The Court of Appeal for Bermuda

CIVIL APPEAL No. 24 of 2015

Between:

KINGBOARD CHEMICAL HOLDINGS ET AL.

Appellants

-and-

ANNUITY & LIFE REASSURANCE LTD ET AL.

Respondents

Before: **Baker, President**

Bell, JA

Clarke, JA

Appearances: **Mr William Wong QC and Mr Jeffrey Elkinson/Mr Ben Adamson**, Conyers Dill & Pearman Limited, for the Appellants

Mr Jan Woloniecki, ASW Law Limited, for the Respondent

Date of Hearing: **6 & 7 March 2017**

Date of Judgment: **24 March 2017**

JUDGMENT

Clarke, JA

1 The question in this appeal is whether the Chief Justice was right to find that the affairs of a publicly listed company had been conducted in an unfairly prejudicial manner.

2 The company is **Kingboard Copper Foil Holdings Limited** ("the Company"), a Bermudian company and the fifth respondent to the Petition. (In the remainder of this judgment I refer to the parties by reference to their status under the Petition). It was incorporated here on September 10 1999. It is managed principally from Hong Kong. A Prospectus for an Initial Public Offering was issued dated December 6 1999 and, as a result, its shares became listed on the Singapore Stock Exchange. More than 60% of its shares were at the material times owned by **Excel First Investment Limited** ("Excel"), a BVI company - the fourth respondent. Excel itself is owned by **Kingboard Laminates Holdings Limited** ("Laminates"), a Cayman company - the third respondent. Laminates is owned as to nearly 75% by **Jamplan (BVI) Limited** – the second respondent, which is owned as to 100% by the ultimate holding company in the Kingboard Group of companies, namely **Kingboard Chemical Holdings Limited** ("Holdings"), a Cayman company – the first respondent. These direct and indirect majority shareholders in the Company are ultimately controlled by a group of individuals related by blood or marriage who are based in Hong King.

3 The Kingboard Group is a leading producer of printed circuit boards ("PCBs"). The Company manufactured copper foil, which is an essential material for the production of PCBs, in China, where it is one of the largest and most advanced manufacturers of that product. Its business model involved selling almost all of its copper foil to Laminates. Laminates was listed on the Hong Kong Stock Exchange in 2007.

4 A minority of the shares in the Company were held by those who were not members of the Kingboard Group. One of those was **Annuity & Life Reassurance Ltd** (“the Petitioner”), the respondent to this appeal. The Petitioner is a subsidiary of **Pope Investments II LLC** (“Pope II”), a Delaware company. Pope II is a pooled investment vehicle which invests on behalf of its clients. Pope II made its initial investments in the Company in respect of the shares which came to be owned by the Petitioner in July 2009 and acquired more thereafter. According to the Petition Pope II had initially purchased an ownership interest in the Company in November 2006. The Petitioner acquired its shares in the Company and became a registered shareholder on April 7 2011 in contemplation of the present proceedings. By July 18 2011 the holdings of the Petitioner and Pope II amounted to over 80 million shares being more than 10% of the Company’s shares.

The History

5 As is apparent from the nature of the business carried on by Laminates and the Company there was a potentially acute divergence of commercial interests between the two. It was in the interests of Laminates to obtain copper foil as cheaply as possible in order to maximise its profits from the sale of PCBs; it was in the interests of the Company to secure as high a price as possible for the foil which it supplied.

6 It was no doubt in the light of the tension between these rival commercial interests that the Prospectus included the following two statements:

> *“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 and*

its subsidiaries] 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…"

7 The Prospectus stated that future inter-Group sales would be regulated by a Supplies Agreement the terms of which were summarised [73][1]. That Agreement was dated 29 November 1999 and was amended by Supplemental Agreements of 5 November 2006 and 13 December 2008. These Agreements were between the Company and Holdings. The first Agreement provided, in essence, that sales of copper foil should be on arms-length terms and on the standard terms for the supply of foil by the Company and its subsidiaries to third parties and at no less favourable a price than that at which the Company would have sold to third party customers. The latter two Agreements provided that the price should be in accordance with the then prevailing market price and that in no event should the terms be more favourable to the Kingboard Group than that offered by the Company and its subsidiaries to independent third parties.

8 The Prospectus also said:

> *"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."*

And

[1] References in square brackets are to paragraphs in the judgment.

"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[2] *(in particular, Chapter 9A of the Listing Manual) are duly complied with…"*

The Audit Committee had four members, including what were described as three independent directors. Mr Ong, an independent director and Audit Committee member, who gave evidence via Skype, said that the Committee understood that its role was to form an objective view of the fairness of Interested Person Transactions ["IPTs"]. The Chief Justice accepted his evidence [78] and found that generic issues relating to the fairness of IPTs were considered from time to time although not necessarily at every quarterly meeting.

9 Chapter 9 of the SGX (i.e. Singapore Stock Exchange) Listing Manual had Listing Rules on IPTs under which the Company had to obtain a Mandate from its shareholders in order for it and its subsidiaries to sell copper foil to the members of the Kingboard Group, being, for this purpose, Holdings and its subsidiaries and associated companies other than the Company and its subsidiaries and associated companies. These constituted "interested persons".

10 In 2006, 2007, 2008, 2009 and 2010 the Company sought and obtained various Shareholder Mandates pursuant to Chapter 9. By these Mandates the shareholders approved the Supplies Agreement pursuant to which the Company and its subsidiaries were to sell copper foil to the Kingboard Group.

[2] Singapore Exchange Securities Trading Limited

In accordance with the SGX requirements only disinterested i.e. minority shareholders could vote to approve the relevant Mandates.

Developments in 2011

11 On **21 February 2011**, the Petitioner requisitioned a Special General Meeting ("SGM") to consider a resolution that an independent auditor be appointed to investigate historical internal transfer pricing and report on whether the Company had fulfilled the commitments made in the Prospectus.

12 On **21 April 2011**, the resolution proposed was defeated at the SGM held on that date.

13 At the AGM held on **29 April 2011**, the minority shareholders refused to approve an IPT Resolution as required by Chapter 9 of the Listing Manual, which would have renewed the Mandate previously given in respect of interested party transactions. The proposed Mandate contained the following paragraph:

> *"Review Procedures for Interested Person Transactions.*
>
> *In general, there are procedures established by the Company to ensure that Interested Person Transactions are undertaken on an arm's length basis. The terms offered to the Kingboard Group shall be on normal commercial terms similar to those offered to unrelated third parties and consistent with the Company's usual business practices and policies which are no more favourable to the interested persons than those extended to unrelated third parties. The sale of copper foil is governed by the terms and conditions of the Supplies Agreement ….*

A register is and will be maintained by the Company to record all Interested Person Transactions that are entered into pursuant to the Mandate. The annual internet audit plan shall incorporate a review of all Interested Person Transactions and the amounts paid therefor as well as transaction prices with other unrelated parties".

