THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ST CHRISTOPHER AND NEVIS
NEVIS CIRCUIT
(CIVIL)
AD 2012

Claim No: NEVHC 2011/0162

BETWEEN

SM LIFE VENTURES LLC

Claimant

and

(1) SUSAN MORRICE
(2) TONY QUINN
(3) INTERNATIONAL NATURAL ENERGY LLC
(4) BELIZE NATURAL ENERGY LIMITED

Defendants

Appearances: Mr Frank Walwyn and Ms Astra Penn for the Claimant
Mr John R Macdonald QC, Mr Jeffrey E Nisbett and Ms Nicola Allsop for the Defendants

JUDGMENT

[2012: June 18-22; 25-27 and 29; July 16]

(Nevis Limited Liability Company Ordinance 1995 ('NLLCO')– allegations by minority shareholder of unfairly prejudicial conduct on the part of the majority – whether majority guilty of unfairly prejudicial conduct – whether Court has power under the NLLCO to order company to purchase oppressed member's shares – section 40 of the NLLCO considered – whether Court has power under NLLCO to order majority to purchase oppressed member's shares – section 52 of NLLCO (Court's power to order dissolution) considered – whether dissolution to be ordered – whether unrepresented members to be given opportunity to be heard on question of dissolution)

[1] The Claimant in this case ('SM Life') is a member of a company called International Natural Energy LLC ('INE'). INE was incorporated in Nevis under the Nevis Limited Liability Companies Ordinance

of 1995 ('the NLLCO') on 7 August 2002. Its principal purpose was to hold the shares of a Belize registered company called Belize Natural Energy Limited ('BNE'), which had been incorporated in Belize a little earlier with the object of exploring for oil in Belize and, if oil was found, extracting and selling it.

[2] To industry surprise BNE struck oil (it was the first company to do so) in Belize in 2005 and began to sell it in January 2006. It has been astonishingly successful.

[3] INE's history has been attended, since the discovery of oil, by dissension and the present dispute is in essence a claim by SM Life against two other members of INE for a remedy to compensate it for unfair prejudice which it is alleged to have suffered in the conduct of INE's affairs since about 2006. There are other subsidiary claims but before I can turn to the factual issues which arise I must first explain the constitution of INE and the contractual obligations which arise from its corporate regulations.

INE

[4] INE's capital structure was set out in a document called an Operating Agreement dated as of 15 August 2002 and expressed to be effective as of 2 January 2003. Under the NLLCO the Operating Agreement[1] performs a function similar to that of the Articles of Association of limited companies incorporated under legislation modeled upon nineteenth century English companies legislation. Under its Operating Agreement INE's capital was divided into three classes of 'membership interests.' For short, I shall refer to these interests as shares. INE's initial authorized capital consisted of 32,000 Class A shares with a par value of US$150 each and 63,000 Class B shares with a par value of US$150 each.[2] The holders of each class of issued share are referred to as Class A and Class B members respectively. The Operating Agreement designated five individuals as 'Originators.' They were, in the order in which the Operating Agreement lists them, the first Defendant, Susan Morrice ('Ms Morrice'), a petroleum geologist then married to Alex Cranberg, a mining engineer ('Mr Cranberg'); a mining engineer called Jean Cornec ('Mr Cornec'); Sheila McCaffrey, the sole owner of SM Life ('Ms McCaffrey); an oil drilling engineer named Paul Marriott ('Mr Marriott'); and a Belizian seismic surveyor, Michael Usher ('Mr Usher'). It is common ground that each of these individuals (other than Ms McCaffrey and Mr Marriott) was issued with an equal number of Class A shares.[3] Ms McCaffrey's entitlement was issued at her direction to SM Life and Mr Marriott's to a family company called Maranco LLC ('Maranco'). The Class A shares were issued without the parties having entered into contracts of allotment, so that the shares were issued for no stipulated consideration, although it is equally the case that the first five class A

[1] NLLCO entities also have Articles of Organisation, but they occupy a vestigial role in the constitution of the LLC
[2] there was also provision for the issue of Class C shares, but no such shares were ever issued
[3] as a result of subdivisions, each Originator was issued with 40,000 shares with par values of US$15. There was a subsequent gratuitous allotment of 24,000 A shares, bringing each Originator's holding of A shares up to 64,000. Mr Usher's original 40,000 shares remained in his estate following his death and the additional 24,000 shares, which were allotted subsequently, were allotted to his widow, Patricia. Mr Usher's holding was eventually registered in her name after probate had been obtained in Nevis

members (or their representatives in the case of SM Life and Maranco) gave liberally of their unpaid[4] efforts in driving the project forward and realising the aim of discovering oil.

[5] Clause 6.01 of the Operating Agreement provided that INE's board of directors was limited to ten members. INE's initial board was to consist of the five Originators. Each Originator was to retain a permanent seat on the board and could not be removed, whether for cause or at all. Clause 10.03 provided for suitably qualified Class B members to be appointed to the board. No Class B member has been so appointed and there is no evidence that any has ever become entitled to be so appointed. Clause 10.03 also provided for other persons to be elected to the board by a majority of members entitled to vote, subject to the ten person limit. No additional director has even been elected pursuant to the provisions of clause 10.03.

[6] Clause 6.03 of the Operating Agreement provided that a vacancy among the elected members of the board occurring for any reason other than an increase in the number of directors might be filled by a majority of directors or by the members. Since no one has ever been *elected* to the board this power to fill vacancies has never arisen. Had it done so, the person so appointed would have held office only until the next following annual meeting of the members. Clause 6.03 further provided that a vacancy occurring among the original permanent members of the board was to be filled by the former permanent member's Successor in Interest, executor, administrator or personal representative. It was under this provision that Patricia Usher ('Mrs Usher') subsequently succeeded to a seat on the board following the death of her husband in 2004.

[7] Clause 6.04 provided for the removal of elected board members. There are no provisions for the resignation or removal of Originator directors.

[8] Clause 9.01 provided for INE to hold Annual General Meetings at a time and place to be appointed by the board. Clause 9.09 provided that action required to be taken at a meeting of members could be taken without a meeting provided each member entitled to vote signed a written consent or consents in that regard.

[9] Clause 10.01 dealt with voting. Class A members have two votes (described as 'voting units') for each percentage point of the total of all issued shares held by the class A member and Class B members have one vote (or voting unit) for each percentage point of the total issued shares held by the Class B member.

[10] Clause 12 provided for distributions to be made at the sole discretion of the board. No dividends have ever been declared or paid. Clause 12.02 provided for the profits and losses of INE to be allocated for each fiscal year in proportion to shares held by the respective members. There is no evidence that this has ever been done.

[11] Clause 13 dealt with transfers. Members might transfer their shares freely to other members. Otherwise, and ignoring details, the Operating Agreement provided for the member wishing to

[4] Maranco LLC had a separate drilling contract under which it earned some US$43 million over 37 months

dispose of shares to negotiate, first, for their purchase by the company and if that cannot be agreed, then at the same price by the remaining members. Only if that process breaks down is the selling member free to sell to third parties, but on no less favourable terms than those that had been offered to the company. INE is not obliged to purchase the shares of any member and may not do so unless a majority of the other members agree that it should.[5]

[12] Clause 13.07 provided that with the written consent of Members holding two thirds of the outstanding voting units a person might become an Additional Member of the company in consideration of such capital contribution as the members should determine. A capital contribution is defined as any contribution to the capital of the company in cash, property, services rendered or a promissory note or other binding obligation to contribute cash, property or to perform services, whenever made.[6] A member so admitted is not entitled to share in any income or gain accruing to the company before the date of his admission. In other words, the existing entitlement of the previous membership to their allocations of income and capital is not to be disturbed in consequence of the admission of an Additional Member.

