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

Claim No. BVIHC (Com) 2014/0127, 2014/0128, 2014/0129

BETWEEN:

[1] KANDY & KANDY LIMITED
[2] AL DOBOWI INVESTMENTS LIMITED
[3] KAYS GROUP LIMITED

Intended Appellants

and

HARJEEV SINGH KANDHARI

Intended Respondent

Appearances:

Ian Mill QC, and Rowena Lawrence of Walkers, for Intended Appellants
Michael Todd QC, and Rosalind Nicholson of Conyers Dill & Pearman, for Intended Respondent

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2015: June 24; 26
2016: May 13

JUDGMENT

Intended Appellants applied for permission to appeal from award of costs to Intended Respondent and for stay of costs order pending determination of intended appeal – Following staying of the Intended Respondent's applications to appoint liquidators of the three Intended Applicants, costs had been awarded to him of those applications and of the application by the Intended Appellants in which the stay order was made.

Stay of liquidation applications had been based on majority shareholders of Intended Applicants having made offer to purchase Intended Respondent's

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minority shares in Intended Applicants – Had been held that offer, as modified just before end of hearing of application in which stay of liquidation applications made, provided the Intended Respondent with, in the words of Insolvency Act, 2003, Section 167(3), "some other remedy" such that he would be "acting unreasonably in seeking to have the liquidator appointed instead of pursuing that other remedy." – Offer compliant with requirements of O'Neill v Phillips [1999] 1 WLR 1092; [1999] 2 BCLC 1 (per Lord Hoffman) although did not provide for Intended Respondent's costs – No determination of merits of liquidation applications made – Accordingly, costs of application to strike out and of liquidation applications had been awarded to Intended Respondent based on principle regarding costs in O'Neill v Phillips (rather than the 'general rule' respecting costs in EC CPR 64.6(1)).

HELD: Requirements for permission to appeal not met – No realistic prospect for success of intended appeal – Costs judgment sought to be appealed was correct in its result and in reasoning, both with respect to costs of application in which stay made and costs of liquidation applications – In any event, costs judgment decision not plainly wrong – Well within generous ambit within which reasonable disagreement possible – Costs are a factor in O'Neill v Phillips compliant offers – Awarding costs of applications to Intended Respondent had been consistent with principle in O'Neill v Phillips.

No other reason to grant permission to appeal – O'Neill v Phillips offers are important tool for obtaining just result in cost effective manner in shareholder disputes – Use should be supported, and where possible, strengthened, so that there is opportunity for sensible respondents in appropriate circumstances to achieve no fault divorce consensually – Too often extensive resources utilized in attempt to deal with liability / responsibility / fault for breakdown in relationship of ultimate beneficial owners of company where pragmatic commercial solution would be preferred alternative – In many cases, shared responsibility and interests of all best severed by divorce, and avoiding painful and expensive process of attempting to ascertain fault.

Costs judgment important because makes clear that costs must be fairly dealt with in context of O'Neill v Phillips offers, ideally in offer itself but otherwise by courts when opportunity presents itself – Costs judgment was practical and fair method of getting just result – It strengthened O'Neill v Phillips offers as an important tool for resolving shareholder disputes.

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No need at this time for law of costs in relation to O'Neill v Phillips offers to be examined and clarified by Court of Appeal as matter of general public or commercial importance – Application for permission to appeal costs judgment dismissed.

[1] **LEON J [Ag]:** The Intended Appellants, three BVI companies, applied for permission to appeal to the Court of Appeal ("**Permission to Appeal Application**") from an order awarding costs to the Intended Respondent ("**Costs Order**"), and for a stay of the Costs Order pending the determination of the appeal ("**Stay Application**").[1]

[2] The Costs Order, made on 17 March 2015 by the Honourable Justice Edward Bannister QC (Ag.) of this Court, ordered the Intended Appellants to pay:

(a) the Intended Respondent's costs of three originating applications, which sought a just and equitable winding up of the Intended Appellants ("**Liquidation Applications**"), and

(b) the Intended Respondent's costs of an application by the Intended Appellants to strike out the Liquidation Applications ("**Strike Out Application**"), which Strike Out Application was granted by Justice Bannister's order made on 25 February 2015 (which order, for pragmatic reasons, stayed rather than struck out the Liquidation Applications).[2]

[3] Justice Bannister's judgment on the Strike Out Application was set out in his Note of Oral Judgment dated 24 February 2015 ("**Strike Out Judgment**"), and his judgment on the costs of the Liquidation Applications and the Strike Out

[1] Amended Notice of Application Seeking Leave to Appeal and a Stay of Paragraph 4 of the Order made on 17 March 2016 Pending the Determination of the Appeal (Pursuant to [CPR] Part 62.2 and Part 62.19), originally dated 31 March 2015 and amended 23 April 2015 [following receipt of the transcript] (together, "**Permission to Appeal and Stay Application**").

[2] Order dated 25 February 2015 as to orders 1 to 3 inclusive, and dated 17 March 2015 as to order 4.

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Application was handed down orally on 17 March 2015 immediately following submissions on costs ("**Costs Judgment**").

