BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHCV 2002/0154

IN THE MATTER of BVI Company No. 233879 ("COLLIO SA" formerly Named "OME LIMITED")

AND

IN THE MATTER of the International Business Companies Act, 1984 (as amended)

BETWEEN:

WB NOMINEES LIMITED

Petitioner/Applicant

AND

(1) The Company, COLLIO SA (formerly named "OME LIMITED")

(2) LEE GOLDSMITH

(3) EMILIAN SCHWARTZENBERG

(4) GILBERT P. WOOD

(5) MR BARBY

(6) BLUE RIBBON ASSETS LIMITED

Respondents

AND

CLAIM NO. BVIHCV 2004/0030

BETWEEN:

WB NOMINEES LIMITED

Claimant/Applicant

AND

BLUE RIBBON ASSETS LIMITED

Defendant/Respondent

Appearances:

Mr. Alan Griffiths, with him Mr. Michael Pringle for the Petitioner in Claim BVIHCV2002/0154, the Claimant in Claim No. BVIHCV2004/0030
Mr. Stephen Moverley-Smith, QC, with him Mr. Philip Kite and Ms. Keisha Durham for the First and Sixth Respondents in Claim BVIHCV2002/0154, and for the Defendant in Claim No. BVIHCV2004/0030
Mr. Kerry Anderson for the Third Respondent in Claim BVIHCV2002/0154
Mr. Elkinson, with him Ms. Dawn Smith for Mr. Donald Boulanger, an intended intervener in the Petition (Claim BVIHCV2002/0154)

2004: May 12
August 31

JUDGMENT

[1] **RAWLINS, J:** These cases are not consolidated, but they are quite closely related. Therefore, the Applications that came before the Court on both of them were heard together on this occasion for convenience and with the consent of the Parties. The Applications would be better appreciated against a brief background of the cases. First, however, it is necessary to provide a brief outline of the Applications.

The Applications

[2] Seven (7) Applications engaged the attention of the Court and the Parties. There are 2, however, which were filed by WB Nominees that are the subject of this Judgment. The Parties that were represented at the hearing consented to an Order that deemed the sitting proper for the hearing of both applications.

The 2 Applications in this Judgment

[3] The first in time is an Application in Claim No. BVIHCV 2002/0154. It prays for an Order to give effect to a Settlement Agreement into which WB Nominees entered with Collio and its then parent company, Blue Ribbon. The Agreement found expression in consent

provisions that form part of an Order that this Court made on 25th April 2003. Alternatively, the Application prays for a declaration that Blue Ribbon was not entitled to take any steps to effect a merger with Collio prior to the performance of the Settlement Agreement, and that any such steps are void and ineffective. Further and alternatively, the Application prayed for an Order setting aside the Merger Provisions on the ground that they were procured by fraud. These applications are contained in the first 4 prayers.

[4] This Judgment does not consider these applications. The first prayer raises issues that relate to specific performance which were not pursued by Counsel for WB Nominees. The other 3 prayers (2-4) are concerned with the validity of the Merger Provisions. It would have been ideal if these issues were canvassed early. They raise essentially the same issues that the Application by Mr. Boulanger raises. These issues were not canvassed at the hearing. The Order to this Judgment will contain directions that relate to them.

[5] The Application on the Petition also prays for an Order that Blue Ribbon should pay the costs of WB Nominees on the petition proceedings to date to be assessed if not agreed. It further prays for the release of the security for costs in the sum of US$50,000 that WB Nominees provided for Collio's costs, and the US$15,000 that it provided for the costs of Mr. Schwartzenberg, the Third Respondent. The Application also prays that there should be no order as to costs between it (WB Nominees) and Mr. Schwartzenberg, except that the latter should be ordered to pay WB Nominees costs on his (Mr. Schwartzenberg's) application dated 24th November 2002, which was unsuccessful. The costs and security for costs issues raised in prayers 5, 6 and 8 will be considered in this Judgment. Those that are raised in prayers 7 and 9 relate to Mr. Schwartzenberg. They will be reserved for report or for further hearing, if necessary.

[6] The second Application in time was filed on 5th March 2004 in Claim No. BVIHCV2004/0030. This is an Application for summary judgment on the claim. The prayer that relates to damages will be the focal point on this Application because this was the aspect upon which Learned Counsel for WB Nominees relied during the hearing.

The other 5 Applications

[7] There was an Application on behalf of Donald Boulanger to be joined as an intervener in the Petition. This was filed on 27th February 2004. On 20th April 2004, Blue Ribbon applied to stay this Application. It prayed that the stay should only be lifted if 3 conditions were met. One was that Mr. Boulanger should provide security for Blue Ribbon's costs on his Application to Intervene in the sum of US$7,875. The second condition was that Mr. Boulanger should pay outstanding costs Orders that were made against him on 23rd January 2002 and 26th March 2002, respectively. The third condition was that Mr. Boulanger should pay the costs of the Application for the stay.

[8] Mr. Boulanger's Application was stayed by an Order of d'Auvergne J. that was made on 5th March 2004. The stay was granted pending the payment of the costs in the 2 costs Orders and interest thereon; the payment of security for costs in the sum of US$5,000 and US$750 costs on the Application to Intervene. The Parties informed the Court that the payments were made. It therefore appeared that the purpose for the stay had fallen away because the conditions imposed by the Order of 5th March 2004 were satisfied. The stay was accordingly lifted.