[13] Clause 14 provided for dissolution and winding up. The company must be dissolved (a) upon a written determination binding two thirds of all voting units; (b) upon the sale or transfer of substantially all of the assets of the company; (c) upon the insolvency, as defined, of the company; or (d) as otherwise required by Nevis law. Other than the power of the High Court in Nevis pursuant to section 52 of the NLLCO to dissolve the company if it becomes impracticable for it to carry on its business in accordance with its operating agreement, no provision of Nevis law that might require the company to be dissolved was identified at trial.

[14] Finally, I should mention that by clause 16.04 it was provided that the Operating Agreement might be amended upon the making of a proposal for amendment either by the board or by persons holding twenty five per cent of all voting units to the membership. It was a requirement of the Operating Agreement that a vote upon such a proposal must be taken within a thirty day period following notice of the proposal (unless extended as provided by the Operating Agreement). The amendment took effect once it had been approved by a bare majority of voting units entitled to be voted.

[15] Such was the constitutional structure under which INE commenced its operations.

The claims of SM Life

[16] In the prayer to its so-called fresh as amended claim form, served only days before trial, SM Life claims a bewildering assortment of twenty two heads of relief, including claims for damages under each of the known economic torts; or alternatively permission to bring a derivative claim in the

[5] the construction of this provision is not free from doubt, but nothing turns on this detail for present purposes
[6] the definition corresponds with section 32 of the NLLCO

name of INE;[7] or, in the further alternative, an order dissolving INE. The reality, however, is that what SM Life really wants is an order that it be bought out by either INE itself or by Ms Morrice or the second Defendant ('Mr Quinn') on unfair prejudice grounds. Only if that relief is not to be granted, does it seek a dissolution. In the nature of things, SM Life's claim is mounted by Ms McCaffrey and relies at any rate in part upon alleged prejudice experienced by her as an individual. Mr Macdonald QC, who appeared together with Mr Jeffrey E Nisbett and Ms Nicola Allsop for the Defendants, sensibly took no point as to the separate personalities of SM Life and Ms McCaffrey. They were treated for general purposes as identical and I shall do the same except where it is necessary to distinguish between them.

The facts

(a) Origins

[17] Ms McCaffrey appears to have known Ms Morrice since before 2002. She appears to have had previous experience in an oil or gas exploration project in the Republic of Ireland. In 2002 Ms McCaffrey and Ms Morrice began putting the Belize project together, in collaboration with the other Originators and Mr Cranberg. A production sharing agreement ('PSA') was entered into with the Government of Belize, which subsequently exercised an option to acquire a ten per cent interest in the project. A joint operating agreement was entered into between BNE and one of Mr Cranberg's companies called CHx Belize LP ('CHx'), a Bahamian limited partnership belonging to Mr Cranberg. The bones of the joint operating agreement were that Mr Cranberg would supply one half of the first six million dollars of initial venture capital in exchange for forty per cent of the profits and would pay forty per cent of all subsequent expenditure.[8] The balance of the initial funding was raised from persons (the Class B members) who had attended so called Educo seminars run by Mr Quinn and who were encouraged in the course of those seminars to invest in INE in exchange for the issue of Class B shares. In 2005 a modest banking facility was opened with Belize Bank International. In June 2006 CHx obtained a significant line of credit from Standard Bank, starting at US$10 million and going up by annual increments to US$30 million. BNE stood as guarantor for sixty per cent of this facility and had, or was supposed to have had, access to sixty per cent of the available funding. Although Mr Marriott was critical of the size of the facility and although Ms McCaffrey accused Mr Cranberg/CHx of abusing it for personal advantage, in my judgment the obtaining of these funds was of enormous benefit to BNE and, therefore, INE. If there was any abuse, it was technical and it has not been demonstrated that BNE, and therefore INE, has suffered any loss in consequence. The Standard bank facility was subsequently replaced.

[7] it was agreed at the start of the hearing that this claim was to be treated as in the alternative to SM Life's other claims

[8] this appeared to be common ground at trial, although the documentation relating to this joint venture is not consistent in every respect with this analysis

(b) Mr Quinn

[18] Ms McCaffrey introduced Ms Morrice to Mr Quinn in around 2002. Mr Quinn, who gave evidence at the trial, is a highly controversial figure both in the Republic of Ireland, of which he is native, and further afield. He runs what he calls Educo seminars, which people are persuaded to attend at very high cost. The trial did not receive evidence about Educo instruction, so that I cannot say anything about its subject matter and content. Mr Quinn told me that he promotes what he called a business structure which, on explanation, seemed to amount to no more than advice to promote better employees in preference to inferior ones, although to be fair to Mr Quinn he was not given an opportunity to set out the principles of his business structure in any detail. Mr Quinn also franchises what he calls Educo gyms and has a chain of health food stores. He claims to have a doctorate and degree in hypnotherapy and to have a Master's degree from the University of East London. Since he has been associated with the Belize project very considerable sums have been paid by INE and BNE for personnel to attend his seminars and to use (and staff) his gyms. Holders of the Educo gym franchise pay royalty to one of Mr Quinn's Jersey companies.

[19] It appears that there is a body of opinion in the Republic of Ireland which is passionately opposed to Mr Quinn and to whatever it may be that he stands for or promotes, to the point where campaigns have been run against him in the media and where he is, or has been, subjected to serious intimidation. These campaigns seem to have extended to persons from time to time associated with him and Ms Morrice, who remains a supporter of and who is supported by Mr Quinn, told me of intimidatory behaviour to which she has been subject, especially in Denver, Colorado, where she lives. I have no reason to doubt this evidence.

[20] Ms Morrice maintained that Mr Quinn was treated from the inception of the Belize project as if he was a Class A member. I reject this evidence. Mr Quinn was well aware of the project from the outset and, after initially expressing doubt, acted as a promoter of it, but it is clear that he was not 'treated as' a Class A member from the outset. Had he been, he would have been given Class A shares and appeared as an Originator in the Operating Agreement.

[21] In October 2006 Mr Quinn paid his one and only visit to Belize. At a ceremony on 10 October 2006 held at the head of the first producing well, Ms Morrice and Ms McCaffrey presented him with a certificate for 64,000 Class A shares in INE. Ms McCaffrey made an enthusiastic speech to mark the occasion. No contract of allotment was entered into between INE and Mr Quinn in respect of these shares and he gave no consideration, executed or promissory, in exchange for their issue.

[22] By a so-called written consent of members alleged[9] to hold a majority of the INE voting units and dated 10 October 2006 it was purportedly resolved that 64,000 Class A shares be allotted to Mr Quinn. It was further recited that there was a vacancy in the elected membership of the INE board and acting purportedly in reliance upon clauses 6.02 and 6.03 of the Operating Agreement the members purported to appoint Mr Quinn to fill the vacancy until the next annual meeting.