Liquidation Applications and Strike Out Judgment

[4] The Strike Out Judgment sets out the background to the Liquidation Applications.[3]

[5] In short, the Liquidation Applications arose from a deterioration in the relationship between the Intended Respondent and other members of a successful mercantile family based in Dubai, United Arab Emirates, that was started by the Intended Respondent's grandfather in the 1950's in India. The Intended Appellants held the shares of the operating companies, which had diverse businesses centered on the manufacture and sale of tyres and batteries, with factories or outlets in the Middle East, Europe, West Africa, the Americas and elsewhere. The Intended Respondent had a 25% equity interest in each of the Intended Appellants. As a result of the situation among the shareholders, the Intended Respondent, in the Liquidation Applications, had applied for a just and equitable winding up of the Intended Appellants.

[6] The Strike Out Application did not determine the Liquidation Applications on their merits. Justice Bannister stated expressly that "[w]hether, if [the Liquidation Applications] went to trial, they would succeed on the merits, is not something with which I am concerned on [the Strike Out Application]."[4]

[7] Rather the Strike Out Application was based on Section 167(3) of the Insolvency Act, 2003 ("**Act**") which provides that on a liquidation application by a member,

> … if the court is of the opinion that –

[3] Also the Permission to Appeal Application summarized the factual background under "Background", paragraphs 1 – 8 (save for a couple of places that apparently aim to characterize the background from the perspective of the Intended Appellants and are not material to this Judgment).

[4] Strike Out Judgment, paragraph 4.

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(a) the applicant is entitled to relief either by the appointment of a liquidator or by some other means; and

(b) in the absence of the other remedy it would be just and equitable to appoint a liquidator, it shall appoint a liquidator unless it is also of the opinion that some other remedy is available to the applicant and that he or she is acting unreasonably in seeking to have the liquidator appointed instead of pursuing that other remedy.

[8] In particular, the Strike Out Application focused on whether an offer to purchase the Intended Respondent's interests in the Intended Appellants provided the Intended Respondent with "some other remedy" to a winding up which it would have been unreasonable for him to decline. If it did, the Court at trial, even if it found an entitlement to the appointment of liquidators was otherwise established, would be bound to decline to appoint liquidators by reason of the above-quoted provision and the fact the Intended Respondent had been "acting unreasonably in seeking to have the liquidator appointed instead of pursuing that other remedy."

[9] In summary, the initial offer to purchase the Intended Respondent's interests in the Intended Appellants was made on 21 October 2014 and "refined" by a series of counteroffers leading to a draft agreement dated 20 February 2015 that was produced on the last working day before the hearing of the Strike Out Application.[5]

[5] Strike Out Judgment, paragraphs 7 and 11.

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[10] Justice Bannister held that the offer was "O'Neill v Phillips[6] compliant [such offers referred to in this judgment as an "**O'Neill v Phillips Offer**"] in point of structure"[7]. The Intended Respondent had submitted to Justice Bannister on the Strike Out Application that there were five reasons that justified his rejection of the offer as set out in the draft agreement, each of which reasons Justice Bannister rejected as follows:

a. that there were allegations of misfeasance and breach of duty in relation to the Intended Appellants – Justice Bannister found they were immaterial to the overall value of the Intended Appellants[8];

b. that the valuation of the Intended Appellants would be complex, expensive and with no time limit for completion – Justice Bannister found that it would be the same processes in a liquidation, and there would be additional costs in a liquidation[9];

c. that there would be no "equality of arms" between the Intended Respondent and the Intended Appellants – Justice Bannister rejected this on the basis that the latest offer provided as much protection for an excluded minority shareholder as is practically possible[10];

d. that the draft agreement "did not embody a promise on the part of the majority shareholders to purchase [the Intended Respondent's] shares" but only a "best endeavors" promise to raise sufficient funds – Justice Bannister held that when the Intended Appellants committed

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[6] O'Neill and Another v Phillips and Others [1999] 1 WLR 1092 ("**O'Neill v Phillips**") at 1107 lines D – H; [1999] 2 BCLC 1 at page 16, line g – page 17, line g. Lord Hoffman set out the concept for an offer to purchase (in the context of an unfair prejudice claim that was before the court) and then set out the basic requirements for a "reasonable offer" including that it be at fair value without a minority discount; the value, if not agreed, should be determined by a competent expert "as expert" (not as arbitrator and not with reasons); there should be "equality of arms" in the sense that both sides should have "the same right of access to information about the company which bears upon the value of the shares and both should have the right to make submissions to the expert"; and in certain circumstances, the offer should include payment of the costs. The latter requirement is discussed further later in this Judgment.

[7] Strike Out Judgment, paragraph 8.

[8] Strike Out Judgment, paragraph 9.

[9] Strike Out Judgment, paragraph 10.

[10] Strike Out Judgment, paragraph 11.

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at the hearing of the Strike Out Application to amend the draft agreement to include a binding obligation to purchase, there was a satisfactory resolution of that concern[11]; and

e. that there was no provision to enable the Intended Respondent to buy out the majority shareholders in case they would not be able to raise funds to pay the price arrived at by the valuer (a "fail-safe mechanism") – Justice Bannister held such a provision would go beyond that to which the Intended Respondent would be entitled in a liquidation and was not a provision suggested as necessary in an O'Neill v Phillips Offer[12].