14 This veto created a major problem. In the light of the refusal to renew the Mandate the Company could not, consistently with its obligations to the SGX, sell copper foil to companies in the Kingboard Group. But, since Laminates was its major customer, it faced the prospect of having practically no one to whom to sell.

15 On **4 May 2011**, the Company received a "*Note on options available to Kingboard Copper Foil Holdings Ltd"* from Allen & Gledhill to which I refer at paragraphs 31 – 32 and 85 – 87 below.

16 The way out of the dilemma adopted by the Company was as follows. On **3 August 2011,** the Company announced that its subsidiary Hong Kong Copper Foil Limited had granted to **Harvest Resources Management Limited** ("Harvest") the exclusive right to use the Company's copper foil producing business in return for a monthly fee of HKD 10,000,000. The agreement reached on that date (hereafter "the Licence Agreement") licensed all the Company's properties and machinery, and the right to use, consume and dispose of its consumables and stocks to Harvest. It was entered into for a two year period from 1 September 2011 to August 31 2013. It included a provision that either party could terminate it on one month's notice within the first 12 months on payment of HK $ 1,000,000 or such amount as might be agreed. After the first 12 months it could be terminated by the Company on one month's notice. It was renewed for another two years in 2013. On 28 August

2015, the Company's Board resolved to extend the Licence Agreement for a further two years to 31 August 2017. From 2011 onwards Harvest sold copper foil to Laminates.

17 Harvest was incorporated, under the name of Wei Bo Limited, in the BVI on 11 March 2011. Its principal, Mr Lin Yuan ("Mr Lin") had, as the Chief Justice found [150] [156], at the very least close business ties to the Kingboard Group before August 2011; no pre-existing experience in the copper foil business; and no identifiable financial capacity to commence a freestanding manufacturing operation. A report dated 20 May 2011 from the Kingboard Group's Purchasing Department had identified him as a potential supplier to fill the gap created by the inability of the Company, as a result of the veto (or any alternative copper foil manufacturers for capacity reasons), to continue meeting the Group's copper foil needs. He was said to want to enter the copper foil business and had no other customers, while the Group needed the product. The Group's major copper foil suppliers are now Harvest and Qiang Copper Fil Co Ltd, a subsidiary of Laminates.

The Petition

18 On the same day as the Licence to Harvest – **3 August 2011** – the Petitioner presented its petition seeking relief under section 111 of the *Companies Act 1981*. That section provides:

> "*111(1) Any member of a company who complains that the affairs of the company are being conducted or have been conducted in a manner oppressive or prejudicial to the interests of some part of the members, including himself, or where a report has been made to the Minister under section 110, the Registrar on behalf of the Minister, may make an application to the Court by petition for an order under this section.*

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

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

(b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up, the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise."

It is common ground that the Chief Justice was right to hold that there was no material difference between the concept of "*oppressive or prejudicial*" conduct in section 111 of the Bermudian Act and the concept of "*unfair prejudice*" subsequently introduced by section 459 of the English Companies Act 1985. Thus, in *Thomas v Fort Knox Bermuda Ltd* [2014] SC (Bda) 15 Com Hellman J took "*prejudicial*" in 111 (1) to mean "*unfairly prejudicial*".

The First Complaint

19 The petition contained two complaints. The first was described by the Chief Justice [70] as having two 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".*

20 Reliance was placed on the fact (i) that the gross profit margin of the Company between 2000 and 2010 had been less than the 46.5% described in the Prospectus, falling to 8.25% in 2010; (ii) that from 2003 to 2010 the gross profit margins of the Company had been markedly lower than those of Laminates and Holdings; (iii) that Laminates had achieved a competitive advantage from the arrangements with the Company; and (iv) that the value of the Company's stock had been artificially lowered [66].

The Second Complaint

21 The second complaint was that the License Agreement was an impermissible way of evading the legitimate decision of the minority shareholders not to approve the 2011 Shareholder Mandate.

The First Complaint Fails

22 The Chief Justice found against the Petitioner under the first head of complaint and there is no appeal from that decision. In broad terms he found that 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 [79]; that the Petitioner's decision to purchase shares had been made because of advice that the Company was trading at a huge discount to fair value [79]; that by 2006 when the Petitioner began its investment, Mr Wells, one of its directors, who gave evidence, knew or ought to have known that its margins had fallen well below the highs trumpeted in the Prospectus (since which the copper price had fallen 30-40% in about 2001 and Lehman Brothers had collapsed in 2008). He found that "*the preferential transfer pricing complaint emerged … more as an instrument of commercial pressure to prevent an investment going bad rather than as a full-blown minority shareholder oppression complaint*" [84]. The pricing arrangements were not "*unfair in the sense required to trigger an entitlement to relief for prejudicial or oppressive conduct under section 111*" [89]. He, also, found that further purchases of shares were made after a privatisation proposal from Laminates was rejected on 11 August 2009 in order to provide a weapon to deploy – namely the ability to block the granting of an IPT Mandate – with a view to encouraging the Company and/or the Respondents to make a more generous offer [85]. He accepted that it was comparing apples and oranges to compare the profit margins of a company supplying copper foil (like the Company) and the margins of a company supplying finished products (like Laminates).

23 The Chief Justice's conclusion was not particularly surprising given that on 16 January 2012 he had ruled that the complaints in relation to preferential trading, standing by themselves, did not disclose a reasonable cause of action, on the basis that the minority had the power to regulate the terms upon which the related transactions took place. The case was allowed to proceed because by then the Petitioner had amended its Petition so as to introduce the second ground of complaint. The 2012 decision came two years after the High Court of Singapore had in 2010 found the allegations under the first ground of complaint were too speculative to warrant pre-action discovery.

