options for responding to an IPT Mandate veto which shook the foundations of the Company's business operating model, would not seek some legal advice on this basic issue. The simple answer would have been, no less under Singaporean than under Bermudian law, that the primary duty of the directors in dealing with a crisis born out of a conflict between the interests of the majority and the minority shareholders was to deal with minority shareholders in a commercially fair manner. I assume in the directors' favour that they did not act contrary to express oral or undisclosed written legal advice, in moving directly to the Harvest License Transaction option and not budging from it once the present proceedings were filed. However in my judgment to the extent that they sought relevant advice at all, I find that they acted on a mistaken view of the law. Further and in any event they were either negligent or guilty of conduct bordering on wilful blindness in failing to obtain explicit advice as what overarching duties they were subject to in the aftermath of the IPT Mandate veto. These findings do not apply to the independent directors whom, as

I explain below, unsuccessfully sought to promote a far more appropriate response but were rebuffed by management on the eve of the Agreement being approved.

123. The evidence clearly supports the finding that before the Allen & Gledhill Note was even prepared, the idea of the Licensing Agreement as the preferred response had already been formed. Option 1 was the very short-term solution of selling copper foil already contracted for until the 2010 Mandate expired. The discussion in the Note on Option 2 began as follows:

> "*5.1 We understand from our discussions with the management of the Company that the Company is contemplating leasing out some of the equipment which is being used for the manufacture of copper foil to a third party while retaining sufficient equipment to satisfy orders placed by third party customers…with the Company. This would allow the Company to earn rental income instead of leaving the equipment idle. We also understand that under this proposed leasing arrangement, the Company will not be involved in, or party to, the purposes for which the third party uses the leased equipment, including such contracts as the third party may enter into.*"

124. This Note is the earlier of two key documents which explain the otherwise inexplicable 'see no evil hear no evil' (or 'don't ask, don't tell') stance adopted by Mr Lo and Mr Ong in denying even being interested in knowing (in Mr Lo's case, solely in his capacity as a director of the Company-he was also a director Laminates) to whom the Company's Licensee was selling copper foil. It is entirely understandable, if management already had conceived the License Agreement as the preferred and primary response to the IPT Mandate being blocked, that Allen & Gledhill dealt with the other options in a somewhat muted manner. Mr. Lo made two important admissions in this regard. Firstly, he admitted, without any reasoned justification, that management considered the licensing option as the only viable option to pursue:

> *Q. I see -- I understand. I think*
> *14 what you're saying is the only alternative you*
> *15 saw that was viable was to lease out the entire*
> *16 business of the company. The only alternative*
> *17 you thought was viable in 2011 was to lease out*
> *18 the business of the company. That was the only*
> *19 choice the company had in your view?*
> *20 A. Yes.*"

125. What is most remarkable about the fact that the essential elements of the License Agreement, entered into on August 3, 2011, had already been conceived before Allen & Gledhill prepared their Note is that this Note was written on May 4,

2011. The AGM at which the IPT Mandate was vetoed had taken place on April 29, 2011, less than seven days earlier. This suggests that management either rushed to judgment at almost supersonic speed, or that this option was conceived far earlier as a tactical response to the eventuality of a veto at the AGM. Mr Lo in his First Affirmation perhaps anticipated this perception by taking credit for conceiving the licensing idea in a different context years previously. The idea lay dormant before he revived it in the wake of the IPT Mandate veto on April 29, 2011.

126. Astute Company managers would have anticipated this outcome as a possibility upon receipt on February 21, 2011 of the SGM Requisition if they quickly resolved to defeat the Petitioner's independent audit resolution. Was Harvest incorporated on March 11, 2011 as part of a premeditated plan to implement the License Agreement in the event the IPT mandate was vetoed? Any answer to this question would be merely speculative, even if Sherlock Holmes might be able to reach a more definitive deductive conclusion. The important point is that the Company's management quickly formed a fixed view that the licensing option should be pursued without any or any demonstrable assessment of which option would be most commercially fair to the shareholders as a whole. This finding is supported by the second important admission. When it was put to him that negotiating with shareholders was Option 2 in an earlier draft of the Allen & Gledhill Note and was moved up the list in the final draft, he conceded that this was in response to input from the Company's management[35].

127. I am bound to find, therefore, that the Company's management gave inadequate consideration to any option to resolving the impasse after April 29, 2011 other than the licensing option. I base this conclusory or inferential finding on two primary factual foundations:

(a) it is obvious that the Company acted either without seeking or obtaining advice (or in breach of any relevant undisclosed advice received) in relation to their duty to respond to the veto in a manner which was commercially fair to the minority shareholders; and

(b) none of the Respondents' witnesses advanced any credible explanation for not pursuing efforts to resolve the impasse. Mr Ong, an independent director, expressly admitted that settlement of the dispute was (at the date of his Affirmation at least) in the best interests of independent shareholders.

128. Objectively viewed, this was a very serious disregard of the management's duty to have regard to the interests of minority shareholders when responding to a legitimate exercise by those shareholders of the veto right conferred by the

[35] Transcript, September 14, 2014, page 788 line 19-789 line 11.

Company's constitution. The commercial unfairness was not simply a technical abstract notion but, as I have already found, made the commercial position of the minority shareholders even worse than it was before. The idea advanced in closing submissions by the Respondents that there was no causative link between the breaches of duty complained of and the commercial prejudice complained of is wholly fanciful and must be decisively rejected.

129. It is not necessary for me to find, and it is not even alleged, that any fraudulent or wilful breaches of duty occurred in relation to the Harvest License Agreement. The management might well have genuinely believed that the Petitioner's exercising its veto at the 2011 AGM was a disproportionate response to the manner in which the affairs of the Company had been being conducted prior to 2011, a manner which I have found fell short of oppressive or prejudicial conduct in the section 111 sense. However, it is quite obvious that the licensing option was essentially preferred because it was the best means of securing the commercial interests of the Kingboard Group. It is impossible to believe that this option would have been so doggedly pursued by the Company's management if it was not aligned with the interests of the Kingboard Group. And the core ingredient of the duty of fairness owed by the majority to the minority in this particular commercial context allowed the majority a generous margin of appreciation within which to exercise business judgment as long as they did not, in effect, toss the fairness rule book aside altogether.

130. I have no difficulty in finding that the Harvest License Agreement was implemented in order to achieve indirectly substantially the same flow of copper foil to Laminates after April 29, 2011 that Laminates received from the Company before the IPT Mandate was blocked. It is impossible to imagine what conduct would amount to oppressive or unfair conduct in the requisite statutory sense if this Court were to find that nullifying the Company's and the SGX's central protective mechanism for minority shareholders in relation to an interested persons transactions did not amount to oppressive or prejudicial conduct. I do not ignore the fact that the commercial analysis has layers of complexity to it and that, to a certain extent, the licensing option could potentially have been deployed in a legally permissible manner. I have already accepted that the commercial detriment to the Company as a whole would have been far worse if the Company had been compelled to simply stop related sales altogether. The Allen & Gledhill Note, finalised with input from the Company whose management clearly wanted advice as to what they could do rather than advice as to what they ought to do, did contain two important caveats which management effectively ignored:

(1) the licensing option was said to be a viable option, but only as an interim solution; and

(2) the licensing option was said to be viable providing it was not a "pass through mechanism" which merely facilitated a continuation of the prohibited interested person transaction in a different form.

131. Mr Lo under cross-examination indignantly scoffed at the suggestion that the Respondents ought to have seriously pursued a negotiated solution to the impasse once the present Petition was filed. The implication is that had the Petitioner not presented the Petition and decided to wage war against the Company and the Kingboard Group, the Harvest License Agreement would indeed have been merely a short-term interim measure because settlement discussions could have been promptly pursued. Again, this evidence, which was implicitly the centrepiece of the Respondents strategic response to the IPT Mandate veto, must be analysed in a nuanced way.