[11] Accordingly, Justice Bannister found that an amended draft agreement which included a binding obligation to purchase would be an offer capable of acceptance by the Intended Respondent and one which it would be unreasonable for him to refuse to accept. He held that the Liquidation Applications should be stayed (rather than struck out, for pragmatic reasons).[13]

[12] In the context of the present Permission to Appeal Application, the following four points should be noted:

(a) the draft agreement dated 20 February 2015 did not contain any provision respecting the Intended Respondent's costs of the Liquidation Applications (or the Strike Out Application),

(b) the absence of such a provision on costs was not one of the reasons asserted by the Intended Respondent to justify his rejection of the offer as set out in the draft agreement,

[11] Strike Out Judgment, paragraph 12.
[12] Strike Out Judgment, paragraph 13.
[13] Strike Out Judgment, paragraph 14.

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(c) the amended draft agreement did not deal in any way with the Intended Respondent's costs of the Liquidation Applications (or the Strike Out Application), and

(d) the Strike Out Judgment, presumably as the matter was not raised, did not deal with the matter of costs not having been dealt with in the amended draft agreement.

[13] No appeal from the Strike Out Judgment and Justice Bannister's order of 25 February 2015 pursuant thereto was pursued by either the Intended Respondent or the Intended Appellants.

Costs Judgment

[14] A hearing was held before Justice Bannister on 17 March 2015 during which Justice Bannister dealt with the costs of the Strike Out Application, and with the costs of the Liquidation Applications, immediately following which he handed down the Costs Judgment.[14]

[15] In the Costs Judgment, Justice Bannister noted that no offer had been made to the Intended Respondent that it would have been unreasonable for him to refuse prior to when the Strike Out Application was brought[15] or right down to the last business day before the hearing of the Strike Out Application[16], and even that offer (the draft agreement) had "unsatisfactory features" referred to in the Strike Out Judgment.[17] It was only towards the end of the hearing of the Strike Out

[14] Transcript, 17 March 2015, page 28, line 15 – page 33, line 14. There followed, almost to the end of the Transcript, further submissions by counsel during which Justice Bannister elaborated on parts of what he determined in the Costs Judgment and which effectively are part of the Costs Judgment.

[15] Transcript, page 30, lines 5 – 25.

[16] Transcript, page 31, lines 1 – 18.

[17] Transcript, page 31, lines 18 – 19.

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Application that "it became clear that what was on offer was a promise unequivocally made" to buy out the Intended Respondent.[18]

[16] Justice Bannister went on to state that the question was whether there was unreasonableness on the Intended Respondent's part which justified the Intended Appellants seeking that he should pay all of their costs.[19]

[17] He held that he could not "accept that there was any moment before the final day of the hearing when the position moved sufficiently for the Court to be able to identify unreasonableness on his part."[20] Justice Bannister emphasized that the Intended Respondent "was entitled to persist in his [Liquidation Applications] and to resist the [Strike Out Application] until the 59th minute of the eleventh hour."[21]

[18] Justice Bannister concluded that the Intended Respondent "should have his costs of the [Liquidation Applications] and the Strike Out [Application]."[22]

[19] Counsel for the Intended Appellants immediately questioned the Costs Judgment in respect of the Liquidation Applications because, he argued, Justice Bannister "hasn't heard any evidence or submissions about the merits of those applications."[23]

[20] Justice Bannister explained further the basis for his Costs Judgment in respect of the Liquidation Applications, stating that the Liquidation Applications had not been attacked on their merits by the Intended Respondents on the Strike Out Application; it was not asserted that they would "bound to fail in any event". The Strike Out Application was founded "purely on the argument that an offer had been

[18] Transcript, page 31, line 23 – page 32, line 1.
[19] Transcript, page 32, lines 13 – 17.
[20] Transcript, page 32, line 22 – page 33, line 8.
[21] Transcript, page 33, lines 6 – 8.
[22] Transcript, page 33, lines 11 – 12, and page 34, lines 16 – 18.
[23] Transcript, page 35, lines 3 – 5.

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made which ought to have been accepted." If the only reason the Liquidation Applications were disposed of was because of the relevant offer made at the eleventh hour, and until that time they were "perfectly good", the costs of the Liquidation Applications must be paid by the Intended Appellants as the applicants on the Strike Out Application.[24]

[21] Counsel for the Intended Appellants appeared to have taken (or really, mistaken) the use by Justice Bannister of "perfectly good" as a reference to the merits of the Liquidation Applications, and proceeded to point out reasons why there were perceived to be problems with the Liquidation Applications, including based on observations made in the Strike Out Judgment by Justice Bannister. He submitted that Justice Bannister was "effectively deciding the merits of the [Liquidation Applications]".[25]

[22] Justice Bannister repeated that the dismissal was not based on there being "anything wrong with [the Liquidation Applications] at the outset" "but because considerably later on you have presented [the Intended Respondent] with a position where it would be unreasonable for him to go on any further. And it seems to me that it follows from that, that you must pay him the price down to the making of the offer which did make it unreasonable for him to carry on any further."[26]

[23] Justice Bannister pointed out that the Intended Appellants obtained a stay of the Liquidation Applications "because of something [they] did on the last day of the hearing" of the Strike Out Application and as a result "rendered all the money which the [Intended Respondent] spent on [the Liquidation Applications] down to the last day of the hearing in front of [Justice Bannister] wasted … And that's why I've made the order I have."[27]

[24] Transcript page 35, line 11 – page 36, line 13.
[25] Transcript, page 36, line 14 – page 37, line 20.
[26] Transcript, page 37, line 22 – page 38, line 22.
[27] Transcript, page 39, lines 10 – 16.