The Second Complaint

24 In considering the second complaint the Chief Justice identified [91] two critical factual issues namely:

> "(*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?"*

25 In relation to (a) he referred, inter alia, to the evidence of Mr Tan, the Respondents' valuation expert as to the Company's results in net profit terms. These showed a net loss of HK 2.6 million in 2012, and a net profit of HK 8.3 million in 2013 and HK $ 23.4 million in 2014, the profits being attributable to the fact that the Licence Agreement was beneficial in cash flow terms with overheads such as distribution costs and administrative expenses decreasing from 2012 onwards by more than 60%. Mr Tan had accepted that in net profit terms if the License -derived income was looked at as a segment it had been running at a loss over the 2012 to 2014 period. But this was not out of line with the performance of similar segments in comparable companies. The Chief Justice thought that Mr Tan made the case that the Licence Agreement was not a commercially outrageous or irrational agreement in a convincing manner. It provided steady income and had 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.

26 The Chief Justice said this [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)"*	[Figures in HK$]

27 The adverse net profit figures were reached after taking into account depreciation. The Chief Justice did not accept that an adjusted EBITDA or Net Cash Generated from Operating Activities analysis was as relevant to share value and the interests of minority shareholders as a net profit measure. He inferred from Mr Tan's evidence as a whole [99]:

> "*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 2011 than before* [sic] *from the standpoint of its minority shareholders. The transaction was <u>in a general sense</u> commercially prejudicial to the Petitioner as a minority shareholder."*

[Emphasis added]

At [102] he observed that "*minority shareholders <u>generally</u> have been commercially prejudiced by the status quo after the veto, and impliedly by the License Agreement as well.*" The Chief Justice accepted [171] that the Petitioner had not proved that the terms of the Licence Agreement were wholly uncommercial. But he found that the Agreement was more favourable to the Kingboard Group than to the minority shareholders of the Company in that the profits of the Company declined and no dividends had been declared since the Licence Agreement was consummated four years before the trial; and that since then the Company's ordinary business operations had effectively been in limbo.

28 In relation to (b) the Chief Justice referred to the tests found in two cases upon which both counsel 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)

29 The Chief Justice found [106] that in terms of commercial strategy both sides had clearly resolved after the filing of the Petition to make no <u>open</u> negotiation or settlement initiatives and to stand or fall by the outcome of the present proceedings. In [112] he found that between 29 April 2011 when the IPT Mandate was blocked by the Petitioner and 3 August 2011 when the Harvest Licence Agreement was signed neither the minority nor the majority shareholders initiated any (or any <u>open</u>) settlement proposals and that no or no <u>open</u> proposals aimed at securing minority shareholder support for the IPT Mandate, or otherwise resolving the impasse, had been made post-Petition either before or after the Respondents' unsuccessful strike-out application on 16 January 2012.

30 The Chief Justice also made a number of findings as to the formation of the idea of a Licensing Agreement. He found [150] that any answer to the question whether Harvest was incorporated on 11 March 2011 as part of a premeditated plan to implement the License Agreement in the event that the IPT Mandate was vetoed was speculative but that the Company's management quickly formed a fixed view that the licensing option should be pursued without any or <u>any demonstrable</u> assessment of which option (licence plan or negotiating with shareholders) would be most commercially fair to the shareholders as a whole:

[126]. The idea of the Licensing Agreement as the preferred response had already been formed before Allen & Gledhill's note of 4 May 2011.

31 In that Note Option 2 was a licensing agreement. In relation to that option the Note recorded:

> *"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."*

32 The Chief Justice recorded [111] that the Petitioner relied heavily in the fact that the Company was advised by Allen & Gledhill 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. [sic] *It would view the transaction as an interested person transaction and accordingly, subject the transaction to the interested person requirements under the Listing Manual."*

Unfairness – The Chief Justice's Findings

33 The Chief Justice said that he had "*little difficulty*" in finding the Respondents' broad response to the IPT Mandate veto was unfair [117]. The *raison d'etre* of the Listing requirement - that minority shareholders be required to approve interested persons' transactions in a vote in which the majority were disqualified from participating - was to impose an effective check on the power of the majority to, in effect, transact with themselves on unduly favourable terms [118]. For the majority shareholders to be 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 related to the "*bread and butter*" of the Company's business activities and the majority shareholders were as a practical matter 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 were commercially acceptable.

34 The general response of the Respondents to the blocking of the IPT Mandate on 29 April 2011 was, the Chief Justice held, based on a misconceived view of what their duties of fairness required in practical terms. As to that, he said:

"*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."*

35 In the Chief Justice's view fairness in this distinctive context fundamentally required the majority shareholder promptly to initiate negotiations with minority shareholders with a view to resolving the impasse and generally to have regard to the best interests of shareholders as a whole when considering how to respond to the IPT Mandate veto [120]. He found it surprising [122] that the Note was silent on the duty of fairness itself rather than options for responding to the veto. It did not emphasize the duty of management to respond in a way that minimised prejudice to minority shareholders for whose protection the Mandate existed. He found [122] that the directors, other than the independent directors, to the extent that they sought relevant advice at all acted on a mistaken view of the law and were either negligent or guilty of conduct bordering on wilful blindness in failing to obtain explicit advice as to what overarching duties they were subject to (namely to respond to the veto in a manner which was commercially fair to the minority shareholders) in the aftermath of the IPT Mandate veto. All of that was, however, entirely understandable if management had already conceived the Licence Agreement as the preferred and primary response to the IPT Mandate being blocked.

36 In short, he found [127] that the Company's management gave inadequate consideration to any option to resolving the impasse after April 29 2011 other than the licensing option and [128] that objectively viewed there was a very serious disregard of the management's duty to have regard to the interests of the minority shareholders when responding to a legitimate exercise by those shareholders of the veto right confirmed by the Company's constitution [128]. The licensing option was essentially preferred because it was the best means of securing the commercial interests of the Kingboard Group [129]. The Licensing Agreement was implemented in order to achieve indirectly substantially the same flow of copper foil to Laminates after April 29 2011 as Laminates received from the Company before the IPT Mandate was blocked [130]. If the Court were to find that nullifying the Company's and the SGX's central protective mechanism for minority shareholders in relation to interested person's transactions did not amount to oppressive or prejudicial conduct it would be impossible to imagine what conduct would amount to oppressive or unfair conduct in the requisite statutory sense [130].

37 Noticeably, he said, the Allen & Gledhill Note contained two important caveats which were 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"*

38 In an important paragraph [132] the Chief Justice said this:

"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 on a transparent basis 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."