[9] In his Application, Mr. Boulanger applied for an Order to set aside the Merger Provisions of the Order that this Court made on 25th April 2003. He states that he is a shareholder of Collio. The Application was made on various grounds. One ground is that he was not given any notification of the Plan of Merger or an outline of it as **section 77(4) of the International Business Companies Act, Cap. 291 of the Revised Laws of the British Virgin Islands, 1991**, requires. He states that any Order that the Court made, which deemed service on a member of any of the companies to the merger, is void and of no effect. Another ground is that he did not receive any notice of the Application for the merger or of the Order of the Court that granted leave for the merger. A third ground is that he did not receive any notice of a shareholder's meeting where the Plan of Merger was presented. He states, additionally, that he did not receive a copy of the Plan of Merger or any other relevant Court Order.

[10] Mr. Boulanger's Application was not heard because it was short served. It would have been necessary to give directions for the hearing of that Application.

[11] Finally, Solicitors for Blue Ribbon filed 2 Applications that Counsel for that company withdrew at the hearing because they had fallen away. The first in time was an Application dated 30th April 2004. This was an Application to strike out material that was allegedly based on without prejudice communications and discussions between the Parties. The material was brought into the documents that were filed for this hearing. The second was an Application that was filed on 6th May 2004. It prays for an adjournment of the hearing because of the filing of the alleged without prejudice material. Counsel for Blue Ribbon withdrew these Applications because the impugned material was redacted for the hearing, by agreement.

Background

[12] The Applications that are the subject of this Judgment were brought on the Petition and on the Claim that arose out of an Order that was made in the Petition proceedings.

The Petition Proceedings

[13] The Petition in Claim BVIHCV2002/0154 was filed on the 26th day of July 2002. It is supported by an Affidavit of even date that was deposed by Fergus Jeremy Anstock, Solicitor. The Petitioner, WB Nominees, prays that the affairs of the First Respondent, Collio, be wound up on the grounds that it is just and equitable to do so. It alleges that the affairs of Collio were being conducted in a manner that was contrary to the obligation of good faith it owes in equity to the Petitioner, and to the Petitioner's legitimate expectations. The main allegation is that in 2002, Collio sold its only substantial asset, Exclusiv, to News Corp. for about US$19 Million, but did not pay it (WB Nominees) its proportionate part then accruing (some US$458,800) based on its shareholding in Collio. Instead, it offered it US$100,000 for its entire shareholding.

[14] Blue Ribbon was joined as the Sixth Respondent on the Petition on its own application. WB Nominees also filed a Derivative Action in Claim No. BVIHCV 2003/0045 against Blue Ribbon and other Respondents. In this action, WB Nominees claims that the Respondents were responsible for the unlawful expenditure of the funds of the company to defend the Petition proceedings. It sought the restoration of the funds allegedly expended to the company.

[15] At the suggestion of the Court, WB Nominees, on the one hand, and Collio and Blue Ribbon, on the other, agreed to the Settlement contained in the Order. It was, in effect, an agreement under which they settled the Petition. Their Settlement Agreement was given effect in various paragraphs of an Order that this Court made on the 25th April 2003. Other paragraphs of the Order granted leave for the merger of the company and Blue Ribbon on the application of Blue Ribbon.

[16] There are some differences between the Order that was made and filed on 25th April 2003 and a Draft Order that the Parties apparently settled subsequently, but which, for obvious reasons, was not signed by the Registrar or filed. The filed Order was made and sent as an approved Draft to the Registry when it was made. The Draft was apparently sent to Solicitors for WB Nominees by Solicitors for Collio and Blue Ribbon subsequently and the Parties settled it.

[17] The un-filed Draft has all of the provisions of the Settlement Agreement in the first Part (paragraphs 1-4) and the Merger provisions in the second Part (paragraphs 5 and 6). The filed Order is not as well structured. It simply contains 7 paragraphs. Apart from the structure, there are 2 differences of substance. Paragraph 7 of the filed Order simply states "Liberty to apply", while its counterpart in the un-filed draft states "Liberty to apply to give effect to terms of settlement". The Transcript reflects that this latter was the intended provision. The second difference is that the filed Order contains a paragraph that the un-filed draft does not contain. It states; "The said merger should not be void by virtue of the provisions of Section 178 of the Companies Act, (Cap. 285)". The filed Order is authoritative and I have used it as such.

[18] As far as the consent aspect (the Settlement Provisions) of the Order is concerned, the recital to the Order records that the Parties agreed to the terms set out in the schedule to the Order. Paragraph 1 of the Order states as follows:

> 1. The petition herein be withdrawn upon the completion of the transfer of the shares in Collio SA ("Collio") referred to in paragraph 1 of the Schedule.

[19] The provisions of the Schedule state:

> 1. Blue Ribbon do procure the purchase of all the Petitioner's shares in Collio for the agreed sum of US$458,800.00 ("the Sum"). Completion to take place at the offices of the solicitors for Blue Ribbon whereupon the Petitioner will receive a banker's draft for the sum and the Petitioner will provide a dated but blank share transfer form, and the original share certificate.
> 2. Blue Ribbon will pay interest on the Sum for the period 4 July 2000 to 26 July 2002 at a call rate to be determined by LGT Bank, Liechtenstein.
> 3. Payment of interest under paragraph 2 above shall be made within one month of the closing of the transaction in paragraph 1 above.
> 4. The costs of LGT Bank shall be shared equally between the Petitioner and the Sixth Respondent.

[20] Paragraph 6 of the Order provides for the discontinuation of the Derivative Action by WB Nominees upon the completion of the transfer of the shares pursuant to the Settlement Agreement.