132. In my judgment the Petitioner would have had no seriously arguable section 111 complaint had the Company's Management decided to implement the Harvest License Agreement <u>on a transparent basis</u> as a truly interim measure and promptly initiated *bona fide* open negotiations in which commercially reasonably proposals were openly tabled with a view to persuading minority shareholders to approve the IPT Mandate on even marginally more favourable terms. As the Allen & Gledhill Note broadly suggested (or at least hinted), these proposals could have made the case that the IPT Mandate had to be approved and that the License Agreement would be detrimental to the minority shareholders in the short, medium and long term. In terms of corporate strategy, such a response would have been consistent with:

(a) the interests of the majority shareholders in avoiding a situation of being forced to negotiate with the minority with a figurative gun to their head, namely the fact that until negotiations were concluded, the Company's business would largely grind to a halt;

(b) the interests of minority shareholders in having the concerns which prompted them to block the IPT Mandate promptly addressed;

(c) the interests of the shareholders generally in resolving the impasse with the least possible economic dislocation to the Company's operations.

133. For the reasons very persuasively advanced by Wong SC, this Court would not properly be entitled to usurp the management's judgment of what constituted reasonable settlement proposals, provided that whatever was tabled fell within the range of commercially reasonable proposals. The problem with the approach adopted by the Company's management is that they very obviously responded to the IPT Mandate in a way which gave priority to the interests of the majority shareholders and took only minimal or token account of the interests of the minority. Can it be an

answer to the complaint that the Harvest License Agreement has caused prejudice to the Petitioner as a minority shareholder for now more than 4 years that either:

(a) it was reasonable for the Respondents to keep the License Agreement in place until the present proceedings were determined and that the Petitioner's conduct in filing and pursuing the present Petition is, in effect, the predominate or substantial cause of any prejudice that flows from the Harvest; or

(b) that it was incumbent on the Petitioner to initiate any negotiations aimed at breaking the impasse and that its failure to do so act breaks the chain of causation between the entry into the Agreement and the prejudice of which complaint is made?

134. These exculpatory arguments only have to be stated to be rejected. They might have validity in the context of a quasi-partnership where the dispute was between two shareholders of equal weight. However, in my judgment it would amount to running a coach and horses through the fabric of section 111 and its minority shareholder protections to find that the burden was placed on the victim of oppression to persuade his 'oppressors' to end the oppression. The fundamental purpose of the IPT Mandate in the present context was to exceptionally empower an otherwise disempowered minority to provoke a commercially fair response from the generally empowered majority. There is another reason of legal policy why it cannot be accepted that the management of a company being sued for unfair prejudice can validly assert the right to continue a course of conduct which a court considers to be *prima facie* unfairly prejudicial simply because a petition is being pursued. Such a construction of the law must be rejected because:

(1) it would be inconsistent with the right of access to the court to hold that a section 111 petitioner should be deprived of relief to which he would otherwise be entitled on the specific ground that he has sought relief;

(2) it would be inconsistent with the statutory intention underpinning section 111 and contrary to public policy and good sense to permit a party engaged in oppressive or unfair conduct to continue to engage in what would otherwise constitute *prima facie* unlawful conduct in reliance upon the fact that an application for relief in respect of such conduct is before the Court. This reasoning applies with even greater force where a petitioner is pursuing a class remedy and other members of the allegedly prejudiced class are not even before the Court.

135. Where a claimant is seeking relief from a court in respect of an alleged continuing breach of duty in circumstances where no interim injunctive relief can be

obtained, the defendant invariably has the option discontinuing the action complained of without prejudice to his right to contend that no actionable breach of duty occurred. It is essentially a matter of litigation strategy in each case as to whether the defendant elects to continue the conduct complained of in the hope that his actions will be vindicated by the final judgment or, instead, elects to adopt the more cautious approach of ceasing and desisting without prejudice to the defences advanced before the Court. The latter approach is often unattractive because it is difficult to avoid the impression that the defendant acknowledges to some extent the merits of the claim. However the former approach will rarely appeal to the cautious litigant unless they are confident that they are faced with a frivolous claim.

136. This analysis may be tested by considering the very loosely analogous situation of a claim by an employee that her work environment is injurious to her health because of mould infestation in breach of, *inter alia*, the employer's common law duty to provide a safe place of work. This claim necessarily involves an allegation of a continuing breach of duty on the employer's part assuming the claimant sues while still employed at the offending location. Assuming some mould actually exists, and before proceedings are issued but an internal grievance is filed, the employer has the option of removing the mould immediately and negotiating with the claimant and removing the mould immediately and not negotiating with the claimant and/or ignoring the complaint altogether. Once proceedings are issued, the employer again has the choice of removing the mould without any admission of liability or ignoring the mould altogether. At trial, assuming the employer does not elect to remove the mould, the only issues can be whether or not the existence of the mould constitutes an actionable breach duty on the employer's part. It will not lie in his mouth to say that he could not remove the mould because, no sooner than its presence was brought to his attention, the claimant sued making any remedial action on the employer's part impossible.

137. The Respondents in the present case have in my judgment freely chosen to adopt an unbending, high-risk 'winner-takes-all' and/or 'hardball' strategy. They have freely assumed the risk that by taking no remedial action over the four years that the present Petition has taken to come on for trial, in the final analysis they will be held to have aggravated in the interim the prejudice complained of when the Petition was first presented. The degree of aggravation involved has two dimensions to it:

(1) <u>the pre-strike-out period (August 3, 2011 to January 16, 2012)</u>: in paragraph 4(c) of an August 31, 2011 Note[36] prepared for the SGX at a time when the Company's management believed SGX approval for the License Agreement was required, the Company described the litigation in salient part as follows:

[36] Exhibit "JL-1" TAB 18.

"*...The Company has been advised by its Bermuda counsel that the Petition does not have any basis in fact or in law. Bermuda counsel is in the process of preparing for and making a strike-out application in respect of the Petition.*

The Company believes a successful striking out of the Petition will demonstrate that the allegations by Annuity & Re (and by extension, Pope) are baseless";

(2) <u>the post-strike-out period (January 16, 2012- September 14, 2015 (trial))</u>: on January 16, 2012, I declined to strike out, *inter alia*, the allegations in the Petition to the effect that the Harvest License Agreement was a device to side-step the veto of the IPT Mandate on the grounds that the relevant claim was an arguable one. That judgment was not appealed.

138. If the Respondents were advised that the Petition as a whole was liable to be struck-out, it is to some extent understandable that they assumed the risk of not pursuing efforts to remove the impasse until after the ruling on the strike-out application was delivered on January 16, 2012, less than six months after the Petition was presented. After that, bearing in mind that they elected not to appeal that Ruling, it is less easy to view sympathetically their insistence on adopting the stance that the reduced profitability ushered in by the License Agreement (for the Company and its shareholders but not to the same extent for the Kingboard Group), merited not even symbolic attempts at remedial action. When one looks at the period from April 29, 2011 to the commencement of trial on September 14, 2015 as a whole, taking the above nuances into account, it is clear that the Respondents adopted a legally flawed approach to the Company's 'constitutional' duties of fairness in an entrenched manner for a considerable period of time. In effect this conduct amounted to a repudiation of the right of the minority shareholders to exercise their IPT Mandate voting power in any manner otherwise than by approving the Mandate. This constitutes evidence not just of a breach of duty but also speaks to the gravity of the breaches in question.

139. I do not ignore the argument that the Company had, as a result of PRC legal advice, genuine concerns about protecting the employment position of its large PRC workforce. What I reject is the proposition that these concerns justified declining to pursue the substantive settlement options altogether, because it is obvious that these options potentially offered the best means of achieving stability for the relevant employees in a long-term sense.

