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

CLAIM NO. BVIHC (COM) 2014/0053

IN THE MATTER OF J.F. MING INC.
AND IN THE MATTER OF SECTION 184I OF THE BVI BUSINESS COMPANIES ACT, 2004

BETWEEN:

[1] MING SIU HUNG, RONALD
[2] SHAW SHIU KUEN, BERTHA
[3] MING SHIU TONG

Claimants

and

[1] J.F. MING INC.
[2] MING SHUI SUM, LAWRENCE

Respondents

Appearances:

Christopher Parker, Q.C., and Clare Goldstein (October 2015 only), Paula Kay (February 2016 only) and Stuart Cullen (May 2016 only) of Harney Westwood Riegels, for the Claimants

Paul Chaisty, Q.C., and Richard Evans and Adam Hinks of Conyers, Dill & Pearman, for the Second Defendant

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2015: October 13, 14, 15
2016: February 23, 24, 25
May 26
August 16

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JUDGMENT

Claim of oppression, unfair discrimination and unfair prejudice by minority shareholders (members) pursuant to BVI Business Companies Act, 2004, Section 184I, in relation to the conduct of affairs of First Defendant Company by Second Defendant, the majority shareholder (member) and sole director – Claimants and Second Defendant are siblings who fell out with each other many years ago and have a long history of disputes between them in relation to the Company and its predecessor businesses going back to the 1970s, and most significantly starting in 1994 and continuing into 2006 – Since about May 2006, Second Defendant has been in control and in charge of the Company, including as sole director.

Parties agreed that not a "quasi-partnership", a classic "family business" in which all members work, or a classic "legitimate expectations" case – Not case of Claimants having been unfairly excluded from management roles – Claimants are minority shareholders with no greater – and no lesser – rights than those to which minority shareholders are entitled.

The Company, under Second Defendant's sole management, year after year from about May 2006 when the Second Defendant reassumed control, did not provide Financial Statements to minority members despite a provision in the Article of the Company requiring him to do so – Understandably after years of bitter litigation between the Claimants and Second Defendant in Hong Kong respecting the Company, minority did not complain.

When Second Defendant discussed with Second Claimant a possible purchase of her shares, she asked him for the Financial Statements – Second Defendant declined to provide them – Second Defendant had access to the Financial Statements from the Company which he ran and would have been able to use the information as a prospective share purchaser – Formal request for Financial Statements made by Claimants – Response by Second Defendant was to pass members' resolutions waiving requirement in Articles for provision of Financial Statement, retrospectively and prospectively – This litigation ensued.

Resolutions passed for benefit of Second Defendant, not for benefit of Company, and for detriment of Claimants – Oppressive, unfairly discriminatory and unfairly prejudicial to Claimants as members.

Remedies need to deal appropriately and justly with the oppression, unfair discrimination and/or unfair prejudice and deal fairly and equitably with the situation – Relief needs to be proportional – Court entitled to look at reality and practicalities of overall situation – Where relationship has broken down and there is history of unfair prejudice (as opposed to one-off act) order for share purchase is preferable.

On objective assessment, Claimants reasonably, legitimately and justifiably lack trust or confidence in the Second Defendant's future management of Company, and in his future conduct as sole director – Justified in that lack of trust and confidence – Real reason for concern, based on all that has occurred – Second Defendant's misguided beliefs on matters of shareholders' rights, his attitudes towards Claimants as minority members that are engrained, his patterns of conduct in defending the indefensible, his hardball tactics, and his repetition of those beliefs and attitudes make it abundantly clear that a Court-ordered buyout is needed – Court concluded that Second Defendant will not serve as sole director of the Company without recurrences of oppressive, unfairly discriminatory and unfairly prejudicial conduct towards Claimants.

Resolutions set aside – Article respecting financial statements to be amended to remove words "unless such requirement be waived by resolution of members" – Financial Statements from 2006 forward to be provided to Claimants – Shares each of Claimants to be acquired – In accordance with bifurcation

agreement, to be an early hearing to determine bases of buyout, effective date of and processes for any valuation(s), processes and bases for determination of acquisition amounts (including any minority discount issue), proportionate interest of each of Claimants in en bloc value of Company (if an issue), and all undermined or incidental issues, steps and matters.

[1] LEON J [Ag.]: This is an "unfair prejudice" claim brought by the Claimants, as minority shareholders[1], pursuant to the BVI Business Companies Act, 2004 ("Act"), Section 184I[2], in relation to the conduct of the affairs of the First Defendant J.F. Ming Inc, ("Company") by the Second Defendant, the Company's majority shareholder (member) and sole director[3].

