BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO: BVIHC (COM) 106/2011

BETWEEN:

TAWNEY ASSETS LIMITED

Claimant

and

EAST PINE MANAGEMENT LIMITED

First Defendant

GUILDRON TRADING LIMITED

Second Defendant

SI CAPITAL PARTNERS LIMITED

Third Defendant

RUDY AMIRKHANIAN

Fourth Defendant

ELENA LOKTEVA

Fifth Defendant

Appearances: Mr Christopher Parker QC and Ms Mariel Steadman for the Applicants
Mr James Ayliffe QC and Ms Keisha M Durham for the Respondent

JUDGMENT

[2012: 8, 9, 16 February]

(Claims for damages for conspiracy/procuring breach of contract arising out of joint venture between claimant and first defendant for merger and management of Russian businesses through second defendant as ultimate holding company – claimant and second and third defendants BVI registered companies – fourth and fifth defendants Russian nationals alleged together with third defendant to control first defendant – fourth and fifth defendants not served – claim for injunction to restrain further prosecution in Russia by former subsidiary of first defendant of claims against former subsidiary of claimant – further claim for relief against first, third, fourth and fifth defendants under section 184I of Business Companies Act, 2004 – application by third defendant for stay of proceedings in BVI on *forum* grounds – application by first defendant that amended statement of

claim be struck out under CPR 26.3(1)(b) to (d) – whether additional terms to be implied in shareholders agreement)

[1] **Bannister J [ag]:** I have to decide two applications in these proceedings. The first in time, brought by the third Defendant ('SI'), is for an order that all further proceedings against SI be stayed on grounds that notwithstanding the fact that SI is a BVI registered company and sued here as of right, the appropriate forum is Courts of the Russian Federation ('the forum application'). The second is an application by the first Defendant ('East Pine') that the amended statement of claim be struck out pursuant to CPR 26.3.(1) as disclosing no cause of action and, consequently, amounting to an abuse of the process, or as being prolix and failing to comply with the requirements of CPR Part 10 ('the strike out application'). In dealing with the strike out application as disclosing no cause of action I am obliged to treat the allegations in the amended statement of claim as true. The following short summary of the factual background is therefore taken from the amended statement of claim itself.

Background

[2] The claim arises out of a joint venture agreement between the claimant ('Tawney') and East Pine, both BVI registered companies, for the merger of two agricultural machinery businesses formerly carried on by them separately in the Russian Federation. Ignoring details which are not relevant for present purposes, Tawney's business was CJSC Agrosnab ('Agrosnab'). Prior to the merger Tawney held Agrosnab, which is a Russian registered company, through its wholly owned Cypriot subsidiary, Plancroft Limited ('Plancroft'). East Pine's business was Mercury Technology LLC ('Mercury') and it was held through a wholly owned Cypriot subsidiary called Oldril Holdings Limited ('Oldril').

[3] East Pine is alleged to be owned or controlled by a corporate finance advisory boutique called Strategic Initiatives or alternatively by investors in Strategic Initiatives. The intended fourth and fifth defendants, which have been referred to throughout as Rudy and Elena and to whom I will refer similarly for convenience and without intending any disrespect, are alleged to be senior executives in Strategic Initiatives. *De facto* control of East Pine is said to reside in Rudy and Elena on behalf of Strategic Initiatives or SI, which is described as the corporate persona, in the BVI, of Strategic Initiatives.

[4] Discussions between the two sides commenced in August 2010. A memorandum of understanding was executed on 22 October 2010, by which time the parties had begun working together on orders for agricultural equipment. Indeed, they had entered into an agreement dated 29 September 2010 for the supply by Mercury to Agrosnab of eight tractors for a price of RR65.5 million (over US$2 million) ('the supply contract'). Some RR 40.4 million of that sum has been paid, leaving some RR 25 million outstanding.