140. It remains to consider the central and contested evidential issue of whether or not the majority shareholders used their control of the Company to <u>cause</u> the Harvest License Agreement to be used as a means of circumventing the IPT Mandate requirements of the SGX which formed part of the Company's internal constitution. The Respondents effectively conceded that the <u>effect</u> of the Agreement was to

circumvent the IPT Mandate from the Kingboard Group perspective in that Laminates was able to access a supply of copper foil from Harvest comparable to that which the Company formerly supplied. This was achieved through the Company leasing its equipment, plant and much of its manpower to its licensee. However the Respondents insisted, principally through Mr. Lo but through Mr Ong as well, that the Company had no knowledge of Harvest's commercial intentions. Accordingly, no relevant breach of duty occurred in relation to the conduct of the affairs of the Company in the requisite statutory sense. This was, it must be said, potentially a complete answer to the Petitioner's best arguments and the best answer which could conceivably have been advanced.

141. This was a beguiling argument because it encouraged the Court to analyse the facts within the standard framework according to which the separate legal personality of the Company from its shareholders meant that the controlling shareholders' knowledge could not automatically be attributed to the Company. This argument must be rejected because in the context of a minority shareholder oppression petition, the crucial question is not what the Company's officers knew solely in their capacity as such when approving the impugned transaction. The crucial question is whether the majority shareholders used their control of the Company to cause the Company to act in an oppressive manner. It cannot be an answer to an oppression petition that the majority shareholders directed their nominee directors to approve an unlawfully prejudicial course of conduct for the nominee directors to say they had no knowledge of the matters which made the course of conduct they were approving unlawful. As Lord Keith opined in in the Petitioner's primary case, *Scottish Co-operative Wholesale Society Ltd. –v- Meyer* [1959] AC 324 at 362-363:

> "*In these circumstances, I have no doubt the conduct of the Society was oppressive. The only question is was it oppressive in the affairs of the Company? At a previous stage of this case when relevancy was under consideration (reported 1954 S.C. 381) the late Lord President Cooper said:*
>
> > *'The truth is that, whenever a subsidiary is formed as in this case with an independent minority of shareholders, the parent company must, if it is engaged in the same class of business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with its subsidiary.'*
>
> *I would adopt this statement with this expansion that conducting what are in a sense its own affairs may amount to misconducting the affairs of the subsidiary. It is difficult to say that misconduct in the affairs of the subsidiary*

is not conduct in the affairs of the subsidiary and that, I think, is what Lord Cooper had in mind. Misconduct in the affairs of a company may be passive conduct, neglect of its interests, concealment from the minority of knowledge that it is material for the company to know. That, in my opinion, is what happened here. Nor do I think what I have said is materially different from the views expressed by all their Lordships in the Court of Session. The Lord President considered that there was a policy by the Society's nominees on the Company's Board of 'uniform silence' in face of the progressive deterioration in the Company's activities; of failure to disclose to the Petitioners the explanation of the deterioration…Lord Carmont considered that the Society's nominees conducted the affairs of the Company oppressively as from the time when being aware of the Society's policy they continued to sit on the Company's Board and to control its affairs. 'They could not', he says, 'in the circumstance of their relation to the Society be anything other than active, or at best passive, supporters of the Society's policy when dealing with the Company's affairs and even their continuance in office as Directors of the Company put an obstacle in the way of the minority taking early and perhaps some timeous action to save the Company or at all events to maintain in whole or in part the value of the Company's shares.' Lord Russell held that they 'acted in the interests of the Society and against the interests of the Company by adopting a policy of masterly inactivity, and allowing the Company's trading activities to decline to vanishing point….'

142. So where the central complaint is that the affairs of the Company have been carried on in a prejudicial manner because the controlling majority has misused its power to prefer its own interests to that of the Company, it cannot be an answer that the relevant nominee directors <u>in that capacity</u> had no knowledge of their controllers improper designs if they had actual knowledge of those designs as agents of the controlling shareholders, and failed to share such knowledge with the independent directors tasked with representing the interests of minority shareholders. In my judgment there is incontrovertible evidence that the majority shareholders intended to use the License Agreement as a means of circumventing the ITP Mandate veto and that at least two nominee directors and one key senior operational non-director (Mr Lo) of the Company were aware of this through their connections with the Kingboard Group. However, even if it were necessary for the Petitioner to prove that the majority's nominees knew in their capacity as directors of the Company that Harvest was always intended to step into the Company's shoes, the requisite knowledge has been sufficiently proved by the material placed before this Court.

143. At this juncture it may be helpful to turn to the second key document which explains why Mr. Lo adopted his initially surprising stance of denying any knowledge, in his capacity as a director of the Company, of the fact that Laminates had filled the supply vacuum created by the blocking of the IPT Mandate by buying copper foil from Harvest instead. Before the Company discovered, on or about August

31, 2011, that no SGX approval for the licensing arrangement was in fact required, it disclosed the intent to operationalise the August 3, 2011 License Agreement on September 1, 2011 to the SGX. In response to SGX queries in late August, the Company prepared a Note which stated, *inter alia*, as follows:

> "*2.3…The Kingboard Group (including Kingboard Laminates has confirmed to the Company that it has not entered into any discussions or agreement with Harvest Resource to purchase cooper foil from Harvest Resource and…has no current plans to do so…*
>
> *However, the Company understands that the Kingboard Group (including Kingboard Laminates) cannot confirm that it will not acquire copper foil from Harvest Resource for the duration of the Licensing Transaction…*
>
> *The Company wishes to highlight that Harvest Resource is an independent third party to whom the Company has licensed the properties, the inventory and the machinery and the Company is not privy to the business plans of Harvest Resource…*"

144. The main focus of the Petitioner's attack on the Harvest License Agreement entailed the contention that these representations to the SGX about the Company's ignorance of to whom Harvest would sell its products were false and that Harvest was not an independent third party. The Respondents' complaints that some of the detailed allegations advanced at trial to the effect that Harvest was a 'sham' entity ought to have been expressly pleaded were not entirely without merit. It would in my judgement be unfair to consider making findings of deliberate misconduct based on allegations which have never been particularised. On the other hand, the core complaint that the Harvest License Agreement was used by the Company as a means of circumventing the blocking of the IPT Mandate was expressly pleaded and covers essentially the same evidential ground. By necessary implication, the pleaded case alleged that the Company was complicit in a scheme to sidestep the IPT veto, with at least the minimum degree of knowledge, albeit complicit to an extent which did not entail any adequately particularised elements of fraud or wilful misconduct. The suggestion that the Company had no knowledge of Laminates' intentions was not wholly false. Deliberate efforts to conceal that information were clearly taken and the Company formally acted without that incriminating information being openly disclosed to the independent directors or minority shareholders.

145. Before embarking upon any detailed analysis of the evidence, it is obvious (with the benefit of hindsight and a general overview of the way in which the licensing option evolved shortly after April 29, 2011) that the tale told to the SGX was an inherently improbable one. Mr. Woloniecki dealt with this issue in his cross-examination of Mr. Lo and Mr. Ong in a very effective and direct manner. He suggested that it must have been obvious to Mr. Lo (and, by implication, the other

Company directors nominated by the Majority Shareholders as well) that Harvest's main customer, like the Company before it, would be the Kingboard Group. Mr Lo's only answer took a similar form to the 'see no evil, hear no evil' bordering on wilful blindness response which was given to SGX in late August 2011.