[9] I say alleged merely because there was no evidence of the state of INE's register of members at this time

[23] The board appointment was plainly invalid. There was no vacancy among elected members of the board since there had never been any elected members. Mr Quinn himself appears to have been wholly ignorant of this supposed appointment. He insisted in cross examination that he was not a director until asked to be so at a meeting at his house in Hamhaugh Island in the Thames in August 2007, some ten months later. He also said, confusingly, that the position was 'formalized' when he had been handed the share certificate at the well head some ten months earlier.

[24] So far as Mr Quinn's shareholding is concerned, Mr Macdonald QC reminded me that the prayer to the fresh as amended statement of claim seeks no declaratory relief as to its validity or otherwise. For all that, it is not possible for me to reach a conclusion in this matter without considering crucial events in the story. It seems to me that there is a serious question (I put it no higher) about the purported allotment to Mr Quinn. Allotments of shares to Additional Members under the 2002 Operating Agreement required to be supported by the written consent of members holding at least two thirds of INE's outstanding voting units.[10] Assuming that the signatories constituted a majority on 10 October 2006, the members were required when allotting shares under the 2002 Operating Agreement to stipulate for payment of a Capital Contribution in consideration of the allotment.[11] The written members' resolution makes no reference to the provision by Mr Quinn of any Capital Contribution in exchange for the issue of the shares. Although, as I have said, Capital Contributions are widely defined, they are not so widely defined as to cover an allotment in consideration of no Capital Contribution at all. While there is evidence that Mr Quinn involved himself in the affairs of INE to some extent, there can be no suggestion that such activity was in satisfaction of a promise made in exchange for an allotment of Class A shares. On the contrary, all appearances point to the shares as having been intended as a gift from Mr Quinn's admirers, Ms Morrice and Ms McCaffrey.

[25] There is in evidence a curious document on the letterhead of BNE. It is dated 20 June 2006. In gushing terms, it invites Mr Quinn to accept an originating shareholding in BNE equal to those held by each of the signatories, the value of which the letter puts at US$16 million. The letter has space for the signatures of Ms Morrice, Mr Cornec, Ms McCaffrey, Mr Marriott and Mrs Usher. It is purportedly signed by Ms Morrice, Mr Cornec and Ms McCaffrey alone. It was pointed out that to the inexpert eye Ms Morrice's signature is strikingly different from that which one finds endorsed on other documents to be found in the documentary evidence and Ms McCaffrey flatly denied that the signature against her name on the letter is hers.

[26] Ms Morrice said that she believed that she had drafted the document in Ireland together with Mr Cornec, Ms McCaffrey, Mr Cranberg and Colette Millea, Mr Quinn's personal assistant. She said that the letter was probably put together on a computer either in Dublin or in a holiday retreat nearby. She said that she thought that she and Mr Cornec signed first. She said that she did not see Ms McCaffrey sign. She said that Mrs Usher was listed as a signatory on the grounds that

[10] clause 13.07
[11] ibid

although she was not at the time a director of INE, steps were being taken, as Ms Morrice put it, to bring her on board. Ms Morrice said that once the three signatures had been applied she and Mr Cornec, without waiting to obtain any further signatures, went to see Mr Quinn, presumably then at home in or near Dublin, and delivered the document to him. His reaction to this event is not recorded.

[27] I have no doubt that this letter, which sits uncomfortably with the other part of Ms Morrice's case, that Mr Quinn was universally treated as a Class A member of INE from the outset, is a clumsy forgery. By this I mean to say that while Ms Morrice and Mr Cornec may have signed it (although that appears improbable) Ms McCaffrey did not and, even if she did, the document is plainly an after the event concoction written in an unsuccessful attempt to legitimize the allotment.

[28] Whatever the true position about the purported allotment of 10 October 2006 there can be no doubt that Ms McCaffrey, having signed the resolution, joined in the ceremony of 10 October 2007 and held Mr Quinn out as a Class A member, can have no personal standing to complain of it. SM Life can be in no better position. There remains, however, a serious question whether INE itself or members of INE who did not participate in this purported allotment are bound by it.

(c) The Hamhaugh House meeting

[29] It appears that until the autumn of 2006 Ms McCaffrey who, like the other INE Originators, was also a director of BNE, had managed BNE's administration in Belize, together with Mr Cornec and Mr Marriott. Mr Marriott described the three as multitasking, but he and Mr Cornec had their responsibilities in the field and I find that the bulk of the administrative work in the early years fell to Ms McCaffrey. By the summer of 2006, after oil had started to flow in quantity, it was generally agreed that BNE needed a full time professional CEO and a Dr Gilbert Canton ('Dr Canton'), a native of Belize, was appointed to that position in September. Although Ms McCaffrey agreed that BNE needed a full time CEO, she objected to Dr Canton's appointment on the grounds that he had no industry experience. Despite that, his appointment was supported by the other Originators and must have been supported by CHx and, one supposes, the Government of Belize. Dr Canton remains in post and the impression I was given is that he is an excellent and assiduous CEO.

[30] Although the details are incomplete, it is clear that Ms McCaffrey came to resent the fact that Dr Canton had, as she saw it, ousted her from her position of command in Belize. She complains that he withheld information from her. He says it was there for her to look at if she wanted to. Although the reasons are obscure, it is also plain that there was friction between Ms McCaffrey and Mr Cornec. Success, therefore, had brought the beginnings of division.

[31] Over 16 and 17 August 2007 a meeting was held at a property belonging to Mr Quinn on Hamhaugh Island in the River Thames. It was attended by the Originators and, obviously, by Mr Quinn himself. It appears to have been convened by Ms McCaffrey. Mr Marriott described its object as being to discuss differences about the management and direction of BNE. All are agreed that the meeting took place in a fraught atmosphere. The accounts of what took place cannot be

reconciled but I find that while dissatisfaction was expressed by Mr Cornec and Ms Morrice at the part played by Ms McCaffrey in the affairs of BNE (Dr Canton had, of course, been in post now for nearly a year) no decision was made to remove her either from the BNE board or from managerial responsibilities.

[32] Ms McCaffrey's version of the meeting, supported to a very limited degree by Mr Marriott, was that Mr Quinn spent time over the two days advocating a number of sharp business practices which he suggested should be put in place in BNE. For example, she says that he suggested that the parties set up their own offshore bank, which they would indirectly own and for which they would raise funds to be lent on to BNE at inflated rates of interest, thus creaming off profit for themselves at the expense of the B shareholders, the Government of Belize and CHx. She says that Mr Quinn recommended the setting up of so-called profit centres, which would operate similar scams, presumably in the provision of plant, personnel and equipment. Although Mr Marriott supported Ms McCaffrey on this issue, I reject this evidence in its entirety. BNE's financial statements were professionally audited and were required to stand scrutiny by Standard Bank, the Government of Belize and CHx. Mr Quinn cannot have supposed that there could be any possibility of such arrangements going undetected. I find that he did not make these suggestions.

[33] In any case, it is common ground that none of the supposed suggestions was put into place. The purpose of this part of SM Life's evidence about the Hamhaugh meeting seems to have been to blacken Mr Quinn's reputation.