[5] Between 13 and 24 November 2010 the parties transferred their shares in Plancroft and Oldril respectively to the second Defendant, Guildron Trading Limited ('Guildron'), in exchange for equal shareholdings in Guildron, which is a BVI registered company. The outcome, therefore, was that Tawney and East Pine indirectly held the two Russian businesses through Guildron's ownership of their respective Cypriot parents. The arrangement envisaged a balancing payment from East Pine

to Tawney of US$4 million. East Pine paid US$2 million of that but the remainder, which was to have been satisfied by the assignment to Tawney of receivables payable to East Pine by Oldril, has not been paid.

[6] On 24 November 2010 Tawney and East Pine entered into a shareholders agreement to regulate the conduct of the affairs of Guildron ('the SHA'). Although it is pleaded that a copy of the SHA is annexed to the amended statement of claim it is omitted, in accordance with long standing tradition, from the copy in the application bundle, so that the Court is left to rely on the excerpts set out in the pleading. Neither side suggested that the absence of the full document prejudiced my determination of the applications.

[7] The SHA, to which Guildron was a party, provided for Guildron's board to be quorate only if at least two out of each side's three nominated directors were present and for board resolutions to be passed by not less than four directors. East Pine and Tawney bound themselves to adopt at general meetings of Guildron all resolutions required to implement the SHA and to instruct their nominated directors to vote at board meetings consistently with the parties' obligations under it. Guildron was prohibited from using its powers as owner of Plancroft or Oldril[1] without approval from its board. Clause 2.8 of the SHA provided that all business of each subsidiary[2] should be carried out under the supervision of Guildron or another subsidiary (meaning, given the nature of the group structure, Plancroft or Oldril) acting as shareholder of the first referenced subsidiary and it was provided, *inter alia*, that no subsidiary could litigate claims with values exceeding US$100,000 without the approval of its immediate parent. The SHA is governed by English law.

[8] On 1 December 2010 Mercury lent Agrosnab RR 13 million (about US$400,000), repayable on 21 December 2010. That loan has not been repaid. Between 29 December 2010 and 15 February 2011 Mercury went on to make four further loans to Agrosnab totaling more than RR 24 million (US$800,000 or so) with maturity dates falling between 31 May and 15 August 2011, none of which has been repaid.

[9] In mid December 2010 Russian personnel managing Mercury moved into Agrosnab's Moscow offices and the two businesses were operated together under the name MAST. The combined businesses were managed by a management board created for the purpose ('the management board'), which reflected the composition of the board that ought to have been put in place in Guildron had the provisions of the SHA in that regard been complied with. Guildron has been left with a board comprising what are described as nominee directors, which I take to mean persons supplied by its registration agents in the BVI, who are said to be able to act only on joint instructions from Tawney or East Pine. It is not alleged that they have ever been called upon to do so. Meetings of the management board took place on 21 January and 24 February 2011. It is neither alleged nor submitted that by convention or otherwise references to 'the Board', where they occur in the SHA, are to be taken as references to the management board or that the proceedings of the management board were subject to the provisions of the SHA.

[1] the SHA refers to 'any Subsidiary' which, because of the definition provisions in the SHA, would include Agrosnab and Mercury, but Guildron did not have ownership powers over either of those companies

[2] for present purposes, Plancroft, Oldril, Agrosnab and Mercury

[10] On 4 March 2011 Elena wrote to unnamed 'members of the Strategic Initiatives team' telling them, in short, that East Pine was entitled to revise the US$4 million balancing payment down to US$1.25 million on the basis of an alleged (by Elena) agreement that that would happen if the valuation of Agrosnab differed substantially from information disclosed to East Pine when the merger was being negotiated. This report was sent on for comment to Mr Korontsvit ('Dmitry'), Agrosnab's original controller, for his comments. This is alleged to have amounted to a dishonest attempt on the part of Rudy and Elena to secure financial advantage.

[11] On 16 March 2011, under the direction of Rudy or Elena or East Pine or SI, the general director of Mercury and those of Mercury's employees who were working in the Agrosnab offices left, never to return or further co-operate with Agrosnab, taking with them a considerable amount of information, including legal, accounting and finance papers. As a result, it is pleaded, Dmitry has been forced to run Agrosnab as a separate business.