39 The Chief Justice rejected any suggestion that it was reasonable for the Respondent to keep the Licence Agreement in place until the present proceedings were determined and that the Petitioner's conduct in filing and pursuing the Petition was the predominant cause of any prejudice that flowed from the licence to Harvest; or that it was incumbent on the Petitioner to

initiate any negotiations aimed at breaking the impasse and that its failure to do so broke the chain of causation between the entry into the Licence Agreement and the prejudice of which complaint was made. He thought such arguments might have validity in the context of a quasi-partnership dispute between two shareholders of equal weight but that it would be running a coach and horses though the fabric of section 111 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 empower an otherwise disempowered majority.

40 The Chief Justice described the Respondents as having freely chosen to adopt "*an unbending, high risk 'winner takes all' and/or 'hardball' strategy*" [137]. They adopted a legally flawed approach to the "Company's constitutional duties of fairness in an entrenched manner and for a considerable period of time.

41 Looking at the evidence in the round the Chief Justice found that [163]:

> "*…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. …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."

42 At [175] the judge referred to 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".*

43 In his findings at [170] the Chief Justice found the following allegations in the Petition proved:

> "*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…

44 He accepted that it would have been worse for the Company had the sales to interested parties, in particular Laminates, simply stopped and no alternative from of revenue was quickly found. However, the Licence Agreement was more favourable to the Kingboard Group than to the minority shareholders of the Company in that profits declined and no dividends had been declared since the Agreement was made and the Company's ordinary business operations have been in limbo. The actions of the Company clearly signified [172] that the majority shareholders did 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 Supplier Agreement; and*
>
> *(d) their actions further demonstrate the majority's willingness to lease out the Company's principal business operations on commercial terms which demonstrably prejudiced the minority shareholders rather than seek a negotiated solution for their concerns"*

45 Such conduct, he held, fell very clearly into the category of oppressive or prejudicial conduct. At [184] he said:

> *"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 [shares] without suffering a loss which was materially contributed to by the improperly implemented and/or continued licensing arrangements".*

Discussion

46 The facts and circumstances of this case- the first in this jurisdiction in which a section 111 petition has succeeded at trial - form an unusual context in which to consider the application of the section. What the Chief Justice described as the constitutional duties of the Company were designed to afford protection for minority shareholders whose approval was required if the Company was to supply copper foil to interested parties. But the weapon given to the minority shareholders as a group had a certain nuclear quality in that, if the Mandate was vetoed, the Company could not sell to any such party. The bulk of the foil which the Company manufactured was sold to Laminates, an interested party, and substitute customers for copper foil would be hard to find since, as the Chief Justice found [88], major market players are often vertically integrated (as was the Kingboard Group) and often found themselves heavily dependent on their "*internal*" supplier. Inability to supply an interested party would thus be likely to deprive the Company of anyone to take most of its production.

47 The Petitioner pressed the nuclear button by vetoing a new Mandate. If neither the majority nor the minority shareholders did anything that would produce the worst of all worlds: no sale to any interested parties; precious little to non-interested parties, and no Licence Income. If there was a Licence Agreement with Harvest, which would then supply Laminates, the Company would at least enjoy the HK $ 10,000,000 per month fee. But the majority shareholders would have procured a situation where the Company was able to supply Laminates, via Harvest. The Company would get no price for the foil from Harvest. The minority shareholders would get no economic benefit derived from such price and would have no ability to withhold their approval to the terms of supply of the foil. The effect of refusing the Mandate would thus, if nothing else happened, mean that the exercise by the minority shareholders of a right of

approval or veto given for their protection would, if they chose the latter course, bring the system for their protection to an end.

48 The Chief Justice decided that the Respondents had caused the affairs of the company to be conducted in an oppressive or unfairly prejudicial manner because they had not gone down the path of negotiation. But, as is apparent from [132] of the judgment – see paragraph 38 above - he thought that the Petitioner could have no complaint if the Licence Agreement had been entered into (i) on a transparent basis; (ii) as a truly interim measure; and (iii) the Company's management had promptly initiated bona fide open negotiations in which commercially reasonable proposals were openly tabled with a view to persuading minority shareholders to approve the IPT Mandate.

The Appellants' Submissions

Prejudice

49 Mr Wong SC, for the Respondents other than the Company, submits that the making of the Licence Agreement must be seen in the context in which it arose. The veto of the Mandate was, on the Chief Justice's findings, based on a misconceived allegation of improper transfer pricing, a complaint which, as the judge found was more an instrument of commercial pressure to prevent an investment going bad than a full-blown minority oppression complaint.

50 The Company entered into the Licence Agreement to avoid the much worse situation which would have arisen if the veto stood and nothing else was done. Mr Lo, the Company's Chairman's right hand man (but not a director), had explained in his affirmation of 10 February 2015 that no new customers could be found to purchase the quantity of copper foil which had previously been purchased by interested persons. Harvest was the company which, out of three potential licences, offered the highest monthly licence fee as well as a one month termination provision not offered by the other two. That notice provision

meant that the Licence Agreement was an interim one. Mr Lo explained that the ability to terminate at short notice suited the Company's commercial objective which was to consider the appropriate action to be taken in order to address the 2011 veto. The terms of the Licence Agreement were, he said, designed to preserve the status quo by providing that Harvest must keep the properties in good repair, protect the properties and machinery against damage, repair defects in machinery or properties and deliver up the properties in their original state on termination. The Company only seconded its employees to Harvest and was thus able to take them back if a Mandate was passed.

51 Moreover, it would always have been open to the minority shareholders to approve a Mandate at any time. In his affirmation Mr Lo said in terms:

> "*126 Indeed, if the Petitioner were willing to consider not to veto a fresh IPT Mandate, the Company could, with the Petitioner's cooperation reconvene a General Meeting with a view to reverting to the situation prior to the 2011 Veto. This should be possible given the flexibility built into the Licence Agreement. This is consistent with the Company's willingness to work with institutional investors all along in order to realise long term value".*

We were told, and Mr Woloniecki for the Petitioner accepted, that the Petitioner had been invited to approve a new Mandate before and after the Petition. It could at any time have indicated that it was prepared to do so.

52 Mr Wells in his evidence confirmed that the Petitioner had been asked to reverse the veto. He was asked whether he would vote in favour of a Mandate if the Court were to rule that there was no improper transfer pricing. He said that he did not think that it would be in the Petitioner's advantage to make that decision without "*any other variables or commitments or assurances of some*

kind of market pricing other than artificial pricing". The option of granting a Mandate, i.e. going back on the veto, was repeatedly put to the Petitioner before and after the Petition and up to trial. The Mandate which they had vetoed provided for arm's length pricing. So the Petitioner was not left wholly without remedy.