146. Mr Ong, on the other hand, gave very important and straightforward evidence on this issue. Firstly he said that Harvest declined to tell him to whom Harvest would sell its product and secondly (and most significantly) that it would not surprise him if the Kingboard Group was a customer:

> *"Q. Now, Mr. Ong, when the company*
> *5enters into this lease and hands this plant and*
> *6 these employees over to Harvest, Harvest is*
> *7 going to have to sell copper foil to somebody,*
> *8 isn't it?*
> *9 A. Yes.*
> *10 Q. Did you ask who their customers*
> *11 were going to be?*
> *12 A. Yeah. But Harvest, I think -- I*
> *13 think Harvest was not responsive.*
> *14 Q. I'm sorry. Is it your evidence*
> *15 that you asked management and they didn't tell*
> *16 you who Harvest was going to sell copper foil*
> *17 to?*
> *18 A. Yes.*
> *19 Q. Very good. That's your evidence.*
> *20 Would it surprise you to know,*
> *21 Mr. Ong, that we have evidence, I'm not going*
> *22 to show it to you, I'll show it to Mr. Lo, we*
> *23 have evidence that Harvest was, in fact,*
> *24 selling copper foil to Laminates in 2011 and*
> *25 2012. Does that surprise you if it's true?*
>
> *2 A. It doesn't surprise me.*
> *3 Q. It doesn't surprise you?*
> *4 A. Because Kingboard Group is the*
> *5 largest buyer of copper foil.*
> *6 Q. Yes. And they would be the most*
> *7 logical customer for Harvest, wouldn't they?*
> *8 A. Yes. But, you know, I get no*
> *9 response from Harvest as to -- you know, I*
> *10 cannot interfere with Harvest Corporation.*
> *11 It's beyond my limits.*
> *12 Q. Right.*
>
> *CHIEF JUSTICE KAWALEY: He seems to*
> *14 be saying -- I think we should be clear.*

15 He seems to be saying, not as was put to
16 him earlier, that management was not
17 responsive to his questions, but that
18 Harvest was not responsive to his
19 questions about who their customers were
20 going to be…"

147. There is, admittedly, a lack of clarity as to whether Mr Ong prior to the License Agreement asked Harvest or asked the Company's management to as Harvest who its main customers would be. Because Mr Ong went on to describe a meeting with Harvest in Guandong Province, possibly in February 2012, at which he said he declined to ask Harvest about its customers because that was their business, not his. Looked at as a whole, the picture presented is one of an elegant dance which might appropriately be entitled: 'ask no questions, tell no lies'. The main function of the Audit Committee was supervising the fairness of sales by the Company to the Kingboard Group representing approximately 90% of the Company's sales. As of April 29, 2011, such sales were prohibited and the licensee was being relied upon to generate as close as possible to the same revenue in license fees for the Company. It was obvious that the licensed equipment and staff were capable of meeting the desired production levels. Absent knowledge of a key customer like Laminates, in a market in which most copper foil sales admittedly took place on an intra-Group basis, the biggest commercial risk would be that the novice licensee would have insufficient customers to generate the generous monthly license fee of HK$10 million. A rational director approving a transaction which involved temporarily leasing most of the Company's employees, equipment and premises and acting in good faith would be obliged to obtain comfort that Harvest had a reliable customer-base before approving the License Agreement. Against this background, the impressively honest admission by the distinguished septuagenarian Mr Ong that he would not be surprised to learn that Harvest is supplying copper foil to the Kingboard Group is very telling evidence indeed. It supports the inference that the majority shareholders' nominee directors, with more intimate connections to the Kingboard Group, knew or must have known what was ultimately obvious as well.

148. The Petitioner's case was, understandably, simply put without explicit reliance on any attribution of knowledge principles which might have been deployed in respect the knowledge Mr Lo clearly admitted he possessed in his capacity as a director of Laminates but denied possessing as a mere employee of the Company. The commercial context in which the License Agreement was entered into may be summarised as follows:

(a) Laminates was the Company's primary customer and, by the Company's own account, market conditions were unfavourable for increasing third party sales to any appreciable extent;

(b) the licensing option was pursued by the Company as a means of obtaining the best possible income flow to replace the lost income from sales of copper foil to the Kingboard Group;

(c) Mr Lin of Harvest was identified as a suitable replacement for the Company not by the Company but by the Laminates Purchasing Department, in a May 21, 2011 memorandum, as someone who wished to enter the copper foil business but had no customers. He was a trading partner of the Kingboard Group and known by both Messrs Lo and Zhou as such.

149. Against this background of admitted and/or undisputed facts, it is impossible to believe that the Company selected Harvest on the basis of the promise of a fee of some HK$10 million per month without appreciating that Harvest's main customer would be Laminates. It was or ought to have been obvious that the only substantial customer capable of generating that sort of income for a start-up copper foil business like Harvest was Laminates which had lost one its main suppliers, the Company. The tendering process, led by former Chairman Mr Cheung Kwok Wing, one of the Kingboard Group's leading lights and its co-founder[37] (he resigned as a director of the Company on January 3, 2012 and furnished no evidence relied upon at trial). The suggestion that this was an independent and transparent process does not withstand close scrutiny. Unless one assumes that the Company's directors in contracting with Harvest were temporarily deprived of all the knowledge they previously possessed of the applicable market conditions and the identity of the Company's main customer, the only sensible inference to be drawn from the proven facts is that they knew or must be deemed to have known that Harvest's substantial income would be derived from using the Company's conveniently located premises, operational equipment and relevantly trained staff to sell copper foil to be delivered to the adjacent Laminates premises.

150. It is a matter of speculation as to whether, in ultimate beneficial ownership terms, Harvest is related to the Kingboard Group in any technical legal sense. The existence of such a formal connection is not an essential element of any finding that the Agreement was a vehicle through which the Company indirectly continued to supply copper foil to the Kingboard Group in violation of the spirit (if not the letter) of the SGX Rules upon which the IPT Mandate veto power is based. It is admitted that Mr. Lin was a 'friend' of the Kingboard Group and it is obvious that he and his company were not wholly independent in the sense the Company conveyed to the SGX. Mr Lo admitted that he knew Mr Lin before the Harvest Agreement was signed as a trading partner of the Kingboard Group. There is a further important commercial

[37] IPO Prospectus, page 26.

reason why the Group-nominated directors at least ought to have known that Harvest's bid was that of a 'connected' party in a general sense.

151. Harvest initially agreed to pay the most generous license fees while agreeing the shortest term (two years as opposed to three years) which was most favourable to the Company (First Affirmation of Mr Lo, paragraph 183). It also entered into the License Agreement on terms which included the remarkable provision, proudly announced by the Company on August 3, 2011, that either party could terminate the License on one month's notice (paragraph 184 of the First Lo Affirmation). It beggars belief that any truly unconnected parties would enter such a substantial commercial contract on these terms. From the Company's perspective, the arrangement only made sense if the Company (and/or the controlling shareholder) was/were confident that Harvest would be able to pick up with Laminates as its main customer otherwise there was no realistic basis for believing the promised fees would be paid. The arrangement also only made sense if the Company knew that Harvest could be trusted with being given temporary control of most of its premises, equipment and staff. Again, unless one believes that the Company's directors, in selecting Harvest as a newly incorporated company owned by persons with no relevant experience and no identified substantial means, were afflicted by a bout of chronic naiveté, the only reasonable inference to draw from the uncontested facts is that the Company knew or ought to have known that Harvest was far from a truly independent entity.

152. Mr. Lo not only admitted that, in the immediate aftermath of the blocking of the Mandate, he personally revived the licensing concept which had been considered in an unrelated context years before. He admitted that he knew Mr Lin as a trading partner of the Kingboard Group and also knew in his capacity as a director of Laminates that Harvest was purchasing copper foil from. As early as May 2011, the Laminates Purchasing Department had identified Mr. Lin as a potential partner through whom copper foil could be purchased/ This topic would have been the most important topic of concern (albeit from opposing ends of the supply chain) for both the Company and Laminates. Yet Mr. Lo effectively argued that any knowledge he had concerning the Harvest License Agreement being used by Laminates (of which he was also a director) as means of re-opening the flow of copper foil from the Company which had been blocked at the 2011 AGM should not be imputed to him in his capacity as an employee of the Company. This technical position does not assist the Respondents since Mr Lo was an important action man who was at all material times both a director of Laminates and operationally the Company Chairman's right hand man.