[12] Starting on 24 March 2001 Mercury began a series of proceedings in the Moscow Arbitrazh Court for the outstanding balance under the supply contract of September 2010 and for payment of the loans made by Mercury between December 2010 and February 2011. In the course of those proceedings, Mercury obtained freezing orders by, it is alleged, dishonestly misleading the Court. Two of these freezing orders remain on foot.

[13] Forbes Hare, acting for East Pine, sent various letters, including an 'undated' one of 20 May 2011[3] and another of 7 June 2011 alleging, falsely, so it is said, that the SHA had been rescinded. Among the grounds relied upon for the assertion that the SHA had been rescinded, or that East Pine was entitled to rescind it, were allegations on the part of East Pine that it had been induced to enter into the merger by the production on the part of Agrosnab of inaccurate, but unqualified, financial information upon which East Pine relied in entering into the merger. That, Tawney says, was not true. It follows, so it is said, that East Pine has given false instructions to Forbes Hare and in putting forward a baseless case for rescission has manifested an intention not to be bound by the SHA.

[14] On 1 September 2011 the present proceedings were commenced and served on the BVI defendants. SI issued its *forum* application on 13 October 2011 and East Pine issued its strike out application on 9 January 2012. Also on 13 October 2011 East Pine issued proceedings against Tawney, Oldril and Guildron seeking relief under section 184I of the Business Companies Act, 2004 ('section 184I'). On or about 2 February 2012 Tawney served an amended statement of claim.

Causes of action/strike out

[15] It will be convenient to deal with the strike out application first. I should say at the outset that the amended statement of claim contains a claim for relief under section 184I on a newly pleaded basis of deadlock. Mr Parker QC, for East Pine, does not complain about this part of the amended statement of claim. It will obviously be necessary in due course to make orders for East Pine's own section 184I proceedings to be dealt with together with this part of Tawney's case.

[3] I assume that this means that the letter was sent on 28 May 2011 but did not bear a date in its text

[16] In what follows, references to numbered paragraphs are references to paragraphs of the amended statement of claim.

[17] The first cause of action is identified at paragraphs 45A and 45B, which together allege that 'the aforementioned actions of Mercury' were procured by East Pine or known to and acquiesced by East Pine. I take 'the aforementioned actions of Mercury' to be a reference to the departure from Agrosnab's offices on 16 March 2011 and the removal of the documents and information pleaded at paragraph 44. These acts are said to have amounted to a breach of the obligation pleaded at paragraph 31A.

[18] Paragraph 31A pleads an obligation, binding on East Pine and Tawney,

> '(1) to do all acts and things within their power (including without limitation through exercising their powers to control Guildron and through Guildron the Subsidiaries by the exercise of voting rights at General Meetings or through instruction of directors) to procure that all business of Mercury and of any Subsidiary be carried on under the supervision of Guildron; and
>
> (2) to abstain from doing any act or thing which obstructs or hinders the business of Mercury or any Subsidiary from being carried on under the supervision of Guildron.'

This obligation is said to arise on the true construction of the terms of the SHA which are set out in the pleading, or 'implicitly.' The only express terms of the SHA which are pleaded and are remotely capable of being said, on their true construction, to give rise to the obligation spelt out in paragraph 31A are those parts[4] of clauses 2.1(a) and 2.8 of the SHA which are pleaded in paragraphs 27 and 30:

> Clause 2.1(a)
>
> '(a) The Shareholders agree (i) to take all actions necessary or appropriate to cause the adoption of all resolutions and decisions at any General Meeting of Shareholders and any meeting of the Board, as is required in each case to implement this Agreement and (ii) to exercise their voting rights at any General Meeting of Shareholders and to instruct Directors which they nominated to exercise their voting rights, subject to their fiduciary duties, in a manner consistent with all of their respective obligations under, and other applicable provisions of, this Agreement.

[4] with the exception of clause 2.8(s), which is specific rather than general

Clause 2.8

'All business of each Subsidiary shall be carried out under the supervision of [Guildron] or another Subsidiary (as the case may be) acting as a shareholder (participant) of such first Subsidiary. The following actions may be taken or transactions may be committed by any Subsidiary subject only to the prior approval by the Company or another Subsidiary (as the case may be) acting as a shareholder (participant) of such first Subsidiary:
....