[21] Paragraphs 2, 3 and 4 of the Order provide for the merger of Blue Ribbon and Collio. These are not consent provisions. The merger provisions state:

> 2. The Court grants permission for the merger of Blue Ribbon Assets Limited ("Blue Ribbon") and Collio in accordance with the draft Articles and Plan of Merger exhibited to the affidavit of Hazelann Hannaway filed on 17 February 2002, such Articles and Plan to be executed by the First and Sixth Respondent, such merger to be effective on the date of registration of the Articles of Merger by the Registrar of Corporate Affairs pursuant to section 78 (1) of the International Business Companies Act.
> 3. The said merger shall not be void by virtue of the provision of Section 178 of the Companies Act (Cap. 285).

> 4. The Plan of Merger sent to the member of Collio pursuant to section 77(4) of the International Business Companies Act be deemed served on the member on the 14th day after posting."

Section 178 of the Companies Act, Cap. 285 of the Revised Laws of the British Virgin Islands, 1991 renders void a transfer of shares or an alteration in the status of the members of a company after the winding up petition is presented. The transfer or alteration would be void unless the sanction of the court is first obtained.

[22] Blue Ribbon moved immediately to effect the merger under the Merger Provisions of the Order. It submitted copies of Articles of Merger and a Plan of Merger to the Registrar of Corporate Affairs on 28th April 2003. However, original documents were executed on 8th May 2003, the date on which the Registered Agent of Blue Ribbon confirmed that it did not object to the merger. It was also on the 8th May 2004 that solicitors for Collio and Blue Ribbon submitted original Articles and Plans of Merger to the Registrar, by hand.

[23] The Registrar issued the Certificate of Merger. The Certificate states that the Articles of Merger were registered on 28th April 2003. It also states that Blue Ribbon is the surviving company. It was given No. 250487. Although "SECTION 76" appears at the top of the Certificate, it is obvious that the merger was effected under **section 77 of the International Business Companies Act**. **Section 77(8) of the Act** states that a certificate of merger that is issued by the Registrar is prima facie evidence of compliance with the Act in respect of the merger. This is a rebuttable presumption.

Claim No. BVIHCV 2004/0030

[24] WB Nominees brought Claim No. BVIHCV 2004/0030 against Blue Ribbon on 27th February 2004. It claims that Blue Ribbon has breached the Settlement Agreement. WB Nominees claims US$458,800 under the purchase obligation in the Settlement Agreement contained in paragraph 1 of the Schedule to the Order. Further or in the alternative, it claims the said sum as damages for breach of the purchase obligation. Alternatively, it claims damages for breach of an implied term of the Settlement Agreement. WB Nominees states that it is an implied term, which is necessary to give the Settlement

Agreement business efficacy, that Blue Ribbon should do nothing to put an end to the state of circumstances under which the Settlement Agreement could be performed. Further or alternatively, WB Nominees claims the said $458,800 pursuant to Clause 5(b) of the Merger Provisions. This is the "fair value" provision of the Plan of Merger. It states:

> "5. The manner and basis of converting the shares of Collio into shares of Blue Ribbon or other property shall be as follows: (b) each share in Collio held by Blue Ribbon on the effective date shall be cancelled. Each share in Collio held by the Minority Shareholders on the effective date shall be cancelled and converted into a right to fair value for those shares."

WB Nominees has insisted that the fair value for its shares is the agreed settlement sum of $458,800.

[25] Further or alternatively, WB Nominees claims an Order for the performance of the interest obligations under the said Agreement or damages for breach of the interest obligations. WB Nominees also seeks an Order for the rectification of the Settlement Agreement; an Order setting aside the Merger Provisions of the Order of 25th April 2003 on the ground that it was procured by fraud; and an Order that Blue Ribbon should pay to it (WB Nominees) costs to be taxed on the indemnity basis if not agreed.

Summary Judgment

[26] I stated the legal principles that provide the bases for the grant of summary judgment in **Pentium (BVI) Limited and Landcleve Corporation v KPMG (British Virgin Islands) (a firm) and Others**, Claim No. BVIHCV2002/0122 (High Court, British Virgin Islands, 30th April 2003). I shall simply re-state them here briefly. Summary Judgment may be obtained under **Part 15 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000** (the Rules"). **Part 15.2(b) of the Rules** states that the court may give summary judgment on a claim or an issue if it considers that the Defendant has no real prospect of successfully defending a claim or issue.

[27] The use of the word "may" in **Part 15.2 of the Rules** does not confer an unlimited discretion upon the court. In **Swain v. Hillman and Another** [2001] 1 All E.R. 91, the

English Court of Appeal said that the salutary power of this Rule is to enable the Court to dispose summarily of claims or defences, which have no real prospect of being successful. (See per Lord Woolf MR, at page 92j of the Judgment). The Court said that the word 'real' is used to direct the court to determine whether there is a 'realistic' as opposed to a 'fanciful' prospect of success. The Court should not conduct a mini-trial. (See page 95b of the Judgment). **Part 15.5 of the Rules** provides that the evidence for the purpose of an application for summary judgment is to be presented in the form of affidavits in support of and/or in opposition to the application.

[28] The court should be cautious, however, since it is a serious step to enter summary judgment. It provides finality without the opportunity for trial on the merits with evidence tested on cross-examination. Yet, a Claimant is entitled to summary judgment if the Defendant does not have a good or viable Defence to a claim. This is in keeping with the overriding objective stated in **Part 1 of the Rules**. This rule enjoins the court to deal with cases justly, by, among other things, saving unnecessary expense and ensuring that cases are dealt with expeditiously. A Defendant cannot be permitted to continue a case on a defence, which offers no real prospect of successfully defending the claim.

This Case

[29] We have seen that the claim that WB Nominees brought in Claim No. BVIHCV2004/0030 is for damages for the breach of the Settlement Agreement in Claim No. BVIHCV2002/0154. The primary obligation that arose under the Agreement was that Blue Ribbon was to procure the purchase of the shares that WB Nominees held in Collio for the agreed sum of US$458,800. Blue Ribbon has interpreted this to mean that its obligation was to procure a purchaser for the shares. Clearly, however, this is not what the Agreement provided.