53 Mr Wong submits that the Chief Justice was simply wrong to find that any commercial prejudice was caused to the Petitioner. The sole complaint of prejudice made in the Petition was as follows:

> *"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."*

54 The paragraphs in his judgment in which, alone, the Chief Justice considered commercial prejudice were [92] – [102]. I have summarised [95] and [96] in paragraphs 25 and 26 above. The central flaw lies in a comparison between Scenario 1(the position if the Mandate had been approved) and Scenario 3 (the Licence Agreement position). The veto happened. Scenario 1 could not, therefore, apply. The relevant comparison is between Scenario 2 (no Mandate and no Licence Agreement) and Scenario 3. The Chief Justice's statement that the transaction was "*in a general sense*" commercially prejudicial to the Petitioner as a minority shareholder depends on a comparison between what did not happen (approval of the Mandate) and what did happen (the Licence

Agreement after the veto.) The Licence Agreement mitigated a detriment that the Company had suffered as a result of the veto.

55 The Petitioner, on whom the onus lay, adduced no evidence that, in the light of the veto, it suffered loss because of the Licence Agreement. It was not suggested that there was some better alternative to Harvest. The Petitioner's expert was not asked to express any opinion on the impact of the Harvest Agreement on share value and said nothing about the commercial nature of the Licence Agreement. The Respondent's expert, Mr Tan, expressed the view that "*all in all*" the Licensing Transaction was "*a commercially sensible position following the veto of the IPT Mandate in April 2011*"; and that it was a *"commercially prudent option" to enter into it; and a "balanced reaction to the sudden loss of its largest customer"*. In the absence of any expert evidence to the contrary there was no basis to reject that conclusion.

56 This was all the more so when the Chief Justice had (i) rejected the Petitioner's case that "*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*" – Paragraph 62 of the Petition which the Chief Justice did not find was established; (ii) described the monthly licence fee at one point [247] as "*generous*"; and accepted [99] [130][171] that the 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.

57 Accordingly, the Chief Justice's findings on commercial prejudice cannot stand and the Petitioner's claim fails at first base.

Discussion

58 I accept that, if the question is whether, given the veto, the Licence Agreement worsened the position of the Company, the answer is plainly that it did not for the reasons adumbrated by Mr Wong. But, in my view, there still remains for consideration whether, in the light of the situation that was reached after the veto and the Licence Agreement that followed it, what the Company did or did not do amounted to oppression or unfair prejudice. As a result of the veto and the Licence Agreement the Company was in a worse state than it was before the veto. As the Chief Justice found [171] its ordinary business was left in limbo, its profits declined and no dividends were declared. Contrariwise the Kingboard Group was able to carry on business much as before, with copper foil provided by Harvest by the use of the Company's facilities.

Unfairness

59 Mr Wong submits that the Chief Justice should have found that there was no oppression or unfairness and in particular that he was wrong to impose two conditions for the implementation of the Licence Agreement namely that the Company's management had promptly to initiate bona fide open negotiations and should implement it as a truly interim measure. Mr Woloniecki, for his part, submits that the continuation of the Licence Agreement was oppressive because it trampled on the right of the minority to veto sales to Laminates and that, in the circumstances, it was entered into otherwise than as a temporary measure.

60 The Chief Justice's thorough and careful decision is, in my view, open to several objections. The first is that the contention that there was unfairness or oppression on the ground of a failure to open or conduct negotiations was both unpleaded and unargued at trial. The contention of the Petitioner below was that the Licence Agreement was a sham, and the Chief Justice rejected that.

There was no alternative argument pleaded or put that there was unfairness or oppression in implementing the Licence Agreement because of a failure or unreasonable refusal to initiate or participate in negotiations or because the Licence Agreement was not an interim measure. It was not suggested that the Licence Agreement was never intended to be interim. Nor was it pleaded or put that there was unfairness or oppression because the Company did not agree to an independent review of past transactions to see whether they were at arm's length (a possible course ventilated by Mr Woloniecki in argument before us but not below).

61 As a result there was no evidence as to how much negotiation had occurred. It is apparent from a passage in the cross examination of Mr Lo, which I set out in paragraphs 70 – 71 below that there had been without prejudice negotiations between Pope II and the Company. Mr Woloniecki accepted that that was the case. When the judge said that there were no or no open proposals he was only correct as to the latter. In [132] the Chief Justice suggested that immediate *open* negotiations would have removed unfairness. But it cannot be the case that fairness requires that any negotiations must not be without prejudice; especially when negotiations would usually be on that basis. To say that there was unfairness in failing to initiate or conduct negotiations when the Court knows that there were some negotiations but not what caused them to fail would, itself, be unfair.

62 The second is that no authority supports the proposition that the majority shareholders had a duty to open up negotiations. That is not necessarily a bar. These are unusual circumstances. But a determination that there has been unfair prejudice or oppression needs to rest on a principled foundation – see *Latimer Holdings Ltd v SEA Holdings NZ Ltd* [2005] 2 NZLR 328 at [64] – "*against which the commercial world and its advisers can measure conduct*". If there was a duty to open negotiations, with the Licence Agreement being an

interim measure, it is necessary to know the nature and extent of that duty. Paragraph [132] of the judgment appears to suggest that it would be sufficient to make commercially reasonable proposals with a view to persuading minority shareholders to approve the IPT Mandate on "*marginally more favourable terms*".

63 That paragraph begs a number of further questions. First, it is not clear to me what sort of proposals the Chief Justice had in mind. When I asked Mr Woloniecki what he thought the Chief Justice had in mind he suggested that it was some sort of "fudge". I do not hold him to that figurative expression but it is illustrative of the imprecision involved. Second, if the manner in which the Company had conducted business in the past was not unfair, as the Court has now held, why was there an obligation to offer something better or marginally better? That would be likely to prejudice the majority. A duty to offer something better in those circumstances runs the risk of shareholders voting irrationally in order to exert commercial pressure on the majority. The Chief Justice himself had recognised that the preferential transfer pricing complaint, itself, emerged as an instrument of commercial pressure [84] and rejected as incredible Mr Wells' refusal to admit that part of the reason for Pope II buying further shares after the privatisation offer was declined was because it wanted to be able to press the nuclear button of blocking the IPT Mandate [84]. Further, how far was the Company, faced with a veto on doing any business with Laminates, bound to go? What if the minority shareholders disagreed with each other?