(w) (i) taking by such Subsidiary of any decision as the sole member, participant, shareholder or equity holder of any other Subsdiary;
(ii) voting by such Subsidiary on any meeting of members, participants, shareholders or equity holders of any other Subsidiary; or
(iii) giving by such Subsidiary of any instructions to nominal shareholders, directors or officers of any other Subsidiary
on any matter provided in Clauses 2.8(1) – (w).'

[19] Clause 2.8 prescribes a system for control of the businesses of the Subsidiaries, which for present purposes means Oldril and Mercury. In short, it provides that Oldril is not to exercise its rights as sole member of Mercury, whether by passing resolutions or voting at meetings or giving directions to Mercury personnel, without the prior approval of Guildron in its capacity as shareholder of Oldril. Similarly, it provides that Mercury is not to conduct business of the sort specified in sub clauses (a) to (w) of clause 2.8 without the prior approval of Oldril. Since neither Oldril nor Mercury is a party to the SHA, these provisions are not directly enforceable at Subsidiary level. Instead, they set out the machinery through which the parties have agreed that the ultimate businesses are to be operated. What is not found in the SHA is any express personal obligation binding East Pine to procure that Mercury does not conduct specified business without the consent of Oldril or that Oldril does not permit Mercury to carry on specified business without the consent of Guildron. That is not surprising, since by the terms of the merger control of each of Oldril and Mercury passed from East Pine to Guildron. That is why, under the SHA, all of East Pine's obligations in this regard are centered, pursuant to clause 2.1, upon its conduct as shareholder of Guildron and as appointor of directors to Guildron's Board and its obligation under clause 2.1 (I paraphrase) to co-operate so as to cause the provisions of clause 2.8 to have effect. There is no allegation of breach by East Pine of any of its obligations under clause 2.1.

[20] Mr Ayliffe QC, for Tawney, pointed to the introductory words of clause 2.8 and submitted that the walk out constituted a breach of the term that the business of each Subsidiary should be carried out under the supervision of Guildron, since the walk out did not happen under Guildron's supervision. The difficulty with this submission is that clause 2.8 does not say that all business of each Subsidiary is to be carried out under the supervision of Guildron. It says that all business of each subsidiary is to be carried out under the supervision of Guildron *or another Subsidiary (as the case may be) acting as a shareholder. . . of such first Subsidiary*. In other words and as I have said, it is providing that no subsidiary is to use its powers as controller of another subsidiary without the approval of its immediate parent. It does not provide for Guildron to supervise the business of

all Subsidiaries. Even if it did, it does not contain any obligation upon the parties to the SHA (which do not include Oldril) to procure that that happened.

[21] Mr Ayliffe QC met this objection by submitting that the opening words of clause 2.8 were in the nature of a warranty that the affairs of the Subsidiaries would be supervised by Guildron. Apart from the fact that any such construction pays no regard to the words 'or another Subsidiary (as the case may be)', it seems to me to be impossible to read the words as imposing any sort of promissory obligation upon the parties to the SHA. As I have said, they set out the agreed machinery for command and control. If they amounted to a warranty, and the walkout was a breach of clause 2.8, then Tawney would be in breach of it. This absurd conclusion demonstrates that the construction contended for by Mr Ayliffe QC cannot be correct.

[22] Clause 2.1(a) does not help. That merely obliges the parties to the SHA to vote at general meetings of Guildron and to cause their nominees at Board meetings of Guildron to vote so as to cause the adoption of resolutions and decisions necessary to implement the SHA and consistently with the provisions of the SHA. It is not pleaded that East Pine failed to vote in favour of any resolution of Guildron or caused its nominee directors to fail to vote in favour of a resolution of Guildron's Board or that it failed to propose any resolution of Guildron or of the Board of Guildron which would, if passed, have prevented the walkout of 16 March 2011.