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[24] Then counsel for the Intended Appellants posed a question to Justice Bannister. He asked whether, if Justice Bannister had found that the initial offer to purchase the Intended Respondent's interests in the Intended Appellants made on 21 October 2014 should have been accepted, he would have awarded the Intended Respondent his costs of the Liquidation Applications. Justice Bannister stated that "on an application of this sort", he would have done so although if the stay "had been based on the merits of the [Liquidation Applications], of course it would have been quite different." Then after explaining further Justice Bannister stated "you owe him [the Intended Respondent] the costs until after you have produced an offer which he can't refuse."[28] A bit later he added "and I think if someone comes along at this sort of stage and produced no decent offer until very, very late, it might be different if you produced an offer within minutes of the [Liquidation Applications]."[29]

[25] Counsel for the Intended Respondent then submitted that in O'Neill v Phillips the reason why the offer was or would have been inadequate was because of the failure to provide costs. Justice Bannister responded "that is true".[30]

Principles Governing Permission to Appeal

[26] Permission to appeal should be given only where (a) the appeal appears to have a realistic (as opposed to a fanciful) prospect of success or (b) there is some other compelling reason why the appeal should be heard (e.g.: in the public interest, the issue (such as a point of law or practice) should be examined by the appellate court because the law requires clarifying as a matter of general public or commercial importance).[31]

[28] Transcript, page 39. Line 17 – page 40, line 25.
[29] Transcript, page 41, lines 13 – 17.
[30] Transcript, page 42, line18 – page 44, line1.
[31] Employers International and Others v Boston Life and Annuity Company Ltd. ("**Employers**") [2007] ECSC J0704-1, paragraph 23; Swain v Hillman [2001] 1 All ER 91 (per Lord Woolf MR); Notes to the CPR r 52.3.7 in Civil Procedure 2015 (the White Book).

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[27] With respect to a discretionary decision, such as an award of costs, an appellate court should only interfere when it considers that the judge "has not merely preferred an imperfect solution which is different from an alternative imperfect solution" which the appellate court might or would have adopted, "but has exceeded the generous ambit within which a reasonable disagreement is possible."[32] Put another way, the judge "erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations, and the result of the error or the degree of the error in principle is that the decision exceeded the generous ambit within which reasonable disagreement is possibly and therefore may be said to be clearly or blatantly wrong."[33]

[28] The English Court of Appeal held as follows:

> In deciding whether an appeal against an order for costs has any reasonable prospects of success, the standard practice in this court, established over many years, is that it will only interfere with a discretion that a judge of first instance has on costs if it can be shown that his decision was plainly wrong. That means he has misunderstood the law, or has made a mistake of legal principle, or has misunderstood the facts by taking into account things that are not relevant or forgetting to take into account things that are relevant.[34]

Grounds for Proposed Appeal

[32] Tanfern Ltd. v MacDonald [2002] 2 All ER 801 approving G v G (Minor: Custody Appeal) [1985] 1 W.L.R. 647; Atack v Lee [2005] 1 W.L.R. 2643 at 2653.

[33] Employers, paragraph 24, citing Michel Dufour and Others v Helenair Corporation Ltd. Civil Appeal No. 4 or 1995 (12th February 1996), at pages 3 – 4.

[34] The Queen on the Application of Eyers v Uttlesford District Council [2010] EWCA Civ 48 at paragraph 3.

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[29] The proposed grounds for the intended appeal, and the Intended Appellants' criticisms of the Costs Judgment, are set out in the Permission to Appeal and Stay Application and in the Second Witness Statement of a director of each of the Intended Appellants, Jasjeev Singh Kandhari.[35]

[30] With respect to the Permission to Appeal Application, the Intended Appellants submit that the appeal has a realistic prospect of success because there is a real prospect that the Court of Appeal will reach a different view including about Justice Bannister's "evaluation of the conduct of the parties following the offer, the relevance of such conduct and the terms of the offer itself".[36]

[31] The Intended Appellants assert that Justice Bannister unfairly and unreasonably characterized the approach of the Intended Appellant to their offer and draft agreement, and the Strike Out Application, with reference to page 35, line 11 to page 43, line 17 of the Transcript summarized above, asserting that the offer was a commercially sensible response by the other shareholders to the Liquidation Applications, and the characterization by Justice Bannister:

> … reflected his antipathy to the judicial approach which encouraged the making of such offers ("the Russian roulette process which is involved in 167(3)") – and antipathy which he had also emphasised during the course of the hearing of 23 February 2015 [i.e. on the Strike Out Application].

It was submitted that this antipathy of the Learned Judge appeared to have lead him to make the Costs Orders … despite the fact that: (a) there was not before him any application which involved consideration of the merits of those [Liquidation Applications]; and (b) the Learned Judge, despite the lack of any such application,

[35] Dated 31 March 2015.
[36] Permission to Appeal Application, "Grounds for the Application for Leave to Appeal", paragraph 14.

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had gone out of his way in [the Strike Out Judgment] to express serious (justified) concerns as to those merits.[37]

[32] With respect to the proposed grounds for the appeal, the Intended Appellants first submit that Justice Bannister erred because he should have concluded that the costs of the Strike Out Application and of the Liquidation Applications should be payable by the Intended Respondent.[38] They assert in particular that the Intended Respondent's bases of opposition to the Strike Out Application and his complaints about the offer were rejected by Justice Bannister, and that the lack of an "unequivocal offer" (which was addressed eventually in the amended draft agreement) was immaterial.