64 Next, the Licence Agreement was, in its own terms, an interim measure since it was terminable on a month's notice. The Licence Agreement could only cease to be interim if either a new Mandate was approved or some agreement was reached. Neither of these events were wholly in the Company's hands.

65 The next problem is that the finding of unfairness on account of a failure to open or conduct negotiations leaves open the question of their likely fate. I find it difficult to think that there was oppression or unfairness if the negotiations would not have succeeded. Both the duty to negotiate and the requirement that the Agreement should remain as a truly interim measure appear to have assumed that the Petitioner would, upon being given a reasonable offer by the majority shareholders, come to an agreement on renewing the Mandate.

66 In the light of the fact that these proceedings are continuing it is apparent that such negotiations as there have been have proved fruitless for reasons which are unknowable. What is known is that the Petitioner held the strong belief that the Company's affairs had been conducted in an oppressive or prejudicial manner to an extent which triggered an entitlement to relief under section 111. The Chief Justice held [32] that such a belief arose at the very latest by 3 August 2011. The Petitioner took the view that the historic transactions were oppressive to the minority shareholders and, as he put it, adopted *"aggressive tactics designed to achieve a favourable buyout in the lead up to 2011"* which were "*perhaps counter-productive*" [175]. The majority shareholders maintained the opposite. The Petitioner maintained its complaint all the way to trial despite the clear ruling by the Chief Justice in the strike-out decision that the complaints regarding the pre-2011 transactions, standing by themselves, disclosed no reasonable cause of action.

67 In those circumstances, it must be doubtful whether any negotiation could have resulted in any progress short of a determination by the Court that the transfer pricing allegation was unsubstantiated, unless the majority shareholders were willing to proceed or negotiate on the basis that the alleged transfer pricing allegation was accepted. Since the Chief Justice ruled in their favour on this point there is no good reason to hold that they ought to have been so willing.

68 Even a determination by the Court might be insufficient. Mr Wells' evidence was that he would not renew the Mandate even if the Court found against the Petitioner on the unfair transfer pricing.

Epithets

69 The Chief Justice, in rejecting any argument that it was incumbent on the Petitioner to initiate negotiations aimed at breaking the impasse appears to have taken the view that the minority shareholders were the victims of oppression when refusing "to *find that the burden was placed on the victim to persuade the 'oppressors' to end the oppression*" [134].

70 At [168] the Chief Justice said:

> "*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:*
>
> *"Q. And at no time has the company attempted to seriously address my client's concerns and those of other minority shareholders by negotiation?*
>
> *A. So, you are suing me right now -- since the petitioner is actually suing our company now, how are we going to conduct a negotiation during this process?"*

71 The did not, however, cite the entire exchange. After the words quoted above the cross examination continued

"Mr Wong: My Lord, without branching into a territory which I should not branch into, I don't think it's right for my learned friend to put a proposition that there's no negotiation between the parties into court in the meantime.

Q Let me put it this way, was there any serious negotiation before we issued these proceedings?

Mr Woloniecki: My friend is quite right to slap my wrist on that one."

Day 4 790-1.

As is apparent from that exchange and as is accepted there has been without prejudice discussion, at any rate after the Petition.

72 Insofar as the Chief Justice's findings (i) that the Company or the majority shareholders were the *oppressors* and the minority were the *victim*, which was being *punished* by management; and (ii) that the Respondents had chosen to adopt an unbending high risk "winner-takes -all" and/or hardball strategy were based on a failure to negotiate they cannot, in my view, stand. Insofar as they were based on a failure to put an end to the Agreement unilaterally they cannot be right since it would have run contrary to the interests of the Company to put an end to the Agreement without the Company having any entitlement to supply interested parties, which it could only do if the minority afforded it a Mandate, which the Company invited the minority to grant. It was not suggested in the Petition, nor was it put, that the purpose of entering into the Licence Agreement was to punish the minority; and the judge accepted at [171] that the Company would be worse off without it. The fact that, whilst the Licence Agreement lasted, the majority shareholders would be better off than the minority does not turn them into oppressors.

73 As I have said, the result of the veto and the Licence Agreement was that the minority shareholders were in a worse state than they were before the veto. Mr Woloniecki submitted that in circumstances where there have been without prejudice discussions and it was impossible to say whose fault it was (if anyone's) that the impasse has not been resolved, and where the Licence Agreement is only justifiable as a temporary measure, the equitable solution is for the court to grant relief under section 111 and order a buyout of the Company's shares. It was, he submitted, looking at it objectively, unfairly prejudicial to the minority and oppressive for the position to remain as it was, with the minority shareholders locked in to the Company in its present state of limbo, with a depressed share value, no dividends and no end in sight. The minority had exercised their right to veto a Mandate, for reasons which the court cannot determine, after the resolution to appoint an auditor to investigate historical internal transfer pricing had been voted down. That was their only means of applying commercial pressure and they should not, having exercised this right, be left in limbo. To do so would deprive the right of all benefit.

74 This was not the approach adopted by the Chief Justice who, as it seems to me, found unfairness in the failure to carry out prompt negotiations in relation to the terms of trade. I am, also, not persuaded that it is one which we should now adopt. The Petitioner asserted that there had been unfair transfer pricing. It launched a Petition on that basis. It exercised its right to complain that it had been unfairly treated on that account. It failed to establish its complaint. It did not have to vote down the Mandate (which only authorised arm's length pricing). But it chose to do so. I accept that we cannot tell what was the rationale of those minority shareholders outside the Pope II camp, although it seems likely that some of them shared Pope II's views. But it is clear that, for the Pope II camp, "*the preferential transfer pricing complaint emerged … more as*

an instrument of commercial pressure" and the veto was a continuation of that pressure.

75 This produced the result that the Company could not carry on as before (even with arm's length trading). That itself was a high-risk strategy and a form of hardball. The impasse resulting from the failure of negotiations could have been resolved if the Petitioner had caused the Mandate to be renewed, a matter which, on the judge's findings, was, in practical terms something which Pope II could procure, at any rate after July 18 2011. Mr Woloniecki said that it was not incumbent on the minority just to admit that they had lost and fold up their tents. But the fact of the matter is that the Petitioner had lost the first part of the complaint and it and Pope II could have accepted the suggestion that a fresh Mandate be granted, and could do so even now. Mr Woloniecki said that, if they did that, there would be no guarantee of any dividends; but there would be no guarantee anyway. Whether to declare a dividend is a management decision.