[23] In my judgment, therefore, the terms pleaded in paragraph 31A do not arise as a matter of construction of the SHA. Nor do they arise by necessary implication. Not only are the terms inconsistent, for the reasons which I have set out in paragraph [20] above, with the provisions of clause 2.8, but the pleading is silent as to the basis upon which it is necessary to imply the term. Although I accept that it will usually be a hard thing to strike out a pleading of an implied term, it is not difficult where no basis for the need to make the implication can be found within the pleading and where the term itself is inconsistent with an express term of the agreement into which the term is sought to be implied.

[24] It follows that paragraph 31A must be struck out. It further follows that paragraph 45B, alleging a breach by East Pine of the obligation alleged at paragraph 31A, must also be struck out. The same goes for the allegations at paragraph 45C (that East Pine's breach was procured by Rudy and Elena) and paragraph 45D (an alleged unlawful means conspiracy which depends upon the walk out having triggered a breach by East Pine of the term pleaded at paragraph 31A). A further allegation, contained in paragraph 45E, of a lawful means conspiracy is not persisted in by Tawney.

[25] Paragraphs 46 to 53 plead the steps taken by Mercury in the Moscow Arbitrazh Court to enforce the supply contract and to recover the loans, including the obtaining of freezing orders.[5] Paragraph 49 pleads that the litigation has not been approved by a Guildron Board resolution. Paragraph 53A pleads that in those circumstances the bringing of the Moscow proceedings has involved contravention of one or more of what are described as 'Applied Requirements' and which are pleaded in paragraph 32, to which I must now turn. Before doing so I should point out that one of the matters which clause 2.8 of the SHA stipulated that no Subsidiary could undertake without the

[5] an allegation of dishonest attempt to mislead the Moscow Court is not persisted in for present purposes, although Mr Ayliffe QC reserves the right to rely upon it in the section 184I application

prior approval of its parent was the commencement of proceedings with a value exceeding US$100,000. Each of the claims made by Mercury in the Moscow proceedings, with the exception of the fourth loan, had a value in excess of US$100,000.

[26] The 'Applied Requirements' are set out in paragraph 32 as follows:

> '32. Further, and in particular, East Pine and Tawney are obliged to do all acts and things within their power to procure that:
>
> (1) Mercury not bring or pursue proceedings of value at least US$100,000 without the prior approval of Oldril, alternatively without the prior approval of Oldril or Guildron ("the Mercury Requirement")
>
> (2) Oldril not decide in favour of or vote in favour of or give instructions for the bringing or pursuit by Mercury of proceedings of value at least US$100,000 without the prior approval of Guildron ("the Oldril Requirement")
>
> (3) Guildron not decide in favour of or vote in favour of or give instructions for the bringing or pursuit by Mercury or proceedings of value at least US$100,000, or for Oldril's deciding in favour of or voting in favour of or giving approval of the Board of Guildron ("the Guildron Requirement")
>
> (4) the Board of Guildron make no resolution that has not been approved by at least 2 Directors nominated by Tawney ("the Board of Guildron Requirement")'

[27] It will be noticed that the opening words of paragraph 32 are 'Further and in particular.' I read those words as indicating that the specific matters set out in paragraph 32 are examples of or flow from the obligations pleaded in paragraph 31A. Since paragraph 31A must, for the reasons which I have given, be struck out, it follows, in my view, that paragraph 32 must fall with it. Apart from that, however, it seems to me that these alleged obligations to see to it that certain events do not happen, which are not expressed in the SHA, cannot be extracted from it or implied into it. The SHA envisages that the parties' co-operation shall be effected at Guildron level pursuant to clause 2.1. It does not impose upon each party severally a standalone obligation to police the business of each subsidiary and ensure that the provisions of sub-clauses (a) to (w) of clause 2.8 are complied with. If either party is unhappy at the conduct by one of the Subsidiaries of the business of that Subsidiary, its remedy under the SHA is to convene a meeting of Guildron or of its Board and propose resolutions designed to put matters right. If the other party obstructs the passage of such resolutions or their implementation, then the first party may have a claim for breach of clause 2.1.