[30] At the hearing, Learned Counsel for Blue Ribbon, Mr. Moverley-Smith, QC, submitted that the words "procure the purchase of" are not clear. He said that Blue Ribbon was merely to procure a third party to purchase the shares. He said that this does not mean that Blue

Ribbon would itself purchase them. Rather, it was to procure someone to purchase them. With respect, however, I do not agree because this interpretation would equate Blue Ribbon's obligation with procuring a purchaser for the shares when the words of the Agreement do not state this. I agree with the submission that Mr. Griffiths made that the word "procure" placed a positive obligation upon Blue Ribbon to ensure or see to it that something was done to have the shares purchased. I think that the obligation required Blue Ribbon to ensure that there was a completed purchase of the shares for the agreed sum even if Blue Ribbon itself purchased them. The obligation that the words created denotes a personal obligation that Blue Ribbon undertook to ensure that the shares were purchased for the agreed sum (See **In re Royal Victoria Pavilion, Ramsgate. Whelan v F.T.S. (Great Britain) Ltd.** [1961] 1 Ch. 581.).

Did Blue Ribbon honour its obligation

[31] Blue Ribbon said that it honoured its obligation when it attempted to procure a purchaser for the shares, namely Danehill. There is a letter dated 10th April 2003 that is on Blue Ribbon's letterhead. The caption is "Acceptance of Offer". It states, in paragraphs 1 and 2, that it accepts the petitioner's offer as contained in the Affidavit of Mr. Miles dated 11th March 2003 to sell the shares in Collio,

> "for a price that equates to its pro-rata ownership as at the date of closing of the sale to News Corp. of Exclusiv Media."

[32] Paragraph 3 of the said letter states that the net price attributable to the shareholders of Collio at that closing date (4th July 2000) was the sale proceeds (US$18,500,000), less closing costs. It also indicates that Lee Goldsmith would provide details at the time of closing. Mr. Goldsmith is the Second Respondent in the Petition. Paragraph 5 of the letter states:

> "A cheque for the exact amount made payable to the account of Smith-Hughes Raworth & McKenzie will be couriered to Harney Westwood & Reigels (HWR) for a closing no later than 14 days from today's date. HWR will be provided at closing with the petitioner's share certificates and stock transfer form signed by WB Nominees with purchaser's name left blank. The closing will take place at the offices of HWR."

[33] Paragraph 6 of the letter states that interest amounts would be determined by LGT Bank Liechtenstein. It also states that interest would be paid in US dollars and computed as if the principal amount had been on a day to day call for the period 4th July 2000 to the date when the Petition was filed. Paragraph 7 states that the interest would be calculated upon closing of the share sale by LGT Bank and payment is to be made within 1 calendar month of the closing of the stock sale.

[34] Solicitors for WB Nominees provided specific figures in correspondence to Blue Ribbon dated 22nd April 2003, 3 days before the Order that contained the Settlement Agreement. It stated:

> "We refer to the letter from Blue Ribbon Assets Ltd. dated 10th April 2003. We record that our client does agree to a settlement of the dispute between it, Collio S.A. and Blue Ribbon Assets. Ltd. based on the proposal contained in the aforesaid letter. This settlement puts an end to the dispute between the abovementioned parties in its entirety. We understand the terms of settlement to be:
>
> 1. That Blue Ribbon Assets. Ltd. will pay WB Nominees Limited the sum of $458,800.00 for its 248,000 shares in Collio S.A. This is based on a share price of $1.85 per share.
> 2. That Blue Ribbon will pay interest on the sum of $458,800.00 for the period 4th July 200- 26th July 2002 at a call rate to be determined by LGT Bank Liechtenstein.
> 3. Payment of interest under paragraph 2 hereof shall be made within one calendar month of the closing of the sale of shares aforesaid.
> 4. LGT Bank Liechtenstein costs are to be shared equally by WB Nominees Limited and Blue Ribbon Assets Ltd.
> 5. The cost of the proceedings are to be argued before and determined by the court."

[35] It continued:

> "In the meantime we are arranging for the share certificates to be sent to us in preparation for the closing date. Please indicate the proposed date for closing. At closing our client will accept a bankers draft or a cheque drawn on your firm's client account for the sum of $458,800.00. Please revert to us forthwith with a draft consent order which we can present to the court on Friday 25th April 2003. With regard to interest please let us have particulars of this sum as soon as possible. We will let you have particulars

of the account into which the sum is to be paid in due course. Kindly acknowledge receipt hereof."

[36] Solicitors for Blue Ribbon replied by correspondence dated the said 22nd April 2003. It stated:

> " We enclose our suggested draft order. As discussed, we would like the Court, for the avoidance of any doubt, to grant permission for the proposed merger, after completion, and presume you have no issue with this."

[37] This response reflects the supposed good faith that led solicitors for WB Nominees to enter into the Settlement Agreement. It is little wonder that when the matter came on 25th April 2003 Mr. Pringle indicated that he had no interest in the merger aspect of the Order at that stage. He did not think that the merger should have been permitted then. (See pages 7-8 of the Transcript for 25th April 2003). He was more perspicacious than I was.

[38] Mr. Moverley-Smith submitted that the terms of the proposals for the Agreement evidenced by the foregoing correspondence did not necessarily become the terms of the Settlement Agreement. It is clear, however, that the correspondences provided the bases for the Settlement Agreement that the Order contained. The terms of the Agreement reflect this. It is noteworthy that although Blue Ribbon's letter of 10th April 2003 refers to Danehill's Agents, there was apparently no correspondence from Danehill or its agents to WB Nominees that signifies that Danehill was actually procured by Blue Ribbon to purchase the shares. There is indeed no evidence that Blue Ribbon procured any person or entity to purchase the share at the agreed sum.