76 In those circumstances I do not regard it as unfair or oppressive for the Respondents not to buy out the minority. The minority did not have to veto. It could have limited itself to a transfer pricing complaint. Having exercised the veto, it could resolve the impasse by renewing the Mandate. It was not left wholly without remedy. What it wanted, of course, was to be bought out. But that is not something that the Company was obliged to do or the Respondents to procure. Nor is it the function of the Court to provide an exit route from a company unless it has found oppression or unfair prejudice.

77 The strongest points in the Petitioner's favour were well put by Mr Woloniecki. They were, firstly, that the Company had made misleading announcements to the effect that there was no previous connection between Harvest and Kingboard and that it was only during the course of the trial, with the evidence

of Mr Zhou of Laminates, that it was admitted that Harvest was selling copper foil to Laminates. He drew attention to the following findings in the judgment. In [151] the Chief Justice found that Harvest was far from a truly independent entity because the Company must have been confident that Harvest would be able to pick up with Laminates as its main customer, otherwise the Agreement did not make commercial sense. In [153] he regarded it to be of no assistance to the Company that Mr Lo suggested that any knowledge of his concerning the Licence Agreement being used by Laminates as a means of re-opening the flow of copper foil from the Company should not be imputed to him in his capacity as an employee of the Company. In [152] he found it impossible to believe that when Mr Cheung Kwok Ping, a director of the Company and of Laminates, who was "*conveniently unavailable for cross examination",* approved the decision to enter into the Licence Agreement he did not appreciate that this was a means to source copper foil for Laminates. In fact, he knew that Harvest was favoured by Laminates because it would be able to fill the supply gap created by the blocking of the Mandate [158]. Mr Lin was well known to senior employees of the Group and in those circumstances the Audit Committee's vetting process involving Deloitte certifying that Harvest had no ownership connection with the Kingboard Group was a largely academic exercise ("*a red herring with whale size proportions*"). In [154] he found assertions in Mr Lo's affirmation that the Company was ignorant of who the customers of Harvest were to be incredible. The suggestion that the Licence Agreement transaction was entered into with a wholly unconnected party beggared belief [155]. He rejected the suggestion that management was unaware of any discussions between Laminates and Harvest and that the Kingboard Group could readily access copper foil elsewhere [156]. In [161] he found that Mr Cheung Kwok Wing, the Chairman must have known that Harvest's main customer would be Laminates.

78 The Chief Justice found [158] that the Company had made various misrepresentations including 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".

79 This attempt to conceal the position in respect of Harvest until the trial does not reflect well on the Company or the Kingboard Group. The Chief Justice acquitted the majority shareholders of outright dishonesty; but said that they had caused the Company to "*flirt with deception*" [163]. Mr Woloniecki submits, with some force, that, if there was not something fishy about the arrangements, why did those concerned attempt to paint this "*alternative reality*" and cover up the connection with Mr Lin. The Company, for which, after the Licence Agreement, there was no incentive to change the status quo, should have attempted constructively to engage with all the minority shareholders and addressed their concerns. There was no easy solution but the knee jerk reaction was oppressive. The exercise of the veto, the minority's only means of exerting commercial pressure, deserved a response as the judge found [164]. What they did was to nullify the only real right – the veto – which the minority had.

80 I see the force of those submissions. But they face a number of obstacles. First, as I have said, there were in fact without prejudice discussions. Second it was not suggested that the unfairness or oppression was constituted by a failure to negotiate. Third, given that the Harvest Licence Agreement was not a sham, the fact that Mr Lin had links with Kingboard and was its "friend" loses much of its significance. If an arrangement was to be made which enabled the Company to have some earnings and Laminates to obtain supplies of copper foil the likelihood is that some "friend" would be required for that purpose.

Circumventing the SGX Rules

81 The Chief Justice regarded the Company as having violated the spirit of the Rules. However, as the judge recorded at [109] Mr Woloniecki had made it clear at an early stage that the Petitioner abandoned any attempt to prove any of the breaches of the rules alleged in the Petition; and no cross examination was devoted to the topic. The case that was sought to be put was that the Licence Agreement arrangements were a sham or a front. As Mr Woloniecki put it "*We are not going to go into the minutiae of the listing rules*". He confirmed to the Chief Justice that the point that the Licence Agreement was actually a sham and that Harvest was fronting the Kingboard Group was the only point he intended to take in this respect: Day 1, pp 219-220.

82 The Licence Agreement contained the following provisions

> *"2.2 The Licensor's grant of the Licence shall be subject to any regulatory approval required by law or any regulatory body or the rules of any recognised stock exchange in respect of this Agreement and/or the grant of the Licence pursuant to this Agreement, having been obtained from the appropriate government, governmental bodies, other regulatory bodies or any recognised stock exchange in terms satisfactory to the Licensor*

and such regulatory approval remaining in full force. In the event such regulatory approval is not obtained or if granted is subsequently revoked, this Agreement shall terminate with immediate effect".

83 On 31 August 2011, a representative of the SGX emailed Allen & Gledhill saying that she had noted from the announcement of 3 August that the Company was subject to any regulatory approval required. She asked what regulatory approval had to be obtained. A partner in Allen & Gledhill replied to say that no regulatory approval was currently expected to be required in order for the Company to enter into or implement the licensing transaction. The SGX does not appear to have expressed any disagreement then or in the succeeding years. It was not submitted or established that Harvest was an interested person for the purposes of the Rules nor does it appear to have been one.

84 In effect, faced with the problem created by the veto the Company took steps, which have not been shown to be contrary to the Rules, to address it. In that it found a way of carrying on without breaking the Rules it could be said to have found a way round them. But I cannot regard it as oppressive or unfairly prejudicial for the company to have done so.

Allen & Gledhill's advice

85 The Chief Justice regarded the Note from Allen & Gledhill as one which considered possible actions without addressing the obligations owed by the Company in the circumstances. The Advice in its final form set out 5 options:

(i) Kingboard Chemical and the Company placing orders under the 2010 Mandate before its expiration (on 29 April 2011) as an immediate measure to meet operational requirements;

(ii) leasing unused manufacturing equipment;

(iii) negotiating with, buying-out, or diluting the shareholding of the Objecting Shareholders;

(iv) canvassing the other shareholders to vote in support of the IPT Mandate;

(v) Kingboard Chemical Holdings taking steps to privatise the Company.