[34] Mr Quinn says that he was invited at this meeting to impart the benefits of his so-called business structure to BNE; to produce a newspaper to inform the Belizian public about the activities of BNE; and to set up a communication channel for the membership of INE. More curiously, he says that the meeting instructed him to produce a revised Operating Agreement for INE on the grounds, he says, that there were three different versions current and that the resulting confusion needed to be resolved. I do not recall seeing any but one version of INE's Operating Agreement for the period down to August 2007. Mr Quinn's reason for redrafting the Operating Agreement is inconsistent with the reason given by Ms Morrice for the new Operating Agreement, which eventually saw daylight in December 2007. She said it was to concentrate power in the hands of the Class A members in order to prevent a hostile takeover orchestrated by the buying up of Class B shares. Mr Quinn's given reason for the redraft is also inconsistent with what eventually emerged, which was a completely different Operating Agreement rather than a reconciliation or harmonization of three different versions. I therefore reject the explanation which he gives for the genesis of the new Operating Agreement which was signed up to by the Originators at a meeting in Belize on 13 December 2007 and by Mr Quinn later on 6 January 2008. The significance of the fact that he proffered the explanation which he gave is that he was reluctant to admit that the true reason for the changes was to freeze out the B membership.

(d) The 2007 Operating Agreement

[35] On 13 December 2007 Ms McCaffrey, Ms Morrice, Mr Marriot and Jean Cornec signed what purported to be a written consent of members of INE replacing its Operating Agreement with an amended and restated version dated 12 December 2007 ('the 2007 Operating Agreement').The genesis of the 2007 Operating Agreement is cloaked in mystery. Following the Hamhaugh meeting Mr Quinn is said to have 'instructed' an Irish barrister called Caroline Williams ('Ms Williams') to help draft and/or review a fresh Operating Agreement. Ms Williams, who gave evidence at the trial, told me that Mr Quinn contacted her on her cellphone while she was in the process of returning to Ireland from abroad. His call came, apparently, out of the blue. Ms Williams was unable to explain how Mr Quinn had obtained her number. Nor was she able to explain why she had been selected for this task. The only previous contacts with him appear to have been in the course of her attendances at Educo seminars. She appears to have taken this telephone call as amounting to a retainer from the INE board, telling me that Mr Quinn took the trouble to explain to her that he had been 'delegated' to do so at the Hamhaugh meeting, which is in itself curious since that should have meant nothing at all to Ms Williams. It is impossible to understand how any lawyer could have assumed that this telephone conversation amounted to a retainer from the INE board without asking to see a copy of the relevant resolution.

[36] Ms Williams went on to say that Ms Morrice telephoned her on her return home and 'would have' given her instructions, then or later. She did not say what these instructions were and no one bothered to ask her. Ms Williams says that she then called upon Mr Quinn at his house, mentioned to him that she was a Class B member of INE and was told that 'they' wanted to concentrate control of INE in the Class A membership to protect the company against a possible hostile takeover. Ms Williams then received an electronic copy of the Operating Agreement, loyally adding at this point that she may (either then or later) have received more than one such, thus echoing Mr Quinn's evidence that there were in existence three rival versions of the Operating Agreement. It was only then that she appreciated that she was dealing with a Nevis registered company.

[37] After receiving this material, Ms Williams says that she met Mr Quinn on a further occasion in October 2007 to discuss the changes which the board of INE supposedly desired. She described this meeting as not about content, but as amounting to no more than a general chat – albeit a general chat that lasted for about two hours. Having managed, with some difficulty, to construct a version of the PDF document(s) which she had received into a version which could be edited, she set off for Nevis with her laptop, from which she worked on the draft for two to three days together with Mr Jeffrey Nisbett. She then went home and saved the document, which was not changed thereafter, in PDF format.

[38] What is so strange about this account is that at no stage does Ms Williams appear to have sent versions of the draft to the INE board for approval/further instructions (she explained this by saying that she did not have contact details for the entire board) – nor, even, to Mr Quinn. Mr Quinn claims to have worked on the draft together with Ms Williams, but she makes no mention of that

and I reject Mr Quinn's evidence on this point. Ms Williams was uncertain whether she sent a copy to Ms Morrice. If she did, she says she did so on the assumption that Ms Morrice would send it to the other members of the board. She seems to have known by some sort of intuition that what she and Mr Nisbett had drafted in Nevis was what her imagined client wanted, but without ever taking the trouble to check whether that was so.

[39] Some time shortly before 11 December 2007 Ms Morrice telephoned Ms Williams and asked her to go with her to Belize for a meeting to approve the new draft Operating Agreement. Ms Williams took three hard copies of it with her. Ms Williams says that there was no discussion of the draft on the journey.

[40] The meeting convened on 12 December 2007 in the Radisson Hotel at Belize City. Present were Ms Morrice, Ms McCaffrey, Mr Cornec and Mr Marriott. Ms Williams was in attendance. The meeting is described as having been very heated and broke up without a decision having been made. It reconvened at BNE's office in Belmopan on the following day. The upshot was that a draft, containing some relatively insignificant manuscript amendments added during the meeting, was signed by the individuals present. Ms McCaffrey claims to have signed under duress, the pressure being the alleged threats to INE from Class B members or persons standing behind them and posing a threat to the company. Mr Marriott said that he signed because he could not bear seeing Ms Morrice in a state of what he described as near hysteria at the refusal of the others to sign. Both Ms McCaffrey and Mr Marriott said they signed after having been promised by Ms Morrice that they could amend the document later, but this was not put to Ms Morrice and in any case if she did say it the absence of any subsequent requests from anyone to review and amend the document can only mean that if it was said it was said only in the general sense that any document of this type is capable, if the correct procedures are followed, of being revisited.

[41] Following signature, resolutions were prepared of an INE board meeting proposing the adoption of the amended Operating Agreement together with the written consent of members to which I have already referred. An unsigned document prepared from information provided by Ms McCaffrey at the time purports to show 637,037 voting units held by those attending the meeting and by Mr Quinn (who attended by proxy) cast in favour out of a total of 952,698.

[42] In her witness statement Ms Williams said that Ms McCaffrey gave her the document bearing the manuscript amendments for her to engross and take back for Mr Quinn's signature.[12] In cross examination, Ms Williams said that two documents bearing identical manuscript amendments were signed on 13 December 2007. She says that she took back these two manuscript amended copies, the signature page of each of which had been completed by the four signatories. Her stated reason for this change of evidence was that she had listened to earlier evidence contrasting the signature page of the amended Operating Agreement which had been used in proceedings in, I think, Denver with the signature page of the same document to be found elsewhere in the trial

[12] there was an issue whether Mr Quinn had already signed the signature page of the drafts, but I find that he signed only when the engrossment was presented to him by Ms Williams for signature on 6 January 2008

bundles and realized that these differences must mean that two signature pages of the same document had been signed. She said in her oral evidence that what she took to Mr Quinn for signature on 6 January 2008 were two manuscript amended drafts each with its own signature page bearing four signatures, which she had previously photocopied. She said that she took the two originals to Mr Quinn, who signed each and gave them back to her. She then removed these signature pages from the manuscript amended drafts and attached them to conformed copies which she had prepared incorporating the manuscript amendments. She says that she then handed all the documents (apart, it transpired, from a document which she referred to as her working copy) to Ms Morrice on 6 or 7 January after Mr Quinn had signed.