[33] It is asserted that the Intended Respondent had focused on saying he should be entitled to be a purchaser if the Intended Appellants failed to complete the purchase and that it "was only at the hearing [of the Strike Out Application] itself that the point was made (by reference to the draft SPA) that it was unclear that the Shareholders were committed to purchasing [the Intended Respondent's shares]".[39]

[34] The Intended Appellants second proposed ground for the appeal is that Justice Bannister erred because there was no basis upon which he could conclude that the Liquidation Applications had any merit, and indeed he stated there was good reason to suppose that they were inherently flawed, so it was "unreasonable and wrong in principle that he should have ordered the Intended Appellants to bear those costs (in particular, given that the Strike Out Application had succeeded). He

[37] Permission to Appeal Application, "Background", page 6, paragraphs 12 and 13.
[38] Permission to Appeal Application, "Grounds for the Appeal", paragraph 15.
[39] Permission to Appeal Application, "Grounds for the Appeal", paragraph 16(b).

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gave no weight to the Intended Appellants success "in all aspects of the Strike Out Application".[40]

[35] While not evident in their Permission to Appeal Application itself, in their written submissions[41] for it they added that the Liquidation Applications were commenced precipitately, with insufficient notice given, and no intimation of the evidential basis on which relief would be sought. There was no detailed letter before action. The offer followed shortly after the commencement of the proceedings. It is a reasonable inference that the offer would have preceded the Strike Out Application had the proper practice of pre-action correspondence been followed.

Position of Intended Respondent on Permission to Appeal Application

[36] The Intended Respondent's position on the Permission to Appeal Application was that the Strike Out Application was based on an offer having been made that it would have been unreasonable for the Intended Respondent not to accept in lieu of pursuing the Liquidation Applications and that at the trial of the Liquidation Applications the relief sought would been declined based on Section 167(3) of the Act. The issue on the Strike Out Application was whether there was an offer which it was unreasonable for the Intended Respondent to refuse. Justice Bannister found that the offer became one that it would have been unreasonable to refuse only in light of the concession made by the Intended Appellants in the closing minutes of the trial.

[37] With respect to the costs of the Liquidation Applications, the Intended Respondent submitted that the offer did not provide for the Intended Respondent's costs of the Liquidation Applications and fairness and reasonableness required that it do so,

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[40] Permission to Appeal Application, "Grounds for the Appeal", paragraph 16(a), (c) and (d).

[41] The Intended Appellants' Written Submissions in Advance of the Telephone Hearing on 24 June 2015 of the Intended Appellants' Application for Permission to Appeal, dated 23 June 2015.

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based on O'Neill v Phillips. As such, Justice Bannister exercised his discretion correctly in line with O'Neill v Phillips and established principles.

[38] With respect to the costs of the Strike Out Applications, the Intended Respondent submitted that a commitment by the purchasing shareholders to purchase his shares, which was his concern from when the initial offer was received, was not provided until almost the end of the hearing.

[39] Further, he submitted that commencement of the Strike Out Application was, at best, premature – significant costs would have been avoided if the Intended Appellants had awaited a response to their offer and then provided a draft agreement as requested.

[40] The Intended Respondent submitted that Justice Bannister was correct in his findings about the offer / draft agreement, and accordingly exercised his discretion properly such that the prospects of the Court of Appeal interfering with the exercise of that discretion are negligible.

Decision on Permission to Appeal Application

[41] This Court has concluded that the Intended Appellants have not met the requirements for permission to appeal to be granted.

[42] As set out above, permission to appeal should be given if at least one of two circumstances exits: the appeal appears to have a realistic (as opposed to a fanciful) prospect of success or there is some other compelling reason why the appeal should be heard.[42]

[42] Employers, paragraph 23; Swain v Hillman [2001] 1 All ER 91 (per Lord Woolf MR); Notes to the CPR r 52.3.7 in Civil Procedure 2015 (the White Book).

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[43] The intended appeal meets neither test.

[44] **Is There Realistic Prospect for Success of Appeal?** This Court is of the opinion that there is no realistic prospect for success of the intended appeal.

[45] Indeed, this Court is of the opinion that Justice Bannister was correct in the result and in his reasoning for his Costs Judgment, both with respect to the costs of the Strike Out Application and the costs of the Liquidation Applications.

[46] Even if this Court is wrong about Justice Bannister being correct, certainly in this Court's view his decision was not (using one of the alternative expressions of the test in the case of a costs decision) "plainly wrong".

[47] At most a different court, for example, might tilt to deny the Intended Respondent a limited portion of his costs of the Strike Out Application based on certain weaker issues unsuccessfully raised by him. But the decision to award him costs of the Strike Out Application as a whole was well within the generous ambit within which a reasonable disagreement was possible. Likewise, with respect to the timing of the commencement of the Liquidation Applications, a different court might question whether the Intended Respondent acted somewhat precipitously, not providing the Intended Appellants with a reasonable opportunity to produce an O'Neill v Phillips Offer at the outset. But given that one was not produced early on, it is unlikely it would have been forthcoming without considerably more negotiation, and quite possibly not at all without the Strike Out Application looming and indeed proceeding towards its finish line.

[48] Costs are a factor in an O'Neill v Phillips Offer. Apart from the issue of the absence of an assurance or promise of completion of a post-valuation share sale, there was no offer of costs in the Intended Appellants' offer or draft agreement. Including an offer of costs in the initial offer would not have been a costly item for

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the Intended Appellants, particularly at that early stage. Awarding costs of the Strike Out Application and the Liquidation Applications to the Intended Respondent was consistent with principle of an O'Neill v Phillips Offer.