[28] The whole purpose of the SHA and the arrangements which it regulated was that neither Tawney nor East Pine separately should have any 'power to procure' that, for example, Mercury should not litigate cases with a value over US$100,000. That is the rationale of any merger. The implication of a term obliging the parties severally to police the conduct of Mercury is not necessary in order to give business efficacy to the SHA nor is the term itself obvious. On the contrary, it seems to me to be convoluted and designed for the purpose of the present proceedings rather than to give effect to

the parties' intentions as gathered from the document. The objects of the SHA are achievable without it.

[29] In my judgment, therefore, paragraph 32 and, accordingly, paragraphs 53C and 53D must be struck out. That entails the striking out of the unlawful means conspiracy pleaded at paragraph 53E. The lawful means conspiracy pleaded at paragraph 53F is not persisted in.

[30] Finally, paragraphs 56A to 65 plead a conspiracy between Rudy and Elena, SI and East Pine to give false instructions to Forbes Hare in order to enable Forbes Hare to advance a case in correspondence that the SHA has been rescinded. That claim, as a claim, in no longer persisted in, although Mr Ayliffe makes clear that he wishes to rely upon these events and Tawney's characterization of them as part of Tawney's claim under section 184I.

[31] It seems fairly obvious (although I am not deciding) that if the SHA was still on foot on 16 March 2011, the walkout by Mercury evinced an intention on the part of East Pine no longer to be bound by it and could have been accepted by Tawney as a repudiatory breach of the agreement. That Tawney has chosen not to do. It wishes to be in a position where it can continue to enforce the SHA and claim that East Pine's prosecution of the Moscow proceedings is a continuing breach of it and clearly feels that it might be in difficulties in relying simply upon East Pine's refusal further to perform[6] without being held to have accepted a renunciation of the part of East Pine. For these reasons, Tawney wishes to be able to point to a breach of a specific term, express or implied, of the SHA. It has clearly been unable to identify an express term of the SHA which covers the events of 16 March 2011 or the prosecution by East Pine of the Moscow proceedings and in my judgment its attempts to fashion an implied term fail. I am not sorry to reach this conclusion. I do not think that the Court should encourage parties in artificial contortions designed to produce a result which is out of step with the commercial position on the ground.

[32] The upshot is that the claims in contract and tort must be struck out. That makes it unnecessary for me to decide whether Rudy and Elena could be personally liable for the tortious or contractual acts alleged to have been committed by East Pine or SI.

[33] Mr Ayliffe submitted that the facts which underlie the causes of action which I have struck out are germane to the claim under section 184I. I am not convinced that that is entirely right, but in any case they will need recasting if they are to be used in relation to that claim. I do not think it right that allegations marshalled in support of claims in conspiracy and for breach of contract should stand as allegations supporting the section 184I claim to be found presently in paragraphs 71 to 72 of the pleading.

SI's forum challenge

[34] This application is substantially redundant the light of what I have held above, but at the hearing it rather shifted into a debate whether Rudy, Elena and SI were proper respondents to Tawney's claim under section 184I. Mr Ayliffe submitted that they are.

[6] again, assuming the SHA was still on foot, as to which I say nothing

[35] I was referred to some authority upon the point. In **Re a Company No: 5287/85**[7] Hoffmann J, as he then was, refused to strike out the name of a party to a petition for unfair prejudice relief, even though he was not a shareholder of the company in question. He had previously been a member and, according to the petitioners, had mismanaged it. The business of the company had been sold and the proceeds of sale had disappeared. The former member had transferred his shares to an offshore company and maintained that that entity, rather than himself, was the proper party to the petition. Hoffmann J had little difficulty in rejecting his application to be struck out as a respondent.