[43] The reason why any of this matters is that Ms McCaffrey asserts that the version of the 2007 Operating Agreement in evidence at trial is not in the same terms as the document signed at the meeting in Belmopan. The evolution of the conformed document is therefore potentially of some importance and I have set it out for that reason. I cannot accept Ms Williams' account of the process given by her in cross examination. First, because no other witness has suggested that two copies of the agreement were signed on 13 December 2007. Any of them who mention the fact refer to a single document only as having been signed and it seems to me improbable that in the fraught atmosphere then obtaining the board members would have troubled to sign two versions. Second, the evidence of Mr Quinn was that he signed only the conformed copy, to which a signature page was already attached and that he was shown one copy of the document with the manuscript amendments, to which a signature page (without his signature) was attached and which he compared with the conformed copy before signing it. I think that Ms Williams must have been mistaken in her attempts to recall these events in her oral evidence. I find that she brought back from Belize a single executed copy of the document; had it engrossed; attached the original signature page to the engrossed version and kept a copy of it with the manuscript amended version; and took both to Mr Quinn on 6 January 2008; that he signed the engrossed copy after having compared it to the manuscript version; and handed it back to her after she had witnessed his signature.

[44] That does not mean that the signature page was not subsequently removed and attached to a version of the Operating Agreement different from that signed at Belmopan. The difficulty with that hypothesis, however, is that Ms McCaffrey alone of the witnesses suggests that that was the case and that, when asked to summarise the differences between the document now in evidence and the document which she says she actually signed, she was quite unable to do so. Although she received a copy of the document in around June 2008, she never protested then or until very much later in the course of these proceedings that it was not what she had signed.

[45] I find accordingly that Ms McCaffrey signed the document referred to as the 2007 Operating Agreement on 13 December 2007 at Belmopan. That document bound her as having been signed by her voluntarily, even if it was signed under pressure. The validity and effect of the document as an act of INE is another matter.

[46] The significant changes to the Operating Agreement included:

(1) The insertion of Mr Quinn into the definition of 'Originator', with a permanent seat on the board provided he retained 25,000 Class A shares (the same qualification was attached to the seats of the existing Originators)

(2) The Originators were given a veto over the grant of Class A membership

(3) The extent of the majority's power of veto over the activities of the board was substantially restricted

(4) Directors other than Originators were to be selected by the Class A members

(5) The directors were given power to allocate profits between members otherwise than *pro rata*

(6) Shares could not be transferred otherwise than to individuals

(7) The directors had an unfettered power to refuse to register transfers

(8) Savage restrictions on transfers of Class A shares were introduced, which effectively left the member holding Class B shares, while leaving the Company free to deal with the Class A interest

(9) Class B shares were freely transferable only to other members who had completed one of Mr Quinn's Educo training courses

(10) further amendments to the Operating Agreement could be made by the exercise of a majority of Class A voting units

[47] In my judgment, the amended Operating Agreement is invalid. It was a requirement of the 2002 Operating Agreement[13] that any amendment to it had to be proposed either by not less than 25% of the membership or by the board of Directors 'to the members.' That was not done in this case. This is not merely a procedural requirement. It is crucial that the membership as a whole should have an opportunity to consider, debate and vote upon amendments to an Operating Agreement, particularly where it is proposed to deprive a whole Class of members of substantial rights, which it will have been appreciated is the effect of the 2007 Operating Agreement. It was not open to the Class A members to shut themselves away from the Class B membership in another continent and pass resolutions amending the Operating Agreement in this way without even informing the Class B members that they proposed to do so.

[13] clause 16.04

[48] There is another problem. It was a requirement of the 2002 Operating Agreement that written resolutions had to be signed by every member entitled to vote.[14] The resolution dated 12 December 2007 purportedly amending the 2002 was not so signed. If the 2002 Operating Agreement in its original form governed the position it was therefore *prima facie* invalid. Mr Macdonald QC relies in this regard upon a resolution passed on 7 August 2006 which (among other things) purported to amend clause 9.09 of the 2002 Operating Agreement to allow written resolutions to be passed by a bare majority. The resolution was supposedly passed at a special meeting of the members of INE held, once more, in Belmopan, rather than, as one would expect, in Dublin, where the majority of the Class B membership were to be found and where they could most conveniently have attended. There is in the trial bundles a notice of this meeting, but it is unsigned and there is no evidence that it was ever sent out. The list of those present at the meeting mentions Ms McCaffrey, Ms Morrice, Mr Cornec, Mr Marriott 'et al' and refers to a Schedule said to contain a full list of members present in person or by proxy. There is no such schedule in the trial bundles.

[49] In my judgment it is highly unlikely that this attempt to amend the 2002 Operating Agreement by providing for written resolutions to be valid if signed by a majority, thus depriving Class B members (and any dissenting Class A member) of the right to a meeting in cases where the Operating Agreement provided for matters to be considered in general meeting was validly effected. It appears to be nothing more than another example of a retreat to Belmopan in order to deprive the Class B membership of rights. If that is so, then the 12 December 2007 resolution purportedly adopting the 2007 Operating Agreement was invalid for the additional reason that it was not signed by every member entitled to vote, as required by clause 9.09 of the 2002 Operating Agreement.

[50] This last point, although touched upon, was not properly explored in evidence or in argument and beyond recording that I find the resolution of 7 August 2006 to be a highly suspicious document I say no more about it. It remains my view, however, that the attempt to amend the 2002 Operating Agreement in December 2007 was ineffective for the reason given in paragraph [47] above.

[51] Following this botched attempt to amend the Operating Agreement there was a period of around six months during which board members other than Ms Morrice found it impossible to obtain copies of the alleged new agreement. A copy emerged only in the course of some litigation being conducted by Mr Cornec. The reasons for this never became clear and must be supposed to have originated in a desire to conceal the amended Operating Agreement from the Class B members for as long as possible by withholding it from those Class A members (including Ms McCaffrey) who were suspected of colluding with the Class B membership against the interests of (primarily) Ms Morrice and Mr Quinn.

[14] clause 9.09

(e) Subsequent events

[52] I do not think that it is necessary for me to do more than sketch the more significant of subsequent events.

[53] It was clear from the evidence that Ms McCaffrey was progressively sidelined from the management of BNE. Dr Canton clearly found her difficult to work with and I find that she became effectively excluded from all participation in the management of BNE.

[54] In July 2008 Ms McCaffrey was removed, without her knowledge, as a signatory on the JP Morgan Chase accounts through which the proceeds of the Standard Bank facility were operated.

[55] The split between Ms McCaffrey and Mr Marriott on the one hand and the remaining directors on the other widened at a board meeting held in Nevis on 11 and 12 August 2008.

[56] On 11 August 2008 Mr Cornec agreed to sell his Class A shares to Ms Morrice at a price of US$290 per shares. Although Ms Morrice paid him the first US$2 million of the agreed price, she disputes his right to any further part of it in continuing litigation between them in the United States. Mr Cornec resigned as a director of each of INE and BNE on the following day. Ms Morrice transferred the interest acquired from Mr Cornec to her second cousin, Josh Stewart ('Mr Stewart') and Mr Stewart was then supposedly appointed to the board of INE. This meant that, when taken into account with the Class A membership interests of Mr Usher, which had finally become vested in Mrs Usher some time in 2008 and which Mrs Usher voted with Ms Morrice, Ms Morrice had a majority among the Class A members, even ignoring Mr Quinn's claimed holding.