153. The technical position is somewhat different as regards Mr. Cheung Kwok Ping, who was both an executive director of the Company and a director of Laminates. He was (conveniently for the Respondents) unavailable for cross-examination. It is impossible to believe that in approving the Company's decision to enter into the License Agreement he did not appreciate that this was a vehicle to not

just to source income for the Company but also a means to source copper foil for Laminates. After all, Mr. Lin (one of Harvest's two shareholders) was well known to senior employees of the Kingboard Group including Mr. Lo and Mr Zhou, both Laminates directors. Against this background, the Audit Committee's vetting process involving Deloitte certifying that Harvest had no ownership connection with the Kingboard Group (described in paragraph 15 of Mr Cheung Kwok Ping's First Affirmation) was a largely academic exercise. The existence ownership independence between Harvest and the Kingboard Group, in circumstances where Harvest would be standing in the shoes of the Company as a significant supplier of copper foil to Laminates, was a red herring of whale-sized proportions.

154. The following averments made in the same Affirmation reveal how incredible the Company's assertions of ignorance on this central commercial matter truly are:

> "*19. The Company is not in a position to know who the customers of Harvest Resource are as the Harvest License Agreement was entered into on an arm's length basis and the Company does not know the business plans of Harvest Resource or who Harvest Resource intends to supply the copper foil to…*
>
> *20. As far as the Management is aware, there have not been any commercial discussions between Harvest Resource and the Kingboard Group for Harvest Resource to supply copper foil to the Kingboard Group. The Company also wishes to highlight that there are many companies which are able to supply copper foil and it is possible for the Kingboard Group to source copper foil from such suppliers. Thus the Kingboard Group is not limited to purchasing copper foil from Harvest Resource.*"

155. For the reasons put to Mr Lo and Mr Ong in cross-examination, the suggestion that that such a commercially significant transaction was entered into with a wholly unconnected party with the Company making no enquiries as to the viability of Harvest's business plan simply beggars belief. The Company's market experience since the IPO Prospectus was that it was impossible to significantly increase third party sales because other companies were also operating under vertical group structures so the dependence on Laminates as a main customer was impossible to eliminate overnight. Any reasonably prudent director approving an exceptional transaction involving the leasing of most of its premises, plant and staff to a truly independent third party would have been obliged to make rigorous enquiries as to how Harvest expected to be able to generate the HK$10 million license fee. After all, Harvest was admittedly a 'start-up' with no existing customers. If no such enquiries were made, either the Company's management was guilty of reckless conduct with

the Company's assets, notwithstanding the one month termination clause; or, alternatively, no such enquiries were made because Mr Cheung Kwok Ping already knew, as a director of Laminates, that Harvest was a trusted friend and ally of the Kingboard Group willing to help out in a time of crisis, not just for the benefit of the Company but the Group as well.

156. For similar reasons, the suggestion that Management was unaware of any discussions between Laminates and Harvest and that the Kingboard Group could easily access copper foil elsewhere must be roundly rejected. Mr. Lin was first identified as a potential licensee by employees of Laminates through his commercial relationship with the Kingboard Group. Mr Cheung Kwok Ping as a director of Laminates must have known that, contrary to his assertion that sourcing copper foil from third parties was unproblematic, the Company was in fact a very significant supplier and no immediate replacement could be found. This was being discussed by the Laminates Purchasing Group on Friday May 20 2011, and Mr Zhou very credibly explained why Harvest is today (a) still a major supplier of copper foil to Laminates, and why (b) Laminates is considering (in the long term) developing its own manufacturing capacity to reduce its dependence on third party suppliers.

157. More significantly still, the May 21, 2011 '*Summary Report of the Group's Purchasing Department*' (Exhibit "ZPF-6" to the Zhou Affirmation) was on its face addressed to, amongst others, Mr Cheung Kwok Ping. This Report made, *inter alia*, the following assertions which contradict paragraphs 19 and 20 of the First Affirmation of Cheung Kwok Ping:

> "*KBCF shall not sell copper foil to us upon completion of existing orders. Shortfalls in copper foil may cause us an unexpected loss, leading us to seek new source of copper foil supply…*
>
> *2. When we seek for supply of copper foils from suppliers of other materials…there was a party, Mr Lin Yi Yuan…who has string intention to cooperate with us. We are of the opinion that we are likely to be in cooperation with Mr Lin for the reasons below:…*
>
> (3) *When venturing into the copper business, the biggest problem Mr Lin is facing is the shortage of customers. The quantity we require is an excellent opportunity for him to develop his copper foil business. As he said, he will provide us significant concessions and a priority of supply of copper foil. In addition… his production will be fully in line with our requirements, the production may commence by the end of the year….*"

158. So it seems probable (in the absence of contrary evidence) that Mr. Cheung Kwok Ping received this Report and accordingly knew when approving the selection of Harvest to be granted the License that Harvest was favoured by Laminates because

it would be able to fill the supply gap created by the blocking of the Company's IPT Mandate. He ought not to have concealed this important information from his fellow directors on the Company's Board, not least because in that capacity he knew or must be deemed to have known that the Company had been advised by Allen & Gledhill that a pass-through transaction might not meet with the approval of the SGX. After the Agreement was executed on August 3, 2011, Mr. Cheung Kwok Ping also knew or ought to have known that the Company was making various representations about the independence of Harvest from the Kingboard Group. He owed a duty to the Company to disclose information central to the accuracy of those representations. Those representations included the following:

(a) the August 3, 2011 Board Announcement which stated:

> "*All of the shareholders and directors of the Licensee are independent third parties which do not have any prior relationship with…the ultimate holding company of the Company, and its subsidiaries…*";

(b) the Company's Note in response to SGX queries raised at an August 16, 2011 meeting in which the Company expressly represented that it had no means of knowing who Harvest's customers would be and that the Audit Committee had confirmed Harvest's independence;

(c) the assertions repeated in the Company's Annual Reports for 2011 (page 5), 2012 (page 4) and 2013 (page 4) that Harvest is an "*independent third party*".

159. These demonstrably unbelievable averments by Mr. Cheung Kwok Ping in his First Affirmation, which he wisely elected not to stand behind in the witness box at trial, merely add further colour to the clear picture portrayed by the principal documentary and oral evidence explored at trial. The Company's narrative of the basis on which it entered into the License Agreement, both contemporaneously and in the present proceedings, reflects a script which is 'inspired by actual events' but does not in certain key respects reflect what must have actually occurred. The key element of the narrative which I am bound to find bore only a superficial relationship to the whole truth was the idea that that the Company had no knowledge (a) of Mr Lin's connection with the Kingboard Group and (b) most significantly, that Laminates was looking to Harvest to replace the Company as a leading supplier of copper foil.