[49] Despite the points raised by the Intended Appellants that have been summarized above, as shown by his Costs Judgment, Justice Bannister did not misunderstand the law, did not make a mistake of legal principle, and did not misunderstand the facts by taking into account things that were not relevant or forget to take into account things that were relevant.

[50] Further, the Costs Judgment was a discretionary decision. The Court of Appeal should only interfere if Justice Bannister had exceeded the generous ambit within which a reasonable disagreement is possible. He did not, in this Court's view. He did not err in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations.

[51] The Intended Appellants, both in the hearing before Justice Bannister and on this Application for Permission to Appeal, seem not to have appreciated that Justice Bannister was focused on the requirements of an O'Neill v Phillip Offer.

[52] This Court does not read anything in the Costs Judgment, including the ongoing exchange after it was initially handed down, as indicating that Justice Bannister was making a decision based on the merits of the Liquidation Applications. He appeared focused throughout on the appropriate costs result on the staying of the Liquidation Applications through the mechanism of the Strike Out Application based on his assessment of the costs aspects of an O'Neill v Phillips Offer. Given that the offer / draft agreement / amended draft agreement did not provide for the Intended Respondent's costs, and given that it was reasonable for Justice Bannister to conclude effectively that the offer / draft agreement / amended draft

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agreement should have done so to yield the type of just result contemplated by O'Neill v Phillips, Justice Bannister got to the just result sensibly in another available manner.

[53] These circumstances were an appropriate reason to depart from the General Rule with respect to the award of costs in EC CPR 64.6(1)).

[54] In that regard, it must be remembered that the Costs Judgment was not based on a merits adjudication of the Liquidation Applications.

[55] The fact that the Intended Appellants "succeeded" on the Strike Out Application by obtaining a stay of the Liquidation Applications does not mean that they made a compliant O'Neill v Phillips Offer before launching their Strike Out Application; they did not.

[56] In substance Justice Bannister concluded that the offer and the draft agreement were deficient in providing to the Intended Respondent the reasonable comfort he was seeking that a post-valuation purchase would be completed. At the end of the day the comfort came by way of a promise to purchase, not the buy/sell mechanism he had sought. But nonetheless he obtained what in essence it appears Justice Bannister considered to be adequate comfort.

[57] In O'Neill v Phillips the Court of Appeal had accepted the argument that Mr. O'Neill was justified in rejecting the offer for a purchase of his shares for fair value determined by a valuer in a fair process (as particularized in that judgment).

[58] The issue arose in O'Neill v Phillips in a different manner, Mr. O'Neill having succeeded in an unfair prejudice claim after rejecting a share purchase offer that did not provide for his costs, for that reason and others. The offer only went to the question of costs, and in that regard whether he had been offered everything to

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which he had been held to be entitled. The offer was found to be inadequate because it did not provide for costs.

[59] The context was comparable in that Lord Hoffman made the point that the exclusion of a member is not unfairly prejudicial if the member has received a reasonable offer for his or her shares, and then the respondent to the petition is entitled to have the petition struck. "It is therefore very important that participants in such companies should be able to know what counts as a reasonable offer."[43]

[60] In dealing with the costs aspect of a reasonable offer, Lord Hoffman held that "this does not mean that payment of costs need always be offered."[44] He held that the majority should be afforded a reasonable time following a breakdown to make a reasonable offer and that the mere fact that the petitioner has presented his petition before the offer does not mean that the respondent must offer to pay costs if he was not given a reasonable time.

[61] Even if a different court were to consider that in an O'Neill v Phillips Offer made early, the shareholder need not be offered costs, an offer made late in the day in the context of the proceedings at hand – in this case the Strike Out Application – would need to include costs to be a reasonable offer that it would be unreasonable not to accept.

[62] When the otherwise compliant and reasonable offer came virtually at the end of the Strike Out Application, the costs of the Strike Out Application and the costs of the Liquidation Applications had become costs that the Intended Respondent had needed to incur to get to the end result. It was right, and certainly within permissible bounds, for Justice Bannister to have made the Costs Order he made.

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[43] Page 16, lines f- h.
[44] Page 17, line d – g.

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[63] Turning to the Intended Appellants assertion of antipathy on the part of Justice Bannister, for the reasons discussed above, this Court does not agree with the Intended Appellants that there is any merit to the antipathy assertion.

[64] Justice Bannister did not at all unfairly or unreasonably characterize the approach of the Intended Appellants to their offer and draft agreement, and the Strike Out Application. He appeared to consider it as a commercially sensible response by the other shareholders to the Liquidation Applications, just as the Intended Appellants asserted to this Court that he should have done. He did not indicate antipathy to O'Neill v Phillips Offers. To the contrary, he showed support for them and founded his Strike Out Judgment and his Costs Judgment on such offers being appropriate, desirable and an important aspect of dealing with minority shareholder concerns.

[65] With respect to the Intended Appellants' submission (noted above) that the lack of unequivocal offer was immaterial, the Strike Out Judgment (the result of which was embodied in Justice Bannister's Order dated 25 February 2015 as to orders 1 to 3 inclusive) did not make findings respecting the expressed concerns of the Intended Respondent about the offer as it evolved from the initial offer to the revised draft agreement. Rather the Strike Out Judgment dealt with the objections, which were raised by the Intended Respondent at the Strike Out Application hearing, to the offer / draft agreement as it stood at the time of the Strike Out Application.