[57] On 28 August 2008 Ms Morrice was appointed to act as INE representative at all meetings of BNE. At an Extraordinary General Meeting of BNE held on 5 September 2008 Ms McCaffrey and Mr Marriott were removed from the BNE board and Mr Stewart and Mrs Usher were appointed in their stead. At the same Extraordinary General Meeting Ms McCaffrey was asked whether she retained any BNE property, including its corporate seal. BNE subsequently made a complaint to the police in Belize, which resulted in her home being searched in January 2009 and the discovery of assorted documents which may or may not have been copy documents and which may or may not have belonged to BNE. It appears that a seal of each of BNE and INE was also discovered. A further complaint was made alleging that Ms McCaffrey had drawn upon BNE bank accounts following her removal from the BNE board. A warrant for her arrest is apparently outstanding in Belize.

[58] On 3 October 2008 Ms McCaffrey was removed as a designated member of the Joint Operating Committee which ran the Joint Venture.

[59] On around 20 January 2009 Ms McCaffrey was purportedly suspended as a director of INE. There is no power to suspend a director of INE. Mr Marriott resigned as a director of INE on 12 February 2009.

[60] Later that year INE announced a so-called Loan Release Programme ('LRP'). Ms Morrice and Mr Quinn contended it was open to all, but I find that it was withheld from SM Life and certain Class B members of whom they disapproved. Under the programme INE lent members funds to be set off against future profits. It is claimed that this was forced upon the BNE board as a result of the refusal of Standard Bank to permit payment of dividends. There was no evidence from any lending institution supporting this contention. I find that this bizarre arrangement was designed to punish INE members of which or of whom Ms Morrice and Mr Quinn disapproved, including SM Life/Ms McCaffrey. Funds were distributed through the LRP later in 2009. Mr Quinn received US$1.6 million.

[61] On 6 July 2010 Maranco LLP commenced an action against Ms Morrice, Mr Quinn, INE and BNE. The Court was not taken to the pleadings but its drift is not hard to guess. The claim was settled on 27 June 2011, by INE redeeming Mr Marriott's holding for US$16.5 million. I was told by Mr Macdonald QC, that amendments were made to the Operating Agreement to permit this redemption to take place. I was not taken to them but if my conclusions on the validity of the 2007 Operating Agreement are correct, it must be questionable whether the 2011 amendments are valid, either.

[62] On 20 August 2011 INE entered into a written Option and Redemption Agreement conferring upon Mr Quinn the right to call for INE to purchase his purported interest in INE[15] for US$23 million or US$285 per share. Mr Quinn said that this was done to set a benchmark value for INE shares. The option has not been exercised and is presently restrained by injunction.

[63] The present proceedings were commenced on 28 September 2011.

(f) Alleged misappropriations

[64] SM Life makes complaint about a number of items of expenditure in each of INE and BNE, whose existence has been disclosed in these proceedings and which it says amounted to misfeasance on the part of the respective boards. It seeks permission to bring derivative proceedings in respect of them.

[65] Between June 2009 and April 2010, after Ms McCaffrey had been effectively excluded, a company called White Knight Enterprises LLC ('WK'), owned by Mr Stewart, was paid a total of US$365K supposedly pursuant to a contract under which WK was to be paid US$125 per hour for consultancy work. Despite these arrangements, most of the amounts paid were paid in rounded sums. Ms Morrice claimed that this was for work done in an attempt to obtain a large investment from a businessman in Abu Dhabi who is said to have subsequently broken off negotiations. The amounts were then reclassified as advances on directors fees and finally returned to INE when it was decided that no directors fees were to be paid.

[66] I reject the story about the attempted investment. Not a single document was produced to support it and Mr Stewart did not give evidence. These payments appear to have been simple withdrawals for

[15] Mr Quinn also has some B shares obtained by him on transfer in exchange for Educo seminars or other services

private purposes which should never have been made and which demonstrate a failure to distinguish between company and personal property.

[67] INE paid some US$264K to a company called Round Table Management Inc ('Round Table') in 2010, again after Ms McCaffrey had effectively been removed from the scene. Ms Morrice said that Round Table was set up to 'facilitate administration' in the United States and that most of the money went to consultants. It is striking that these payments ceased as soon as Maranco commenced the proceedings which led to the redemption of its shares. Ms Morrice explained that by saying that they were advised that for tax reasons a Nevis company could not have a US base. I do not think that there is sufficient evidence for me to conclude that these payments were unratifiable peculations by Ms Morrice.

[68] A Mr Tom Perkins had a contract with INE for a round US$40K. He was actually paid US$90K. Ms Morrice said that Mr Perkins was in negotiations with Shell together with a Mr Bill Ackerman. There seems to have been no good reason why INE, which was simply an investment holding company, should have been in negotiations with Shell. Again, however, I do not think that there is sufficient evidence for me to be able to conclude that this was an unratifiable withdrawal of INE funds on the part of Ms Morrice.

[69] Next, Ms McCaffrey complains that INE paid Ms Morrice travel and accommodation expenses of some US$603K between 2008 and 2011. Ms Morrice's response was that she did do an awful lot of travelling. While that is no doubt true, the business of INE does not require its directors to travel to any significant extent. It is noticeable that there was no charge for travel and accommodation before 2008, which was of course the time when Ms McCaffrey was eased out. While the figures for 2010 and 2011 may not be self evidently unreasonable, I do not accept that INE's business required Ms Morrice to incur travel and accommodation expenses of US$119K in 2008, still less of US$376K (over US$1K per day) during 2009.

[70] No serious attempt has been made by Ms Morrice to account for these figures or to explain what of INE's needs required her to travel to this extent on its account. Figures of this sort clearly cry out for some sort of justification. The difficulty is that I do not have sufficient information to be able to say what, if any, of these amounts represent unratifiable drawings on the part of Ms Morrice. The most that can be said is that a significant proportion of these expenses must have been personal.

[71] INE paid Mr Quinn or his companies US$544K in 2008 and US$201K in 2010. The first of these figures are said to represent reimbursement by INE to Ms Morrice of seminar fees for BNE personnel which had been paid in the first instance by Ms Morrice. They obviously cannot be ratifiable as a legitimate expense of INE but what appears to have happened is that INE has paid instead of BNE. It seems to me that it would be unjust in those circumstances to treat these payments as having damaged INE, since had BNE paid directly there would have been a corresponding effect on INE's balance sheet. The latter of the two figures represented the fees to permit Ms Morrice, Mr Stewart and an associate of Ms Morrice's called Mary Ann Malone to attend a 13 day seminar in the

Bahamas. The invoice was signed off by Ms Morrice. The figures are inherently preposterous and no reason has been given why the business of INE required, or justified, expenditure of this sort. There was no suggestion that this was in reality an expense of BNE which would have indirectly flowed through to INE. It seems to have been a jaunt for which Ms Morrice should have paid out of her own pocket. A further sum of US$62,309 paid by INE to Ms Morrice turns out to have been the amount of an Educo gym franchise fee due from her to Mr Quinn, but which she has failed to pass on. The evidence showed, however, that in the ordinary way she would have been reimbursed for this sum by BNE, so that on a look through basis INE has lost nothing in the result.