160. The position on attribution of knowledge was again somewhat different as regards the Chairman of the Company and co-founder of the Kingboard Group Cheung Kwok Wing. He filed no evidence on behalf of the Respondents but Mr Lo

admitted in his own First Affirmation (paragraph 182) that it was Mr. Cheung Kwok Wing who identified and had preliminary discussions with potential licensees before preparing a shortlist in in early June. If Mr Cheung Kwok Wing initially identified Mr Lin as a potential licensee in or about May 2011, the question arises as to how Mr Lin came to the attention of the Laminates Purchasing Department? The May 21, 2011 Laminates Report is decidedly vague about how Mr Lin came to Laminates' attention. Did Mr Cheung Kwok Wing himself provide the introduction? Or did Laminates put Mr Lin in touch with the then Chairman. It is impossible to say one way or the other. But it seems highly implausible that such an experienced businessman as the co-founder of the Kingboard Group would have been unaware of the elementary business fact that any licensee capable of generating a respectable license fee would have to take on Laminates as a customer. It is also impossible to believe that, as the co-founder and shareholder of a family-based Group, Mr Cheung Kwok Wing would have been wholly disinterested in ensuring that the Group did not suffer financially because of a significant drop in copper supplies. After all, his Assistant as Company Chairman was Mr Lo, a non-executive director of Laminates who was also an addressee of the May 21, 2011 Laminates Report which both mentioned the importance of filling the copper foil supply gap and the possibility of Mr Lin as an ideal customer. The idea of Mr Lo concealing from his 'boss' significant information about the Group his boss founded seems wholly fanciful.

161. The crucial question is whether it is clear that the Chairman (the most senior director of the Company) knew that the Harvest License Agreement would to a material extent have the effect of circumventing the IPT Mandate veto. The only reasonable inference to be drawn from the largely undisputed facts relating to the Chairman's seniority and depth of connections with the Group is that in leading the License Agreement charge, Mr Cheung Kwok Wing must have known that Harvest's main customer would be Laminates of the Kingboard Group. It is inherently improbable that such a 'big beast' in the Kingboard corporate 'jungle' made such a significant decision impacting on both the Company and the Group adopting the passive, weak and wholly non-business-like stance that he had no right to know to whom Harvest would sell the copper foil to be produced using the Company's premises, equipment and staff. Although the evidence on this point is somewhat unclear, it seems more likely than not that that Mr Lin was a person of lower rank to the Company's then Chairman, a courtier rather than a king in his own right. Had he been a 'big beast' in his own right, his impressive wealth and business achievements would have been an important selling point for the selection of Harvest. He remained at the end of the trial a somewhat shadowy figure. Against this background, I make no finding (in the absence of corroborating documentary evidence) on the controversial issue of whether or not the HK$20 million deposit contemplated on the face of the License Agreement was ever actually paid.

162. Be that as it may Mr Lo, who appeared throughout to be the consummate loyal senior corporate servant, was clear that the operative choice of Harvest was made by the Chairman:

> *"Q. The first affirmation, bundle 1,*
> *3 tab one. Please take a look at 182. You say*
> *4 there that the then-chairman of the company*
> *5 Mr. Cheung Kwok Wing had preliminary*
> *6 discussions with such potential licensees to*
> *7 inquire about their interest in the licensing*
> *8 transaction.*
> *9 And you see there you say in early*
> *10 June 2011 in Cheung Kwok Wing had short listed*
> *11 three potential licensees.*
> *12 A. Yes.*
> *13 Q. Now what I'm going to suggest,*
> *14 Mr. Lo, is while management including you may*
> *15 have had discussions about the concept of*
> *16 licensing, who was approached, who was allowed*
> *17 to tender for the license was solely the*
> *18 decision of Mr. Cheung Kwok Wing?*
> *19 A. Yes, we have discussed among*
> *20 management about the potential licensing but*
> *21 since Mr. Cheung Kwok Wing at the time was the*
> *22 chairman of the company and he was the highest*
> *23 in the management, so he was the one that*
> *24 decide on this.*
> *25 Q. Yes, thank you."*

163. Looking at all the evidence in the round, I find that the majority shareholders sought to achieve their critical commercial objective of protecting the commercial interests of the Group while strengthening the negotiating position of the Company in its battle against the Petitioner and other minority shareholders without engaging in outright dishonesty. They caused the Company's management to flirt with deception through occasionally deploying a very creative approach to the literal truth. However this was not a case involving the falsification of documents, and the Respondents clearly complied with their discovery obligations in a way that dishonest parties would likely not. Nevertheless, the Company's management sought limited action-oriented advice and failed to either obtain or act in accordance with advice focussing on their need to select a response which supported rather than undermined the Company's duties of fairness to minority shareholders. Ensnaring themselves in a web of strategic intrigue, and possibly infused with righteous indignation in the wake of what they considered to be an unjustified IPT Mandate veto, the majority shareholders caused the Company to adopt a legally impermissible course of conduct, in section

111 terms, which effectively circumvented the prohibition imposed by the minority shareholders.

164. This was done, Mr Woloniecki rightly emphasised, in circumstances where the Company had been expressly advised (Allen & Gledhill Note, paragraph 10) that there was no legal basis for challenging the validity of the IPT Mandate veto itself. If the veto was legally valid, it deserved at least a plausibly positive response on the Respondents' part. In the event, the Harvest License Agreement (both as initially implemented and because it has been maintained in force for more than four years) in my judgment was in substantive terms inconsistent with the spirit (if not the letter) of the following provisions of Chapter 9 of the SGX Listing Rules:

> "***901***
> *The objective of this Chapter is to guard against the risk that interested persons could influence the issuer, its subsidiaries or associated companies, to enter into transactions with interested persons that may adversely affect the interests of the issuer or its shareholders.*
>
> ***902***
> *In applying these rules, regard must be given to:—*
>
> *(1) the objective of this Chapter; and*
>
> *(2) the economic and commercial substance of the interested person transaction, instead of legal form and technicality."* [emphasis added]

165. No need to make any detailed findings about the role of the Audit Committee arises. Suffice it to say that the evidence of Mr. Ong and the documentary record of the Committee's meetings suggest that prior to the 2011 AGM they generally approached their duties in a somewhat mechanistic manner with a tendency towards undue deference to the Company's management. That may have flowed form the fact that the main task of that Committee was to review figures supplied by management and form a rough and ready judgment as to whether the pricing levels were fair, bearing in mind a bulk discount was appropriate. Selecting an appropriate response to the IPT veto was an extraordinary scenario which required far higher levels of analysis than would understandably be required in the ordinary course of business. The requisite higher level of analysis was probably deployed by the Committee, but not with sufficient force to divert the Company's majority shareholder–controlled management from their chosen course. This could well have been, in part, because it was obvious that the Company's management would not easily be persuaded to change course.

166. I base these findings on the clear picture that emerges from the substantially uncontested evidence as a whole. However, one document which vividly illustrates the point is an email exchange between Mr Lo and Mr Ong on July 19, 2011 before the License Agreement was approved by the Board[38]. Mr Lo inserted his comments beneath Mr Ong's intelligent and fair-minded queries, based on discussions between Mr Ong and his fellow independent director and lawyer Mr Chim :

> "*1a.. We would like to seek advice from A&G as to whether shareholders' approval at a General Meeting is required for the change of the Company's principal activities and model of this magnitude.*
>
> *Response from the Company: Confirmed with A & G that no shareholders' aproval* [sic] *is required and even though EGM is required to be held, the resolution to approve the license agreement will only require a simple majority, given the fact that the parent company holds up to 64% interests in Kingboard Copperfoil Holdings Limited, the resolution will definitely be passed.*
>
> *1b..We feel that the holding of an EGM will give all shareholders an opportunity to consider the proposed Licensing Agreement and offer feedback and at the same time, give the dissenting minority shareholders an opportunity to reconsider their opposition to the Shareholders' Mandate that was voted down at the last AGM.*
>
> *Response from the Company: please see comment as per 1a.*
>
> *We are also trying to find good commercial grounds on which the management can justify the change of the business mode, when in so doing, will cause such a substantial loss of revenue and profit to the Company and its shareholders. Will appreciate if management can give us some lead on this aspect.*
>
> *Response from the Company: please be informed under the licensing agreement, the licensing period is 1 year fixed and 1 year negotiable. The purpose is that it will give some flexibility to the management. Because of the non-approval of the IPT mandate, the Company cannot sell copper foil to the parent company in future and at the same time, no other customers in the market place can absorp* [sic] *such huge copper foil quantity. If the Company cannot rent out the manufacturing facilities, the Company will be running the risk of liquidation, because the Company cannot sell its copper foil products and the revenue cannot cover expenses and the Company will incur substantial losses.*

[38] Core Bundle Volume 2 pages 1243-1244 ; Trial Bundle 3, TAB 25/5.