[2] The Claimants and the Second Defendant are siblings[4] who fell out with each other many years ago. They have a long history of disputes between them in relation to the Company and its predecessor businesses going back to the 1970s, and most significantly starting in 1994 and continuing into 2006.[5] Since about May 2006, the Second Defendant has been in control and in charge of the Company, including as sole director.

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[1] Each of the Claimants owns 1000 shares, being approximately 5.88%, of the issued shares of the Company.

[2] 184I. Prejudiced members

(1) A member of a company who considers that the affairs of the company have been, are being or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him in that capacity, may apply to the Court for an order under this section.

(2) If, on an application under this section, the Court considers that it is just and equitable to do so, it may make sure order as it thinks fit, including, without limiting the generality of this subsection, one or more of the following orders …

Even though they are separate, the term "unfair prejudice" often is used in this Judgment, as in some of the authorities, to encompass the trilogy of types of conduct, as applicable, encompassed in the statutory provision – oppression, unfair discrimination and unfair prejudice.

The English Companies Act 2006, Section 994, uses only the term "unfairly prejudiced'. On its face, the Act appears to confer a broader basis of relief, although it is not necessary to draw the distinction here. Also it should e noted that other statutes use comparably wider language than does the English provision. The Canada Business Corporations Act, Section 241 and the Ontario Business Corporations Act, Section 248 use the terms "oppressive, unfairly prejudicial or which unfairly disregards the interests of …". The oppression remedy is widely acknowledged as being one of the most powerful weapons in the arsenal of the shareholder.

[3] The Second Defendant now beneficially owns 14,000 of the 17,000 issued shares of the Company, being approximately 82.35% of the issued shares of the Company. He has been the sole director of the Company since 25 May 2006.

[4] The Second Defendant is the third eldest of the seven children in the family (Second Defendant's Witness Statement, paragraph 7).

[5] Second Defendant's Witness Statement, paragraph 6.

[3] While initially the Claimants focused this litigation mainly on the period from about May 2006 when the Company came again to be under the sole control of the Second Defendant, the Second Defendant expanded part of the focus back into the 1970s and certainly into the 1994 – 2006 period, seeking to highlight certain actions and conduct of the Claimants, particularly the First Claimant, that the Second Defendant submitted would demonstrate further the Claimants' responsibility for the disputes, their non-involvement in the business for most of the years, and their conduct and attitudes which he submitted would justify the Second Defendant's actions and disentitle the Claimants to a finding of unfair prejudice and to relief.

[4] The Claimants then responded by increasing their focus on actions and conduct of the Second Defendant in the earlier period.[6] They raised certain actions and conduct of the Second Defendant that they submitted would demonstrate further his responsibility for the disputes, his attitude towards the Claimants and the other siblings who did not work in the business, and his conduct and attitude which would support a finding of unfair prejudice and support the Claimants entitlement to relief, particularly a Court-ordered buyout.

[5] As a result, a significant part of the evidence and submissions related to the period prior to about May 2006.

[6] The Claimants sought, as their primary remedy, a buy-out of their interests in the Company. Alternatively the Claimants sought (a) the removal of changes to the Articles of Association of the Company ("Articles") made in 2014 by two members' resolutions ("Resolutions"), signed by the Second Defendant as the majority shareholder (member), that by their terms eliminated (waived), retrospectively and prospectively, members' rights (including the Claimants' rights as members) to basic annual financial information (profit and loss accounts and balance sheets) ("Financial Statements") about the Company, and (b) the provision to the Claimants of the Financial

[6] The evidence at the trial of this action consisted of evidence from the First Claimant (Witness Statements dated 26 May and 21 August 2015, with examination at trial); Second Claimant (Witness Statement dated 26 May 2015, with examination at trial); Third Claimant (Witness Statement dated 26 May 2015); Second Defendant (Witness Statements dated 26 May and 11 September 2015; an issue was raised about the "status" of these witness statements as the Second Defendant did not attend at trial for cross-examination – the issue is discussed and determined in this Judgment); Ian Grant Robinson (who served as Receiver of the Company in the 2004 – 2006 period) (Witness Statements dated 25 May and 14 September 2015 and examination at trial); and Stephentica Vinkie Lee (solicitor with Harney Westwood and Riegels in Hong Kong) (Witness Statement dated 25 September 2015 in connection with pleading amendment application determined at the outset of trial).

Statements (and additional financial and other information).[7] The Claimants have not received Financial Statements since May 2006.

[7] The proceedings have been bifurcated by agreement of the parties, with the concurrence of this Court.