Conduct

[39] The conduct of Collio and Blue Ribbon in this case has been quite interesting. Faced with a Petition to wind up Collio, its subsidiary, on 17th February 2003, Blue Ribbon filed its Application for Validation seeking the Court's sanction to merge with Collio. It then entered into a Settlement Agreement to compromise the Petition. The Settlement sum in that Agreement is basically the amount to which WB Nominees, in its Petition, claim entitlement on its shares in Collio on the sale of Exclusiv. The Settlement Agreement provides for the

place for completion. It further provides that upon competition, WB Nominees would receive a banker's draft for the agreed sum. WB Nominees was there and then to provide a dated but blank share transfer form and the original share certificate. The Agreement provides for the payment of interest within 1 month of the Closing.

[40] The explanation that Learned Counsel for Collio and Blue Ribbon gave then to justify the merger is also noteworthy. He said that the merger provisions were "very much for the benefits of other shareholders". He urged the Court to sanction the merger:

> " … because Mr. Pringle has got his agreement for his money. He will get his money. What we would like to do is repay the other sixteen shareholders their money. That was the intention of the validation order application. … this is the second petition which was brought forward and we really think its time for the shareholders to get their money back and we think it would be unfair if we paid, or Blue Ribbon procured to purchase with Mr. Pringle's clients shares for considerable premium, and yet the other shareholders don't get their money ASAP." (See page 6 of the Transcript for 25th April 2003.)".

[41] Page 6 of the Transcript further records the following Statement by Mr. Kite:

> " … paragraph 7 (of the filed Order), Mr. Pringle would like to have liberty to apply to give effect to the terms of the settlement and I have no objection to that. We do think that it is important to do the merger, Mr. Pringle has got his agreement and he (sic) would like to return the further money to the other shareholders."

[42] These were the representations that led the Court to sanction the merger. The Court was entitled to assume good faith on the part of Blue Ribbon. I did not anticipate that, after these representations, the merger provisions would have become the vehicle that would be used to nullify the purchase and interest obligations under the same Order. That, however, was the result of the action that Blue Ribbon took when, within 3 days of the Order, its Solicitors presented copies of Articles and a Plan of Merger to the Registrar urging urgent registration. Originals and other relevant documents were presented over a week later. The certificate that the Registrar issued gave the effective date of the merger as the date of the presentation of the copies.

[43] When Solicitors for the represented Parties came to Court almost 2 months later, Mr. Pringle drew the Court's attention to the fact of the completed merger. He complained that Blue Ribbon had not complied with its obligations prior to effecting the merger, under which his client's shares were subjected to the 'fair value' provisions. In response, Counsel for Blue Ribbon sought to place the blame at the feet of WB Nominees. According to him, Blue Ribbon waited for one month for WB Nominees to produce a share certificate to facilitate the completion. The certificate was not produced. Blue Ribbon wanted to release the money to the other shareholders. My observation is that this assertion is not in keeping with the terms of completion contained in paragraph 1 of the Schedule. Completion was to take place at the offices of Blue Ribbon's Solicitors. WB Nominees was thereupon to receive a banker's draft for the sum of US$458,800 and thereupon provide a dated but blank transfer form and the original share certificate.

[44] Mr. Kite further informed the Court at the sitting on 25th June 2003 that exactly the same amount of money was offered to Solicitors for WB Nominees "for different consideration". He said that documents were sent to them and all that they needed to do was to sign and return them. He assured the Court that the deal was still on the table and they were waiting for Mr. Pringle to come back and sign the documents.

[45] In paragraph 19 of the Affidavit that Mr. Pringle deposed and filed on 4th March 2004 in support of the Applications of WB Nominees, he states that he learnt of the merger for the first time on 17th June 2003. His further statement is that he contacted Mr. Kite on the same day to enquire when the sale of the shares could be completed. He was told that there was a problem because there were no longer any shares. He received no reply to the telefax that was sent to Solicitors for Blue Ribbon on 26th May 2003 that advised them that WB Nominees was in a position to close. He was never advised that Blue Ribbon was in a position to close.

Time

[46] The issue of time arose at the hearing. Mr. Moverley-Smith submitted that no time was provided in the Settlement Agreement for the time within which Blue Ribbon is to perform

its obligations. He further submitted, on the premise that Blue Ribbon's obligation is to procure a third party to purchase the shares, that, impliedly, there are warranties that a third party would require. He said that these would include, for example, a lengthy time period to complete.

[47] I however agree with the submission that Mr. Griffiths made that, in the absence of a stipulated time that was of the essence, a reasonable time must be implied. I also agree that it is unreasonable in the circumstances of this case that Blue Ribbon apparently did little to perform its obligation after one year. Notwithstanding this, I do not think that time is a critical issue in all of the circumstances of this case. This is because of the view that Blue Ribbon now takes that the present rights of WB Nominees after the merger is not for Blue Ribbon to procure a purchaser for the shares at the agreed price pursuant to the clear terms of the Settlement Agreement, but the fair value Clause 5(b) of the Plan of Merger.

Right to fair value?

[48] Mr. Moverley-Smith submitted that the changed circumstances brought about since the merger mean that the position is uncertain as to what Blue Ribbon is actually required to do under the Settlement Agreement. I do not however think that the merger provisions excuse Blue Ribbon from performing its obligations under the Settlement Agreement.