On the other hand, under the licensing agreement, the license fees can cover the expenses such as depreciation expenses and from the cash flow perpective, the Company will have positive cash inflow which will keep the Company alive. Through this interim measure, the management wants to make our minority shareholders understand that with the non-approval of the IPT mandate, it will do harm to their interests because the revenue and profit of the Company will drop significantly. The management will propose the IPT mandate again in the coming AGM of the Company which will be held around end-April 2012 and hopefully, the minority shareholders will approve IPT mandate after they realize the benefits of the IPT mandate…"

167. Management essentially brushed aside the independent directors legitimate concerns about the losses shareholders would likely suffer from the licensing arrangements and their suggestion to resolve the IPT Mandate issue at the same time as proposing the licensing agreement[39]. Two main points were in substance made:

(a) the parent company could control the outcome of the vote so there was no need to engage with minority shareholders at all; and

(b) the losses would be greater if the licensing agreement was not entered into. However, management's strategy was to demonstrate to minority shareholders through the losses that they would suffer under the licensing regime the error of their ways. The following year, the minority would be given the chance to reconsider the IPT Mandate.

168. This raw display of corporate power did not metamorphose into soft diplomacy when the Petitioner had the temerity to issue the present proceedings. After that, as I have already found above, management decided that any attempts to resolve the IPT Mandate deadlock should await the determination of the present proceedings, whenever that might be. As Mr Lo stated under cross-examination[40]:

"*Q. And at no time has the company*
3 attempted to seriously address my client's
4 concerns and those of other minority
5 shareholders by negotiation?

6 A. So, you are suing me right now --
7 since the petitioner is actually suing our
8 company now, how are we going to conduct a
9 negotiation during this process?"

[39] However, after initially rejecting the suggestion that third party sales should be continued, they later adopted and implemented this idea.
[40] Transcript, September 14, 2015, page 790, lines 2 to 9.

169. Mr Lo may not have been specifically asked to explain why the idea of putting the IPT Mandate to a vote the following year was abandoned. However as early as July 2011, the independent directors suggested seeking to persuade minority shareholders to reconsider their position at the earliest opportunity to avoid the obvious shareholder prejudice flowing from the licensing arrangement and were rebuffed by the Company's management. Overall, Messrs Ong and Chim, both septuagenarians[41], appear to have behaved honourably in trying times for the Company's Board of Directors and its Audit Committee.

Findings: do the grounds of oppressive or unfair conduct proven reach the threshold of justifying a winding-up on the just and equitable ground?

170. The Petitioner has proved the underlined allegations in the Petition:

- "*58.The License Agreement has not been entered into at arms length or on usual or commercial terms…*"

- "*59. In return* [for the lease of all of the Company's equipment, machinery and properties], *the Company is merely entitled to HKD 120,000,000 per year which is insufficient to cover even the annual depreciation of the property, plant and machinery, being HKD 190,000,000 as provided in the Company's 2010 financial statements. As a consequence, the transaction represents a very real loss for the minority shareholders, such as the Petitioner, who unlike the Respondents are unable to benefit from the sale by Harvest of copper foil to the Kingboard Group."*

- "*60. Further, the purported effect of the License Agreement is to circumvent the consequences of the refusal by minority shareholders to vote to pass Resolution 8 and enable transactions with interested persons to continue without a Shareholders Mandate pursuant to Chapter 9 of the Listing Rules…*"

- "*61. It is implicit in the Announcement that Harvest will sell the copper foil it produces with the Licensor's Properties, the Machinery and Inventory to the Kingboard Group. There is no indication that Harvest has any other customers…*"

- "*62. The License Agreement is a device to transfer the value of the Company away from its minority shareholders and to continue the practice of preferential transfer pricing. This benefits the Kingboard Group, and*

[41] In Company's 2013 Annual Report published on or about February 26, 2014 (at page 6), Mr Ong is described as aged 73 and Mr Chim 71.

therefore the Respondents, at the expense of the minority shareholders such as the Petitioner… ”

171. The Petitioner has not proved the unfair transfer pricing allegations or that the terms of the License Agreement were wholly uncommercial; I accept the Respondents' case that it would have been worse for the Company had the IPT sales simply stopped and no alternative form of revenue was quickly found. Nor have the un-pleaded allegations that Harvest was a "sham" been proven. However I do further find that the Agreement was more favourable to the Kingboard Group than to the minority shareholders of the Company in that profits declined and no dividends have been declared since the Agreement was consummated four years ago. Since then, the Company's ordinary business operations have effectively been in limbo.

172. The IPT Mandate veto did not come about like a bolt out of the blue. The Majority Shareholders at an SGM convened by the Petitioner on April 21, 2011 voted down the far more moderate proposal for an independent review of the pricing system then in place for IPT sales under the Supplies Agreement. Against this background, the Respondents effectively repudiated the right of the Petitioner to exercise its minority shareholder rights under, *inter alia*, the SGX Interested Persons Transactions Listing Rules (Chapter 9). This was done by entering into an arrangement through which the copper foil previously produced for sale to the Kingboard Group was produced by the Company's licensee, Harvest, as the primary response to the IPT Mandate veto. Their actions clearly signify that they do not acknowledge the right of minority shareholders to:

(a) demand an independent review of the fairness of the IPT sales which constituted over 90% of the Company's sales; or

(b) exercise their IPT Mandate vote in any way other than by approving the Supplies Agreement; and

(c) their actions further demonstrate the majority's willingness to lease out the Company's principal business operations on commercial terms which demonstrably prejudice the minority shareholders rather than seek a negotiated solution for their concerns.

173. In my judgment this conduct falls very clearly into the category of oppressive or prejudicial conduct which would justify the making of a winding-up order on the just and equitable ground. The facts I have found are almost the mirror image of those in *Re Orient-Express Hotels Limited* [2009] Bda LR 32 at paragraph 65 where Richard Ground CJ, in a passage upon which Mr Wong SC heavily relied, held that "*no court, properly considering the matter, could wind-up a large public company, which is solvent and trading, on the just and equitable ground on the basis of those*

allegations on the petition of a shareholder who purchased its shares in full knowledge of the structure of which it complains…". The present case falls into the separate category which Ground CJ's lucid analysis expressly contemplated in the concluding words of the same passage:

> "*They will, in the current market, take a loss, but I do not think that there is any sufficient allegation that the fall in share price is attributable to the existence of the structure, which was of course in place when it was at the top of the market.*" [emphasis added]

174. Here, the Company is admittedly solvent but its normal business operations have ceased and it is admitted that no dividends have been declared since the License Agreement was entered to. The central pleaded allegation which has been proved is that the Agreement was entered into in violation of the Company's duty to minority shareholders and that they have suffered commercial prejudice as a result. The normal remedy for the disgruntled minority shareholder of exiting through selling its shares on the open market is not an adequate remedy because it seems self-evident that the market value of the Company's shares has been 'artificially' depressed by the very oppressive or prejudicial conduct of which the Petitioner complains.