[66] This Court notes that the Strike Out Judgment was not appealed.

[67] The documents put before this Court respecting the evolution of the initial offer, described below, show that from the first substantive response on behalf of the Intended Respondent after the offer was made, the Intended Respondent was

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concerned about what would happen if his shares were valued and then the three purchasing shareholders were unable to fund and complete the purchase.

[68] Initially he proposed that the value certified by the valuer be deposited within seven days and thereupon he would be bound to sell, and if the purchasers failed to deposit the funds, he could purchase their shares.[45] The response on behalf of the purchasing shareholders was a counterproposal for the purchasing shareholders to have 90 days to raise funds.[46]

[69] In a lengthy response on behalf of the purchasing shareholders following receipt of the Intended Respondent's witness statement for the Strike Out Applications, they stated that they:

> … are in no doubt that they will be able to purchase the [Intended Respondent's] shares … In the unforeseen event that [they] are unable to fund or raise the necessary funds to purchase … [the Intended Respondent] would be free to pursue the [Liquidation] Applications.[47]

[70] Important in the chronology is that the Strike Out Application was commenced 23 December 2014. It was ground on the offer by the purchasing shareholders, as it stood at that time.[48]

[71] The Intended Respondent's Witness Statement on the Strike Out Application, filed on 15 January 2015, set out his concerns about the offer as it then stood ("**Intended Respondent's Witness Statement**").[49] In particular, he reiterated his

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[45] Letter from Conyers Dill & Pearman ("**Conyers**") to Walkers (Singapore) Limited Liability Partnership dated 18 November 2014, pages 4 – 5, paragraphs 13 – 19.
[46] Letter from Dentons to Conyers dated 11 December 2014.
[47] Letter from Dentons to Conyers dated 3 February 2015.
[48] Strike Out Application dated 23 December 2014, "Grounds", paragraph 2; Affidavit of Jasjeev Singh Kandhari, sworn 15 January 2015, paragraphs 9 and 10.
[49] Paragraphs 13 – 15.

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initial concern about what would happen if his shares were valued and then the three purchasing shareholders were unable to fund and complete the purchase.

[72] The Intended Respondent thereafter suggested that the purchasing shareholders provide a draft agreement as a means of clarifying matters in their offer that they had asserted were misunderstood by the Intended Respondent.[50]

[73] The purchasing shareholders responded that their offer was clear and asked which parts were not, and the Intended Respondent responded reiterating his desire for a draft agreement to narrow the issues if there was a misunderstanding.[51] The purchasing shareholders responded that they had already embarked on the process of preparing a draft agreement.[52]

[74] At some point between that exchange and the hearing of the Strike Out Application a few business days later, a focus of the Intended Respondent came to include not just the 'buy/sell' mechanism that the Intended Respondent wanted as a means to deal with his concern about what would happen if his shares were valued and then the three purchasing shareholders were unable to fund and complete the purchase but also, presumably as an alternative, a promise on the part of the purchasing shareholders to purchase the shares, not just what he characterised as a "best endeavors" promise to raise sufficient funds. The Intended Respondents, presumably on behalf of the purchasing shareholders, agreed at the hearing to amend the draft agreement to include a promise to purchase.

[50] Letter from Conyers to Dentons dated 13 February 2015.
[51] Letter from Dentons to Conyers dated 16 February 2015 and letter from Conyers to Dentons dated 17 February.
[52] Letter from Dentons to Conyers dated 18 February 2015.

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[75] Accordingly, it is not correct for the Intended Appellants to imply that it was only at the hearing of the Strike Out Application itself that the concern behind the unequivocal offer issue arose, even if the alternative solution of a clear promise to purchase arose then, or shortly before then. It was as an alternative means of dealing with the Intended Respondent's concern about what would happen if his shares were valued and then the three purchasing shareholders were unable to fund and complete the purchase. The promised amendment to the draft agreement provided a contractual commitment that the purchasing shareholders had to purchase the Intended Respondent's shares.

[76] It may be, as the Intended Appellants assert, that the Liquidation Applications were commenced somewhat precipitately, with insufficient notice and insufficient prior information given. However, had more notice and information been given, there is every reason to expect that the offer that was in fact made by the Intended Appellants would have been the offer that followed, not the offer contained in the amended draft agreement. The Intended Respondent would have had comparable concerns and then the Liquidation Applications would have followed.

[77] Likewise, it can be said that the Intended Appellants were precipitous with their Strike Out Application.

[78] Perhaps it would have been more appropriate and sensible for both sides to be less aggressive invoking the Court's involvement in their attempt to resolve their situation that developed between the purchasing shareholders and the Intended Respondent in respect of the Intended Appellants. However there is nothing in the actions of the Intended Respondent that this Court can see would aid this intended appeal to reach the necessary threshold for this Court to grant permission to appeal.

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[79] **Is There A Compelling Reason Why Intended Appeal Should Be Heard?** This Court considered carefully the second basis upon which permission to appeal may be granted, namely whether permission to appeal should be granted for any other reason, and in particular whether there is a need at this time for the law of costs in relation to O'Neill v Phillips Offers to be examined and clarified by the Court of Appeal as a matter of general public or commercial importance.

[80] By way of background to the consideration of this aspect of the test, shareholder disputes are a significant part of the work of the Commercial Court in the Territory of the Virgin Islands.