[49] With respect, I do not think that the submissions that Mr. Moverley-Smith made cause me to be inclined to the view that Blue Ribbon has a realistic chance of defending the claim that WB Nominees brought against it. Very simply, Blue Ribbon agreed to procure the purchase of the shares that WB Nominees held in Collio for US$458,800 in settlement of the Petition that WB Nominees brought. Blue Ribbon led the Court to sanction the merger between it and Collio on the understanding that this would facilitate the carrying into effect not only its obligation to WB Nominees but also to other minority shareholders. It had earlier represented to WB Nominees that the merger would not be effected prior to the performance of the obligations in the Agreement. Blue Ribbon then rushed to have the merger registered purportedly within 3 days of the Order. There is little evidence that after the Order it even attempted by that time to perform its obligations under the Agreement.

[50] In the face of this, Blue Ribbon now says that the merger brought about changed circumstances that create uncertainty regarding its obligations under the Agreement. Blue Ribbon is now certain, however, that WB Nominees' entitlement is for the fair value of its shares. It says, further, that the sum to which WB Nominees is now entitled is uncertain and can only be determined by an expert. These assertions simply attempt to blur the fact that, having entered into the Settlement Agreement, Blue Ribbon proceeded to use the sanction of the merger in a manner that now makes it impossible for itself to perform its obligations under the Agreement. I do not think that it is open to Blue Ribbon to claim uncertainty in its obligations because of its own actions that were taken subsequently to the Agreement. It is in breach of the purchase obligation under the Agreement. It cannot claim that the Agreement is at an end on the ground of frustration that is self-induced. While WB Nominees has a real prospect of success on its claim, Blue Ribbon does not appear to have a viable defence or a realistic chance of successfully defending the claim.

Blue Ribbon's defence

[51] We are aware that **Part 15.5(2) of the Rules** requires a Respondent to an Application for summary judgment who wishes to rely on evidence to file Affidavit evidence and serve copies. Blue Ribbon's evidence for the purpose of this rule is contained in the Affidavit of Mr. Kite that was filed on 30th April 2004. I considered that Affidavit and noted paragraphs 15 and 16 in particular. They are under the rubric "The Summary Judgment Application". I considered paragraphs 17 to 23 to the extent that they are relevant to the Application. They are under the rubric "The Merger Application". The Affidavit contains no evidence that provides a viable or realistic defence to the claim.

[52] Blue Ribbon filed a Defence and Counterclaim on the day before the hearing. First, this of course is not evidence for the purposes of **Part 15.5(2) of the Rules**. Second, the submissions that Mr. Moverley-Smith made during the hearing were based mainly on that Defence and Counterclaim. I already expressed the view in Paragraph 49 of this Judgment that those submissions do not show that Blue Ribbon has a realistic chance of defending the claim. However, Mr. Moverley-Smith raised the question of the effect of the Counterclaim.

The effect of the Counterclaim

[53] The Counterclaim is based on allegations that Collio and Blue Ribbon suffered damage because of deliberate acts by WB Nominees. It alleges that the acts were deliberate and were calculated to damage Collio and did damage it by causing it to be de-listed from the OFEX exchange. The Counterclaim raises two heads of loss. It states that one arose because Collio was not able to make an on-market offer to re-purchase shares, and, second, that the de-listing reduced the value of Blue Ribbon's own shareholding in Collio.

[54] Mr. Moverley-Smith submitted that the Counterclaim relates in part to the value of shareholdings in Collio, which in turn is related to the share value in the Statement of Claim. He submitted, further, that where a Counterclaim is clearly related to the issue of share value it can be raised as an equitable set-off against the claim by way of defence. He cited as authority **B.I.C.C. PLC. v Burndy Corporation and Another [1985] Ch. 232**. He submitted that if the Court were minded to give judgment in favour of WB Nominees, Blue Ribbon would seek a stay of judgment pending the trial of the Counterclaim.

Is equitable set off applicable?

[55] In **the B.I.C.C. case**, at page 247-248, Dillon, L.J. made authoritative statements on the three forms of set off that the law recognizes. He referred, first, to the legal set off of mutual debts under the **Statutes of Set Off 1729 and 1735**. I shall refer to another form that he identified simply as set off for diminished value. The third is equitable set off, which Mr. Moverley-Smith pleads in aid of Blue Ribbon. In **B.I.C.C.**, Lord Dillon explained that this form of set off arises in cases in which a Court of Equity would have regard to cross-claims as entitling the Defendant to be protected against a claim. He said that these are particular cases in which the cross-claim is related to the subject matter of the claim and there are factors, which would render it unjust in equity that the Claim should be enforced without regard to the cross-claim.

[56] However, I agree with the submission that Mr. Griffiths made that equitable set off does not arise in the present case. In the first place, the present case involves a claim, *inter alia*, for

damages for the breach of an Agreement that was made in full settlement of the Winding Up Petition. The allegations that Blue Ribbon makes in its Counterclaim were proffered in defence of the Petition. Notwithstanding this, the Parties made an Agreement that is in favour of WB Nominees on the said Petition. That Agreement contains no provision that recognizes any right by Blue Ribbon or Collio to damages or compensation for any alleged damage that WB Nominees caused them. WB Nominees instituted the claim in order to have the benefits of the Settlement Agreement. It is quite anomalous that Blue Ribbon should, under that claim, seek to Counterclaim for rights that it did not seem to think that it had when it entered into the Agreement. It is important that the Agreement, in effect, settled the Petition and resolved all the disputes that came on that Petition between the Parties to the Agreement.