[72] Ms McCaffrey complains about payments made to Mr Quinn's companies by BNE for Educo seminars (US$718K over three years), Dr Canton gave evidence, which I accept, that he regarded this expenditure as beneficial to the workforce and to productivity and that it was supported by the Government of Belize. In those circumstances it seems to me to be contrary to principle for the Court to attempt to set aside such expense and in any event it does not lie in the mouth of Ms McCaffrey to complain about the expenditure of a company of which neither she nor SM Life is a member.

[73] During 2009 and 2010 INE spent US$538K on public relations services. It is striking that these payments, too, commenced after Ms McCaffrey had been effectively disposed of and that they ceased at around the time when Maranco commenced its proceedings. I do not think that it is for me to say that INE was not entitled to make use of public relations consultants in its dispute with the Class B members (or some of them) and others. The fact that the expenditure ceased once Maranco brought its complaint may show no more than common prudence, but this expenditure, unlike the previous items, does not seem to me to have the character of an unauthorized withdrawal.

[74] Between 2008 and 2010 INE spent over US$1.8 million on various security and surveillance services. This was justified variously as arising from the need to provide physical protection to directors (Mr Quinn was treated as a director for this purpose) and for defending the company against non physical attack from its enemies by, e.g., surveillance operations. The expenditure comes to an abrupt halt at around the time when the Maranco proceedings were started. It is clearly excessive. Whatever may have been the need for some personal security, the expenditure was made in very large part for the purposes of Mr Quinn, who appears to have hired what amounted to a private army at the sole expense of INE. It seems to me that there is a prima facie case for supposing that a substantial amount of this expenditure is to be treated as if it was a gift to Mr Quinn. However, before making a finding that any of this expense amounted to an unratifiable abuse of INE's funds the Court would need to be in a position to establish what of it was justifiable and what was not. That is not possible on the evidence before the Court.

Remedies

(a) Buy out

[75] Ms McCaffrey seeks an order that INE, Ms Morrice or Mr Quinn buy her out at an independent valuation with no minority discount. Her principal ground for seeking this relief is her exclusion from participation in the management and affairs of INE, although she relies upon the payments which I have dealt with in the preceding section of this judgment as showing that the affairs of INE have been conducted in a manner prejudicial to herself as well as to other members.

[76] So far as exclusion is concerned, I consider that the origins of her grievances were less the result of oppressive conduct directed against her, than of the fact that upon the discovery of marketable oil by BNE she was inevitably, as she herself admitted,[16] going to have to hand over the reins of administration. I do not consider that she can claim to have been oppressed as a result of the inevitable fact that BNE became too big for her to continue to handle on her own.

[77] Later events, however, do show deliberate discriminatory conduct and, indeed, a policy of deliberate attempts, which I have not recounted in detail, to make her life as an Originator as difficult as possible. She has also been discriminated against by the exclusion of SM Life from the LRP, although it has been said in open court that the scheme remains available to SM Life.

[78] The NLLCO contains no provision conferring a power to make a buy out order. Mr Walwyn relied upon section 11 of the NLLCO, which provides that in construing the Ordinance, or any part of it, the Court or any other person shall refer to the common law or to the construction of the same or similar acts in other jurisdictions. Founding himself upon this provision, he invited me to treat a company formed under the NLLCO as giving rise to the same or similar equities as were held by the Supreme Court of Massachusetts to arise in the case of a company described by that Court as a 'close company': **Donahue v Rodd Electrotype Company of New England, Inc**[17].

[79] It does not appear that the company in question in **Donahue**, Rodd Electrotype, Inc, was formed under any particular form of incorporation regime that of itself brought equities into play. Instead, it was the circumstances of its formation and the identity of its participators which allowed the Supreme Court (a) to class the company as a 'close company' and (b) to identify the obligations owed to one another by the participators in such a company. The Court 'deemed a close company to be typified by' (i.e. they were not attempting a universal and exclusive definition) (1) a small number of stockholders; (2) no ready market for the corporation's stock; and (3) substantial majority stockholder participation in the management, direction and considerations[18] of the corporation. Having noted the close resemblance of such a corporation to a partnership,[19] the Court identified the

[16] 'I needed help'
[17] 367 Mass. 578, 328 N.E.2d 505
[18] Which I take to mean deliberations
[19] compare the English decision in **Ebrahimi v Westbourne Galleries** [1973] AC 360, upon which Mr Walwyn also relied

familiar methods of oppression available to the majority against a minority in such companies should the majority choose to resort to them. The Court went on to point out that one remedy which may redress the wrongs suffered by a minority, dissolution, is unlikely to be available to a minority under a close company's regulations. The Court then held that stockholders in close corporations owe to each other substantially the same fiduciary duties as do the members of a partnership and must discharge their management and stockholder responsibilities in accordance with this strict good faith standard.

[80] Applying these principles, the Supreme Court ordered a founding member who had caused the corporation to redeem his shares either to reverse that process or to cause the corporation to purchase the plaintiff's shares on the same basis. It is to be noted that the Court did not order the defendants or any of them to purchase the plaintiff's shares using their own money.

[81] This case is illuminating (as well as being a joy to read), but I do not think that anything in section 11 of the NLLCO entitles me to follow it. Section 11 provides guidance as to the *construction* of the NLLCO. If I am to follow **Donahue** or **Westbourne Galleries**[20], which was also cited to me, it can only be because I am persuaded that a combination of the provisions, express or to be implied, of the NLLCO, taken together with the terms of the 2002 Operating Agreement and the composition of INE's membership, compels the conclusion that INE is to be treated as what would be described in Nevis or English company law textbooks as a quasi partnership. Even then, I would have to take great care in deciding what factual situations justified the intervention of the Court and what remedies were available to the Court in response.

[82] I am satisfied that INE is not to be treated as the equivalent of a close corporation within the meaning of **Donahue**, or of a quasi partnership within the meaning of **Westbourne Galleries**. For a start, it has two (potentially three) classes of shares. This is wholly untypical of the close corporation. Secondly, it has some four hundred members, which is also out of line for the typical quasi partnership company. Third, management is deliberately conferred only upon that section of the membership holding Class A shares (unless a Class B member comes to hold 1,000 or more Class B shares or is elected by a majority of the membership). This is therefore not a company in which all or even a majority of members can expect to be able to participate in management of the business. It is true that there is no ready market for INE's shares, which seem to have traded, without regard to the provisions of clause 13 of the 2002 Operating Agreement, within the classes of membership only but I do not think that that feature on its own is sufficient to give INE the qualities of a close company, for the reasons which follow.

[83] LLC's are typically (although not exclusively) used for the holding of medium to long term investments and their regulations commonly severely restrict or even forbid the withdrawal of contributions otherwise than upon a dissolution, especially where, as here, the investments which

[20] [1973] AC 360

they hold are illiquid. Indeed, and unless the company's operating agreement otherwise provides,[21] that is the position under the NLLCO. The 2002 Operating Agreement, except in the limited circumstances provided for by the transfer provisions of clause 13.03(a), does not provide anything of the sort. While clause 13.03(a) entitles the company to purchase a transferring member's shares, it is never obliged to do so. It seems to be impossible in these circumstances to import into the arrangements which regulate this company an equitable entitlement to a return of capital.