[81] Because of the number of companies incorporated in this jurisdiction, particularly as joint venture vehicles in corporate structures, the Commercial Court handles a significant number of these types of disputes, usually brought either in a liquidation application as a ground for a just and equitable winding up, or in an unfair prejudice claim.

[82] In such disputes, O'Neill v Phillips Offers can be, and should be, an important tool for obtaining a just result in a cost effective manner. Their use should be supported, and where possible, strengthened, so that there is an opportunity for sensible respondents in appropriate circumstances to achieve no fault divorces consensually and cost effectively.

[83] Too often extensive resources of the parties and the Court are utilized in an attempt to ascertain liability / responsibility / fault for a breakdown in the relationship of the ultimate beneficial owners of the company where a pragmatic commercial solution would be a preferred alternative for all concerned.

[84] To be clear, that is not every case.

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[85] In some cases there is fault, and it needs to be ascertained through a court litigation or arbitration process. A majority should not be compelled to buy out a minority merely because the minority wants an exit mechanism that does not exist in the constitutional documents of the company or in an agreement, or the minority wants a price for the minority's interest that is more than the majority or the market considers it to be worth.

[86] Yet there are many other cases in which there is shared responsibility for the breakdown (not necessarily equally shared) and the interests of all concerned would be best severed by a relatively expeditious consensual divorce, and by avoiding the painful and expensive process of attempting to ascertain fault.[53]

[87] Courts continue to struggle with the kinds of situations that real life more often presents: shared responsibility (to abandon the less helpful word "blame") for the breakdown.

[88] It was in the context of the dispute in O'Neill v Phillips that Lord Hoffman drew upon the phase "no-fault divorce"[54]. It was an unfair prejudice case. A minority shareholder sought to be bought out because he asserted that trust and confidence had broken down. Lord Hoffman characterized his claim as being an assertion that there is "a stark right of unilateral withdrawal" from a company, which he held is not available. He held that one partner is not entitled at will to require the other partner or partners to buy his shares at fair value. However, at its heart, Lord Hoffman was holding, in this Court's view, that the test for a breakdown is not subjective but objective. There is no right to a just and equitable remedy "at will"; because of a subjective view of the party seeking the winding up that there has been a breakdown of trust and confidence.

[53] The subject is discussed in the Judgment of this Court in Fortune Bright Global Limited v Central Shipping Co Limited, BVIHC (COM) 2015/0038, 29 April 2016.

[54] [1999] 1 WLR 1092 at 1104, lines B – C.

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[89] In Wang & Others v Union Zone Management Ltd & Others[55], the Court of Appeal (per Farara JA [AG]) held that there must be something more than a breakdown, articulating it as follows:

> The breakdown in the relationship between shareholders is not, in and of itself, justification for winding up a company. For such a state of affairs to rise to the level of a just and equitable winding up of the company, it must represent or lead to deadlock on the board or between the shareholders in general meeting or a breach of some underlying agreement, express or implied, between the shareholders as to their rights inter se or the extent to which they are to participate in the management and decision-making of the company, or some unauthorized change in the type of business or activity for which the company was incorporated in the first place.
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> .

[90] The Costs Judgment is important because it makes clear that costs must be fairly dealt with in the context of O'Neill v Phillips Offers, ideally in the offer itself but otherwise by the court when an opportunity presents itself. Justice Bannister's approach of awarding costs to (in this Court's words) "top up" a deficiency in the amended draft agreement, having relied on that amended draft agreement as the basis to stay (effectively strike) the Liquidation Applications, was a sensible, practical and fair method of getting to a just result. Whether by design or more likely by improvisation as the matter proceeded, Justice Bannister strengthened O'Neill v Phillips Offers as an important tool for resolving shareholder disputes consensually.

[91] Perhaps at some point, as relevant jurisprudence respecting O'Neill v Phillips Offers develops, it may become important, or at least desirable, for the Court of Appeal to examine and clarify the use of O'Neill v Phillips Offers overall, or the costs issues in relation to them. However, from the perspective of this court of first

[55] BVIHCMAP2013/0024, Court of Appeal, 12 January 2015, page 26, paragraph 53.

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instance, it seems that the time is not now. The current situation does not meet the test for permission to appeal. Hopefully, for the present time, the Strike Out Judgment, the Costs Judgment, and this Judgment will provide sufficient motivation and guidance for disputing shareholders in relation to O'Neill v Phillips Offers.

Stay Application

[92] In light of this Court's Judgment on the Permission to Appeal Application, there is no need to determine the Stay Application. For good order, it should be dismissed.

Costs

[93] In the Permission to Appeal and Stay Application (paragraph 3 of orders sought), the Intended Appellants sought that costs of Permission to Appeal Application and the Stay Application be costs in the intended appeal.

[94] In light of the decisions in this Judgment, the costs of the Permission to Appeal Application and the Stay Application should be reserved to be determined by this Court following the parties' submissions on costs, unless the parties can agree, using good faith efforts, on the appropriate disposition of the costs of the two applications.

Orders

[95] Accordingly, there shall be the following orders:

1. The Intended Appellants' Application for Permission to Appeal Application and Stay Application shall be dismissed.

2. Costs of the Permission to Appeal Application and the Stay Application shall be reserved to be determined following the parties' submissions on costs.

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Justice Barry Leon
Commercial Court Judge
13 May 2016

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