[57] In the second place, Blue Ribbon did not particularize or quantify the loss and damage that it alleged in the Counterclaim that it suffered. It said that the value of the loss would be given following the receipt of an expert's report. However, I am inclined to the view that Mr. Griffiths expressed, when he said that the Counterclaim is baseless and could only serve to delay the attempts that WB Nominees is making to realize the fruits of its Settlement Agreements. I find that the Counterclaim presents no grounds that would preclude the entry of summary judgment in favour of WB Nominees on its claim.

The interest obligation

[58] As far as WB Nominees is concerned, Blue Ribbon should also be liable for damages to be assessed for the breach of its interest obligation under the Settlement Agreement. I note that, in a letter dated 18th April 2004, Solicitors for WB Nominees informed Solicitors for Blue Ribbon that their client was willing to accept US$36,704 in full satisfaction of the interest obligation. However, Learned Counsel for Blue Ribbon submitted that WB Nominees' entitlement to interest has not yet arisen and cannot be the subject of damages because it could only arise one month after the completion under the purchase obligation. He said that since the time for completion has not arrived, the interest obligation has not arrived either.

[59] In my view, the submission is unsustainable for two reasons. First because it is my finding that Blue Ribbon is in breach of its purchase obligation under the Agreement. The second reason flows from the first. Since Blue Ribbon is liable for breach there will be no completion as the Agreement contemplated. There will therefore be no event to trigger the interest obligation. Blue Ribbon in effect, breached its interest obligation under the Agreement when it breached the purchase obligation. Blue Ribbon has not therefore shown that it has a viable defence that convinces me that it has a realistic chance of defending the claim for damages for the breach of its interest obligation.

Measure of damages

[60] It is trite principle that the measure of damages that should be awarded to a Claimant for the breach of an Agreement, is the sum to which it would have been entitled had the contract been performed. This is the sum to which WB Nominees is entitled for the breach of the Agreement by Blue Ribbon.

[61] Regarding the purchase obligation, Mr. Griffiths submitted that since this obligation required Blue Ribbon to procure the purchase of the shares for US$458,800 this sum is the damages to which WB Nominees is entitled for the breach of its obligation. He submitted that in the alternative, the measure would be the fair value of the shares, and, under the Agreement, the fair value of the shares would be the same sum.

[62] On the other hand, Mr. Moverley-Smith submitted that the amount that the Court may award for damages is uncertain. He said that the sum could now only be the difference between the agreed price of the shares under the Agreement and the value of the rights in the shares that WB Nominees retain under the merger. That is the right to be paid fair value for the shares under Clause 5(b) of the Plan of Merger. He submitted, further, that the fair value is unclear and uncertain because this could only be determined on expert evidence and there is no such evidence before the Court as to the present fair value. He noted that the fair value of the shares in 2000, immediately following the sale of Exclusiv was in fact $458,800. He suggested, however, that the present fair value might be very different and opined that the current view of Blue Ribbon might be that the value is about

10p per share, if we accept Mr. Elkinson's intimation regarding recent payment to a number of shareholders. He concluded, however, that since there is no evidence by which this could be ascertained, the Court must be uncertain as to the quantum of damages.

[63] With respect, I do not agree with these submissions. The measure of damages that would put WB Nominees into the position into which it would have been had Blue Ribbon honoured the contract would have been the expressed sum contained in the purchase obligation, US$458,800. It will bear interest at the rate of 5% from the date on which the claim was filed (27th February, 2004) to the date of Judgment. It will also bear judgment interest at the rate of 5% from the date of Judgment until this sum is fully satisfied.

[64] The interest obligation was not quantified. However, it is quantifiable and, to this extent, it is not an uncertain sum. It could be ascertained under the interest provisions of the Settlement Agreement. Damages that are awarded for the breach of the interest obligation should therefore be assessed on application.

Costs

[65] We are aware that the basic principle is that costs follow the event. **Part 64.6(1) of the Rules** provides that, as a general rule, a successful Party is entitled to have its costs paid by the unsuccessful Party, unless there are excepting circumstances under **Part 64.6(2) of the Rules**. In this case, various aspects of costs arise for consideration. I shall consider, first, the costs that WB Nominees incurred for the enforcement of the Settlement Agreement, and, second, the costs in the Petition proceedings.

Costs in the enforcement

[66] This refers to costs occasioned by the 2 Applications that are the subject of this Judgment, as well as costs on the Claim Form. It should be clear from this Judgment that there are no excepting circumstances in favour of Blue Ribbon. Its conduct occasioned these proceedings, unnecessarily. WB Nominees should therefore be entitled to have its costs in these proceedings to be assessed by the Master on the indemnity basis, if not agreed.

Costs on the Petition proceedings

[67] The Order of 25th April 2003 made the award of costs in the Petition the subject of further hearing. Blue Ribbon has insisted that there was no successful Party in the Petition because it was not heard on the merits. It has therefore suggested that the Parties should bear their own costs. I indicated then and on subsequent occasions that the equities are with WB Nominees. Under the Settlement Agreement it was due to recover basically the alleged entitlement that occasioned the institution of the Petition.

[68] Solicitors for Blue Ribbon urged the Court to permit them to canvas the issue of the award of costs in order to afford them the opportunity to convince the Court that certain matters that relate to the conduct of the Petition proceedings by WB Nominees might cause the Court to award no costs under the exception in **Part 64.6 of the Rules**. Subsequently, Solicitors for Blue Ribbon pursued a course of disclosure proceedings against Mr. Wood, the Fourth Respondent. This was expressly with the view to have the Court issue contempt proceedings against Mr. Wood and utilize this to prove impeachable conduct by WB Nominees. The intention was to counter WB Nominees' insistence that it could prove that it would have prevailed if the Petition proceedings were concluded by a trial on the merits.