175. Ironically, but for the decision of the Company's management under the control of the Majority Shareholders to, in effect, punish the Petitioner for daring to exercise its IPT Mandate veto rights and further seek relief under section 111, the facts of this case might well have more closely resembled those in *Latimer Holdings Ltd. and Powell-v-Sea Holdings Ltd.* [2004] NZCA 226. There, relief was refused because the petitioner had adopted an aggressive investment strategy, was complaining of matters of which he had proper notice and was effectively using the court to obtain a profit unavailable in the market. Here the Petitioner's aggressive tactics designed to achieve a favourable buyout in the lead up to 2011 were perhaps counter-productive. However, I firmly reject Mr Wong SC's suggestion, based on *dicta* in *In Re London School of Electronics Ltd* [1986] 211 at 222A-C (Nourse LJ), that the Petitioner's conduct was itself so unfair and prejudicial as to negate its entitlement to obtain relief in respect of the Company's oppressive response to the IPT Mandate veto.

176. The management's strategy in the present case was clearly not due to a complete lack of legal advice because the disclosed material reveals that the Company:

(a) effectively rejected the initial advice received which had prioritised a negotiated settlement over the licensing option;

(b) effectively ignored the advice that the licensing option could only be an interim solution; and

(c) effectively ignored a somewhat muted warning that it might not be acceptable to use a licensing arrangement as an indirect means of selling copper foil to the Kingboard Group.

177. Apart from the significant fact that the Company has been in a holding pattern for the last four years because of management's decision not to initiate any open or formal attempts to address the substantive dispute until the present litigation was determined, one other consideration falls to be taken into account. Laminates, the Company's main customer has admittedly, as a result of itself being dependent on a License Agreement which can be terminated by the Company at short notice, been seriously exploring creating its own capacity for manufacturing copper foil. This would not be a short-term development, and is a somewhat intangible commercial threat to the Company's long-term future even if the IPT Mandate were to be passed, perhaps in modified form. It is a further vivid illustration, however, of how the Kingboard Group has been actively advancing its own commercial interests while asserting that it is powerless to address the Company's position because the Petitioner has had the impertinence to issue the present proceedings. To a marginal extent, it aggravates the seriousness of the breaches of duty which the Petitioner has proved and provides further support finding that the grounds for potentially making a winding up order have indeed been made out.

178. I say potentially because it is important to remember that section 111 is designed to provide an alternative remedy to winding-up. There is a subtle but real distinction between the onus of demonstrating that potential grounds for exercising the jurisdiction to wind up exist and that the circumstances of the particular case warrant actually exercising that jurisdiction by making a winding up order. The Petitioner is only required to prove the former; not the latter. It is also important to emphasise that these findings in no way represent an enlargement of the existing narrow scope for obtaining relief in respect of listed companies under section 111 of the Companies Act. The facts of the present case simply provide an exceptional example of a Company's management circumventing the constitutional machinery for protecting minority shareholders in a fundamental way.

179. Majority shareholders are given considerable latitude under Bermuda law to exercise their own business judgment in managing companies, provided they abide by the basic ground rules which they adopt and upon which minority shareholders rely when they purchase a listed company's shares. Where majority shareholders choose to toss that rule book aside when a minority shareholder seeks to enforce the rules, provided actual prejudice ensues (as I have found occurred here), this Court has little choice other than to find that a case for a just and equitable winding-up has been made out. Any other interpretation of section 111 in such a context as this would almost amount to holding that minority shareholders of solvent listed companies can never obtain statutory relief. The following observations of Hammond J on behalf of the

New Zealand Court of Appeal decision of *Latimer Holdings Ltd. and Powell-v-Sea Holdings Ltd.* [2004] NZCA 226 in my judgment accurately reflect the Bermudian law position under section 111 of the Companies Act 1981 on minority shareholder oppression in the context of listed companies:

> "*[111] In our view, s174 can and does apply to listed companies with tradeable shares, but the considerations which will apply to them will not necessarily be the same as obtain with respect to closely held companies. But it would be quite wrong for the New Zealand corporate community to think that the activities of listed companies are beyond the reach of this provision.*" [emphasis added]

Findings: relief and the position of other shareholders

180. It was common ground that the question of relief should be dealt with after judgment had been handed down on 'liability'. However, Mr Woloniecki in his closing submissions invited me to decide at this stage whether or not in principle other minority shareholders not presently before the Court would be entitled to seek equivalent relief to that sought and obtained by the Petitioner. His simple argument was that section 111 provides a class remedy. It was not disputed that these shareholders (the Pope Holdings) were in principle entitled to relief. Mr Woloniecki invited the Court to rule that in principle minority shareholders unconnected to the Petitioner should be afforded an opportunity (perhaps by notification via the SGX) of any future hearing in relation to the grant of buy-out relief. However, as I have already found above, the Petitioner is not entitled to seek relief in respect of shares in the Company purchased after the presentation of the Petition on August 3, 2011.

181. When a shareholder petitioner seeks a winding up order on the just and equitable ground, the Court typically gives directions for service or advertisement of the petition, designed to bring the proceedings to the attention of non-parties, before the effective hearing date of the petition. In the present case it appears that no such Court directions were given. This may in part be attributable to the fact that the Company was bound to report on the status of the litigation to the SGX and has at least mentioned the existence of the litigation in annual reports. Mr Wong SC did not dispute the argument that section 111 is fundamentally a class remedy. In principle it seems to me that all minority shareholders must have a right to be heard at the relief stage of the present Petition.

182. However I would give liberty to apply for any specific directions in this regard rather than making directions at this stage without affording counsel a further opportunity to be heard.

Conclusion

183. The Petitioner's complaint that the affairs of the Company have been conducted in a manner which is oppressive or prejudicial in contravention of its rights as a minority shareholder under section 111 of the Companies Act 1981succeeds in part. The complaint that the Harvest License Agreement was a commercially prejudicial means of enabling the Company, at the direction of the Majority Shareholders, to circumvent the Petitioner's legitimate exercise of its right to veto the IPT Mandate at the 2011 AGM succeeds. The majority shareholders most significantly breached their duties to the Petitioner when they responded to the Petitioner's decision to exercise a right crucially responded to the Petitioner's exercise of its right to veto an Interested Person Transaction, a right conferred by the SGX Listing Rules and incorporated into the Company's constitution, by effectively nullifying rather than vindicating that right.

184. The Petitioner's complaint that the commercial basis on which previous IPT sales had been conducted with minority shareholder approval constituted oppressive or prejudicial conduct was not proved. Section 111 of the Bermudian Companies Act 1981 cannot be deployed, especially in relation to a publically listed company, to obtain judicial relief in respect of commercially unfavourable outcomes. Unfair prejudice, under the existing law, requires some fundamental breach of the express or implied terms upon which the aggrieved shareholder made his initial investment. Such a breach of the reasonable expectations of the parties as to how the Company would be constitutionally governed occurred in relation to the Harvest License Agreement, not because it was a sham or its principals were in a technical sense related parties (although at least one was a business 'friend'). Rather the breach occurred because:

(a) the Company entered into the Harvest License Agreement on the purported basis that its officers did not know who Harvest's main customer would be when they knew or must be deemed to have known that the main customer was the Kingboard Group. The Company well knew that it was prohibited by the IPT Mandate veto from directly or indirectly continuing to be a significant customer of the Kingboard Group;

(b) although the License Agreement achieved a better commercial result for all shareholders than ceasing 90% of its operations altogether, was a plausibly reasonable short-term measure and generated valuable cash flow, the Company ceased paying dividends and the Kingboard Group benefitted more by largely being able to continue business as usual, while the Company was left in a state of limbo;

(c) instead of taking positive steps to resolve the impasse at the earliest opportunity, the Company's management used the existence of the present proceedings as an excuse to continue a state of affairs which

made it impossible for minority shareholders to exit the Company by selling their- without suffering a loss which was materially contributed to by the improperly implemented and/or continued licensing arrangements.

185. I will hear counsel in relation to costs and as to the directions sought concerning the relief limb of the Petition.

Dated this 10th day of November, 2015 ______________________

IAN RC KAWALEY CJ