In an earlier draft of 28 April 2011 item (ii) had not featured. It was then inserted at the suggestion of management.

86 In relation to (ii) Allen & Gledhill advised that there were no express requirements in the Listing Manual restricting or prohibiting the Company from entering into the proposed leasing arrangement but that the SGX-ST should be consulted on the proposed leasing arraignment before it was implemented. The Note added:

> *"5.3. On the assumption that the Company will want to revert to its current business model, the proposed leasing arrangement is an interim measure to allow the Company to earn rental income while it considers how it can deal with the fundamental issue of the Objecting Shareholders voting against the renewal of the IPT Mandate".*

87 In relation to Option 3 the Note read:

> *"8.1. The Company could consider approaching the Objecting Shareholders to ask them to vote on, or not to object to the*

renewal of the IOT Mandate if it is subsequently put before the Shareholders again.

8.2. *The intent of such approach would be to impress upon the Objecting Shareholders that the business and financial position of the Company will be adversely affected if the IPT Mandate is not renewed, which will in turn affect the share price of the Company and that the actions of the Objecting Shareholders are counterproductive and will essentially have a negative impact on the value of the shares they hold in the Company.*

8.3. *It is likely that the Objecting Shareholders are already aware of the potential consequences of their actions and their actions may be intended to pressure the Company to engage with them and address their concerns. Given the previous allegations and demands of the Objecting Shareholders, it is likely that their current actions are intended to seek some form of financial payment or for their shares to be bought out"*

88 I do not regard this Note as justifying a conclusion that the Company was acting in an unfair or oppressive way; nor was it pleaded that a failure to follow it was unfair conduct. The Chief Justice described the Note as containing two important caveats which the management effectively ignored. The first was that the licensing option was "*said to be a viable option, but only as an interim solution*". That is not, however, quite what the Note says: see paragraph 86 above. The second was that 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. The actual terms in which that advice is contained are set out in paragraph 32 above. However, the Chief Justice rejected the claim that the Harvest Agreement was a sham.

89 In short it does not seem to me that there has been a "*visible departure*" from the standards of fair dealing "*viewed in the light of the history and structure*" of the company and the reasonable expectations of its members.

90 Accordingly, I would allow the appeal.

The Petitioner's Respondent's Notice

91 The Chief Justice declined to grant any relief to the Petitioner in respect of any shareholdings that were acquired after the presentation of the Petition [33] – and I infer that he intended that restriction to apply to any shareholders who purchased after the date of the Petition who had the same knowledge as the Petitioner as to the state of affairs of the Company. He held it to be "*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 the petition*" [35]. In so holding he applied the observations of Lord Steyn in *Bermuda Cablevision Ltd v Colica Trust Co Ltd* [1998] AC 198 at 212 G:

> "*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.*"

92 In the light of the view I have reached that the appeal should be allowed, it is not necessary to decide whether the Chief Justice was justified in limiting the relief that he granted to the Petitioner to shareholdings acquired before the presentation of the Petition. But, in my view, he was. It would, generally speaking, be inappropriate and unjustifiable to wind up a publicly traded company which was not carrying on business unlawfully on the just and equitable ground at the suit of a petitioner which had purchased its shares after, and in full knowledge of, the position complained of in the Petition. Accordingly, it would not be appropriate to grant section 111 relief as an alternative to winding up. Even if a winding up order was potentially available, I would not think it right to grant section 111 relief in this case in respect of such shares. I share the Chief Justice's view [32] that:

> *"a minority shareholder seeking discretionary financial relief on ultimately discretionary grounds ought [not] to be permitted, at its own volition, to increase its 'loss' and quantum of compensation after filing an oppression/prejudice petition"*

At the very lowest that was a view that he was, in the exercise of a discretion, entitled to take.

93 The Petitioner contends that the Chief Justice should have accepted the submission that "*what clearly amounted to betting on litigation [was] merely an extension of the litigation funding concept*". I regard the analogy as entirely inapt. Whether relief should be granted by reference to shares acquired after the date of the Petition would determine the extent of the recovery to which the Petitioner would be entitled. If there were third party funders they might be entitled to share in that recovery. But the need for third party assistance, not apparent in this case, could not affect the measure of recovery to which the Petitioner was entitled. A third-party funder may buy, as Mr Woloniecki put it,

"a piece of the action". But the minority shareholder is not entitled to increase the size of the action by claiming oppression as a result of buying shares in full knowledge of the current position; nor can he justify any attempt to do so on the basis that it is a means of funding himself.

The Application to Admit New Evidence

94 At the commencement of the hearing of the appeal Mr Woloniecki applied to admit fresh evidence in the form of an Executive Summary of a report made by Ernst & Young ("E & Y") in 2016. E & Y had been commissioned by the Company's Audit Committee in November 2011 to report on Interested Person Transactions and the operation of the Licence Agreement. The Report apparently existed in draft at the time of the trial but was not then produced.

95 In the event, it became apparent that the essential information which the Petitioner sought to derive from this report was the fact that Mr Lin was a director of two Chinese companies which were subsidiaries of Holdings. We refused to admit this evidence for a number of reasons. First, the fact that the companies in question were subsidiaries of Holdings was a matter of public knowledge and details of the directorships could have been obtained from the public records. Second, the relevant information, sent by the Company to E & Y, was disclosed prior to the trial. Third, it did not appear to us that the information was likely to have an important influence on the outcome of the trial or the appeal. It went to the strength of the link between Mr Lin and Kingboard, which the judge found established. The Company did not, on the appeal, seek to challenge the finding at [112] [5] that there was a close tie between Mr Lin and Kingboard Group. The new evidence did not support the contention that the Licence Agreement was a sham, which was the case being made. Any claim that it involved a breach of the Rules was abandoned.

Costs

96 The Chief Justice awarded the Petitioner 90% of its costs. The 10% reduction was to reflect the fact that the transfer pricing allegation failed. The Respondents submitted that this discount was far too small. We postponed argument on this issue until our judgment. If the appeal is allowed the point becomes moot; and the question of what order should, in the light of our judgment, now be made in relation to the costs here and below will have to be determined hereafter.

Signed

Clarke, JA

Signed

Baker, P

Signed

Bell, JA