[36] In **Re BSB Holdings Ltd**[8] Vinelott J refused to strike out an unfair prejudice petition against a person ('BSB') not a member of the company whose affairs were said to have been conducted prejudicially ('Holdings'). Holdings owned BSB and the business formerly carried on by Holdings had been transferred to BSB. It was alleged that certain major shareholders of Holdings had arranged matters so that they had become able to acquire shares in BSB to the exclusion of other shareholders of Holdings. The petitioner, which was a shareholder of Holdings, sought orders that the major shareholders distribute part of their shares in BSB to members of Holdings other than persons associated with them. BSB submitted that since no relief was sought against BSB directly, it was not a proper party to the petition. Vinelott J held that the unfair conduct complained of was the manipulation of the affairs of what had originally been a wholly owned subsidiary of Holdings, that BSB was party to those dealings, that the relief sought was for the transfer of shares in BSB's capital and that at the end of the day, if the petitioners were successful, it might be expedient to make orders against BSB for the issue by BSB itself of shares to compensate the petitioners. In those circumstances, Vinelott J considered that BSB was a proper party.

[37] In **Supreme Travels Ltd v Little Olympian Each-Ways Ltd**[9] Lindsay J refused to join as party to an unfair prejudice petition a company which had never been a shareholder, director or manager of the company whose affairs were said to have been misconducted and which was not alleged to have committed any wrong. The learned judge was of the view that no Court would order the proposed additional respondent to purchase the petitioner's shares and that, since no other relief was claimed against it, it would be wrong for it to be joined. In the course of his judgment Lindsay J considered the decision of Knox J in **Re Baltic Real Estate**[10]. I was not referred to the full report of that case, but it appears that Knox J did not regard the fact that the respondents seeking a stay of the proceedings against them, who were not members of the company, were former directors and members, nor the fact that there was a possibility that relief might be granted against them (they might be ordered to procure the sale of shares in the names of other respondents to the petitioner) as sufficient to justify their remaining parties.

[38] In **Re Fahey Developments Ltd**[11] a company which was not a member of the company whose affairs were said to have been conducted to the prejudice of the petitioner applied to have the petition struck out as against it. It was alleged to have been a creature of the other member of the deadlocked company and to have been used by him to misappropriate assets of the company to her prejudice. It contended that the proper course to have taken to obtain relief against it was to

[7] (1985) BCC 915
[8] [1992] BCC 915
[9] [1994] BCC 947
[10] [1992] BCC 629
[11] (1996) BCC 320

have proceeded by way of derivative action. The judge refused to strike the petition out. Among his grounds were the facts that the claim against the respondent formed an integral part of the claim against the shareholder respondent and would avoid duplicity of proceedings if heard in the unfair prejudice petition. To proceed otherwise would involve an unnecessary duplication of costs. There were other factors which are not relevant for present purposes.

[39] It is very difficult to extract a unifying thread of principle from these authorities. All one can say is that in some cases the English Courts have permitted unfair prejudice proceedings to commence or continue with persons other than members of the relevant company as parties. The possibility of the non member respondent being involved in the grant of relief or even being compelled to provide relief seems to be persuasive. In the present case the allegation is one of deadlock stemming from a breakdown of relations with the consequence that the business of Agrosnab is being destroyed. The relief sought is transfer of East Pine's holding to Tawney and, or alternatively, orders permitting the Tawney board members of Guildron to have control of Guildron or to have conduct of proceedings in the name of Guildron to make recoveries in the name of unspecified subsidiaries. I find it impossible at the moment to envisage that SI, which appears to have played no part as an actor in the story, would be compelled to provide relief at the end of the day. As for Rudy and Elena, now that the claims in contract and tort have gone, I find it hard to see what other grounds there could be for obliging them personally to recompense Tawney (assuming that Tawney could show a loss). Certainly there is no hint of a basis in paragraphs 71 to 72 for any grounds for an order against them personally and the relief actually sought in paragraph 72 does not involve them at all. For these reasons I do not consider that either Rudy, Elena or SI would properly be respondents to the unfair prejudice claim. The *forum* challenge therefore disappears.

Conclusion

[40] Paragraphs 1 to 70 inclusive of the statement of claim, together with paragraphs 1 to 3 inclusive of the prayer must be struck out. References in paragraphs 4(c) and 4(e) of the prayer to the third, fourth and fifth defendants must be deleted.

[41] I will hear Counsel on the question of costs and as to directions in this and East Pine's cross action for unfair prejudice.

Commercial Court Judge

16 February 2012