[84] Such an entitlement begs the question what circumstances would justify the Court in ordering a return of capital. As has been seen, clause 13 of the Operating Agreement makes redemption by the company conditional upon the agreement of the majority of the remaining members. It may be asked why SM Life alone should be entitled to a return of capital because Ms McCaffrey has been excluded from management or because there has been grossly extravagant expenditure by or at the instance of Ms Morrice when other members are not so entitled or what it is about Ms McCaffrey's personal circumstances which justifies discrimination of this sort? In my judgment it is not possible to rationalize an order of this sort on the basis of exclusion, still less of improper withdrawals, the latter of which affect all members equally. In my judgment there is neither jurisdiction nor an equitable basis in the circumstances of this case for ordering INE to redeem Ms McCaffrey's shares.

[85] Even if I took the view that INE is to be treated as a close corporation, which for the reasons I have given I do not, I would not regard myself as having the power to direct another member of the company to purchase Ms McCaffrey's shares – on the grounds of exclusion or otherwise. Such a coercive power can only, in my judgment, be conferred by the legislature. No participator in INE had any reason to expect that by becoming a member it would find itself liable to pay to provide members wishing to retire with a benefit which the NLLCO precluded them from obtaining from the company directly.

[86] For these reasons I decline to order INE, Ms Morrice or Mr Quinn to purchase SM Life's shares.

(b) Dissolution

[87] I therefore turn to consider the question of dissolution.

[88] Clause 14 of the 2002 Operating Agreement provides for dissolution upon the happening of certain events. None of them has yet occurred. Section 52 of the NLLCO, however, provides that the High Court[22] may decree dissolution of a LLC whenever it is not reasonable (sic)[23] practicable to carry on its business in conformity with the operating agreement.

[21] see sections 40(4) and 45

[22] defined as the High Court having jurisdiction in St Kitts and Nevis

[23] this error is probably the result of aggressive Microsoft spell checking, which habitually substitutes 'reasonable' for 'reasonably'

[89] Mr Macdonald QC says that INE's business is the holding of the BNE shares and that there is nothing to make it in any way impracticable for INE to continue to do that. In my judgment, however, that is too narrow a description of INE's business. Although not specifically set out in clause 3 of the Operating Agreement, INE's business, as developed, includes not only the holding of the BNE shares, but managing the fund invested by the Class B membership.

[90] Apart from that, I do not read section 52 of the NLLCO as engaged only where there is a loss of *substratum*. In my judgment section 52, while certainly embracing loss of *substratum*, goes wider than that. It is engaged not simply where a company's business cannot be reasonably practicably be carried on at all, but where it is not practicable to do so *in conformity with the company's operating agreement*.

[91] In this case the company's true Operating Agreement has been flouted since August 2006 and has been completely disregarded since December 2007. The present board shows no appetite for doing anything other than continuing to ignore the rights of the Class B membership under the 2002 Operating Agreement and its track record offers no grounds for believing that its behaviour will change. There are serious uncertainties as to the identity of the company's Class A membership. Those uncertainties must inhibit any proper continuing management of the company as an investment fund, since distributions are impossible in a company whose share register is affected by such uncertainty. The participation of Mr Quinn, to the tune of US$1.6 million, in the LRP illustrates the significance of the problem. The company has held one (possibly two – the witnesses were uncertain) Annual General Meeting in the nine and a half years of its existence, in contravention of clause 9.01 of its Operating Agreement. No dividends have been paid. Company funds have been distributed in unlawful disregard of the principles of *pari passu* distribution, so that uncertainty affects the allocation (if it has ever been attempted) of profits under clause 12.02 of the 2002 Operating Agreement. Under the 2007 Operating Agreement Class B shares may be freely transferred only to persons who have attended one of Mr Quinn's seminars and other transfers are the subject of severe restrictions and, in certain circumstances, expropriation. Mr Quinn, who has played a part in the affairs of the company since August 2007 (the LRP, for example, was his idea), turns out never to have been properly appointed to the board. Although the practice appears to have been at any rate temporarily halted, a section of the membership has felt free in the past to treat company funds much as if they were their personal property. The company's assets purportedly stand charged with satisfaction of an obligation to buy Mr Quinn's Class A shares (assuming that he has any) under his purported option agreement in circumstances where there is no one at board level willing to challenge that position. Finally, there is evidence that INE money is being used to fund litigation by Ms Morrice and Mr Quinn in a manner not authorised by the 2002 Operating Agreement.

[92] It seems to me that these considerations make it seriously arguable that it is not reasonably practicable for the business of INE to be continued in conformity with the 2002 Operating Agreement and thus seriously arguable that the power of the Court to decree a dissolution under section 52 has arisen.

[93] I do not, however, intend to exercise that power in the present proceedings, for the following reasons.

[94] First, the points made in paragraph [89] to [92] above were not squarely argued in the way in which I have put them. Mr Macdonald QC was not alerted to them in that form and so had no opportunity to deal with them.

[95] Secondly, I would not consider dissolving INE without having heard representations from the Class B membership or, at least, without having given the Class B membership the opportunity to be heard on the question.

[96] Thirdly, I would not exercise the power to dissolve INE on the application of SM Life/ Ms McCaffrey. First, because the manner in which her case has been put shows, to my satisfaction, that dissolution is not what she really wants. Her opening written submissions did not mention dissolution and no developed argument was advanced on her behalf why dissolution would be appropriate in this case. I am of the view that the claim for dissolution was made in order to apply pressure so that she could achieve her real aim, which is to be bought out.

[97] The second reason why I decline to exercise the power to dissolve on the application of SM Life/Ms McCaffrey is because Ms McCaffrey was complicit in many of the steps which have, in my judgment, given rise to a seriously arguable case that INE should be dissolved. She was party to the purported resolution of 7 August 2006, which was designed seriously to undermine the protection available to the Class B members and, whether reluctantly or not, she was party to the 12 December 2007 resolution which was designed to complete the process. She was party to the questionable allotment of 64,000 shares to Mr Quinn in October 2006 and to his invalid appointment as a director of INE. It seems to me that it would be quite wrong to permit her now to take advantage of these matters in support of a claim to have INE dissolved.

(c) Other remedies

[98] I do not propose to give permission to Ms McCaffrey to bring a derivative action, and certainly not an action in the name of and at the expense of INE. While I am satisfied that Ms Morrice has spent far more than is commercially justifiable of INE's money on travel and security it seems to me that it is not shown that there has been what amounts to outright theft – which is what, in essence, it is necessary to show before payments are unratifiable by a majority. Derivative proceedings would therefore be at best speculative.

[99] Finally, there are, as I have indicated, claims based upon the economic torts. I do not intend to deal with these in any detail. The claims are fanciful, are said to involve non-parties and are not made out. In particular, there is no evidence that BNE conspired with or combined with any person to injure INE or SM Life or that it knowingly induced any person to beak a contract with the intention of causing loss to INE or to SM Life.

Conclusion

[100] I will grant a declaration that the 2007 Operating Agreement is invalid and that Mr Quinn was never validly appointed to the board of INE. I will also declare that Ms McCaffrey has never been validly suspended from the INE board. All of the other relief claimed in this action is refused.

Commercial Court Judge

16 July 2012