[69] Blue Ribbon's case by which it intends to prove conduct vitiating costs is that WB Nominees intended to use documents that Mr. Wood produced to it for the purposes of the Petition proceedings. Counsel for Blue Ribbon said that Mr. Wood did not respond to a Production Order of this Court dated 19th December 2003. It urged the Court to permit it to pursue continued production proceedings against Mr. Wood on the presumption that he has other documents that might have assisted Collio and Blue Ribbon in their proceedings on the Petition. I relented and issued continued production proceedings against Mr. Wood. Mr. Wood did not then and has not ever submitted to the jurisdiction of this Court in the Petition proceedings.

[70] A second presumption upon which Blue Ribbon based the continued production proceedings is that legal advice (presumably by Solicitors for WB Nominees) told Mr. Wood not to cooperate to obey the Production Orders. In all of the circumstances of which I am now aware, it is my view that the production proceedings amount to a fishing exercise and a delay mechanism. Neither the production proceedings nor anything that the costs submissions that the Parties have filed raise anything that would preclude WB Nominees from having its costs in the Petition proceedings. They have only served to lengthen the litigation and delay a just conclusion in those proceedings. WB Nominees should therefore have its costs in the Petition proceedings to date to be assessed on the standard basis by the Master, if not agreed.

Security for Costs

[71] At the hearing, Mr. Moverley-Smith, quite wisely, and in the best traditions of the legal practice, accepted that there are now no bases for the continuation of the Order for Security for Costs. This security was entered in the sum of $50,000 against WB Nominees to secure the costs of Collio in the Petition proceedings. That security is now released.

ORDER

[72] Premised on the foregoing, it is hereby ordered that:-

1. The stay that was imposed on the 5th day of March 2004 upon the Application of Donald Boulanger to intervene in the Petition proceedings is lifted by reason that the conditions that were imposed by that Order have been satisfied.
2. The Application of Donald Boulanger to intervene in the Petition proceedings is adjourned to a date to be fixed on Notice by Solicitors for Mr. Boulanger, for directions to be given for hearing, if necessary.
3. The Applications that were made by Blue Ribbon Assets Limited on the 30th day of April 2004 to strike out without prejudice materials, and on the 6th day of May 2004 for an adjournment of these proceedings, are withdrawn.

4. By consent and for the purpose of convenience, the Application that was filed on behalf of WB Nominees Limited on the 27th day of February 2004 in the Petition proceedings, and its Application for Summary Judgment that was filed in Claim No. BVIHCV2004/0030 on the 5th day of March 2004 were heard together, and the sitting deemed proper for the hearing of these Applications.

5. Pursuant to Paragraph 1 of the Application that was filed on behalf of WB Nominees on 5th March 2004, Summary Judgment is hereby entered for WB Nominees Limited on its claim in Claim No. BVIHCV2004/0030 that was filed on 27th February 2004, and Paragraph 1(b) thereof, against Blue Ribbon Assets Limited for damages in the sum of US$458,800 for the breach by Blue Ribbon Assets Limited of its purchase obligation under the Settlement Agreement contained in an Order of this Court that was made on 25th April 2003 in Claim No. BVIHCV2002/0154.

6. Pursuant to Paragraph 3 of the said Application that was filed on 5th March 2004, Summary Judgment is also hereby entered for WB Nominees Limited against Blue Ribbon Assets Limited on the claim in Claim No. BVIHCV2004/0030 that was filed on 27th February 2004, and Paragraph 3(b) thereof, for damages to be assessed for Blue Ribbon's breach of its interest obligation under the Settlement Agreement contained in the Order of this Court that was made on 25th April 2003 in Claim No. BVIHCV2002/0154.

7. Blue Ribbon Assets Limited shall also pay interest to WB Nominees limited on US$458,800 at the rate of 5% from the date on which the claim was filed (27th February, 2004) to the date of Judgment, and Judgment interest at the rate of 5% from the date of Judgment until this sum is fully satisfied.

8. WB Nominees Limited is hereby awarded its costs occasioned by the Claim Form proceedings in Claim BVIHCV2004/0030 and on the Application for Summary Judgment in the said proceedings and on the costs aspects of its Application that was filed on 27th February 2004 in the Petition proceedings, the said costs shall be assessed by the Master on the indemnity basis, if not agreed.

9. WB Nominees Limited is also hereby also awarded its costs in the Petition proceedings to date to be assessed by the Master on the standard basis, if not agreed.

10. The security that WB Nominees Limited entered with the Registrar of the High Court on 26th November 2002 in the sum of $50,000 to secure the costs of Collio in the Petition proceedings is now released and the Registrar shall take such steps as are necessary to give effect to this direction.

11. The prayer that WB Nominees made in Paragraph 7 of its Application that was filed on 27th February 2004 in the Petition proceedings, for costs against Emillian Schwartzenberg on his Application dated 24th November 2002, is adjourned to Friday the 1st day of October 2004 at 9:00 o'clock in the forenoon for report and for directions for hearing, if necessary.

12. The prayer that WB Nominees made in Paragraph 9 of its Application that was filed on 27th February 2004 in the Petition proceedings, to be released from the security for costs that it entered on 20th January 2003 in the sum of $15,000, to secure the costs of the said Emillian Schwartzenberg, is granted in part by consent, the sum of US$9,000 shall be released immediately, with the balance in the sum of US$6,000 retained until further Order of the Court.

13. The prayer that WB Nominees made in Paragraphs 2, 3 and 4 of its Application that was filed on 27th February 2004 in the Petition proceedings and the prayers that Donald Boulanger made in his Application dated 27th February 2004 in the said Petition Proceedings are also adjourned to Friday the 1st day of October 2004 at 9:00 o'clock in the forenoon for report and for directions for hearing, if necessary.

Hugh A. Rawlins
High Court Judge