[8] In accordance with the bifurcation, this Judgment determines whether there is 'liability' – oppression, unfair discrimination and/or unfair prejudice – and if so, whether the remedy or remedies should or should not include a Court-ordered buyout[8] of the Claimants' interests in the Company.

[9] If a buyout is ordered, there will be a hearing to determine, among other things, the bases of the buyout and the processes for the determination of the buyout amounts.

Background

[10] Ming John Fook, the father of the Claimants, the Second Defendant and their three other siblings ("Father") owned properties in Hong Kong and moved into the property development business in the early 1970s, using a Hong Kong company, Ming Hsing Development Co. Ltd. ("Ming Hsing"). The Second Defendant began to work with the Father in that business around 1972 and held the

[7] Amended Claim Form and Amended Statement of Claim, both dated 13 October 2015. While the Second Defendant submitted throughout that there was a lack of explanation by the Claimants for their change in approach to seeking a compulsory buy-out as their primary relief, this case needed to be determined on the pleadings as they stand.

In any event, the Claimants explained satisfactorily their shift in approach, which this Court accepts. Most significantly they readjusted in light of the position maintained by the Second Defendant regarding the Financial Statements.

Further, often parties and their counsel will adjust as litigation proceeds, in light of such factors as additional information, further insights into the importance of existing information, developments during the litigation, and/or additional and ongoing consideration by the parties' legal counsel of the parties' factual and legal positions. Within the bounds of the rules on amendment of pleadings (in particular CPR 20.1) and Practice Direction 20), as interpreted by the courts, and the Overriding Objective, it should be an accepted fact of commercial litigation, particularly "real time" litigation where the "facts on the ground" may evolve as the litigation proceeds (as distinguished from "autopsy litigation" where the issues are about events which have concluded, often some time earlier). Holding parties to their pleadings may be viewed differently in litigation under today's CPR than in the days long gone of trial by ambush without document disclosure, witness statements, and other processes and procedures that enable the parties to enter the trial courtroom much better informed about the opposite party's case, including the opposite parties' evidence and legal positions and submissions (see, for example, *Verner v Giannaros & Ors* [2016] NSWSC 242 (4 March 2016), Justice White).

[8] Among the specified remedies in subsection 184I(2) of the Act ("without limiting the generality of this subsection") is an order "(a) … requiring the company or any other person to acquire the shareholder's shares".

position of managing director. The other children were not living in Hong Kong at the time and did not work in the business. The Second Defendant provided personal guarantees for the business. Whether the Second Defendant's contribution to the growth of the business relative to the Father's was as great as the Second Defendant stated, there appears to be no question that he worked to build the business and made a material contribution.

[11] Disputes involving the seven children in the family began in the 1970s. The disputes are continuing into their fifth decade.

[12] The 1977 Incident. In 1973, the Father gave the Second Defendant 1,400 shares and each of the children 1,000 shares in Ming Hsing. As told by the Second Defendant, in 1977 five of the Second Defendant's six siblings used their shareholdings to try to remove him as managing director. The evidence was that they felt they should be able to take turns in the position. The Second Defendant's evidence was that "My Father was furious about this fight within the family and ended up repurchasing the shares from all of us."[9]

[13] 1980s. The Second Defendant continued "During the 1980s there was not a lot of contact between myself and the Claimants, especially after the 1977 Incident."[10] The Claimants continued to live "overseas".

[14] The Second Defendant's evidence was that he "believed that [the Claimants] resented me because they believed that my Father favoured me over them and the other siblings." He continued "My siblings never put in any effort that I did to make the business as successful as it was."[11]

[15] 1991 – 1992. The Company was established in April 1991 as a holding company for the Father's corporate assets, which consisted principally of Ming Hsing and other companies in property holding and/or development in Hong Kong. It appears to have been central to the Father's estate planning.

[9] Second Defendant's Witness Statement, paragraph 11.
[10] Second Defendant's Witness Statement, paragraph 13.
[11] Second Defendant's Witness Statement, paragraph 10.

[16] The Second Defendant's evidence was that from the incorporation until the Father's death at age 83 on 21 December 1992, the Second Defendant "made most (if not all) of the day to day decisions with respect to the running and development of the business." He said that in many respects that his Father "was like a passive shareholder, given his advanced age."[12]

[17] The Chinese Memorandum. The Father recorded his wishes on 29 September 1992 as to what he then considered should happen to the ownership of the Company upon his death in a document that became known among the family members as the Chinese Memorandum (being in the Chinese language) which, although not considered legally binding, was solemnly entered into. In fact, the Second Defendant stated in his evidence that the Chinese Memorandum "which my Father wrote … was treated as a will".[13]

[18] It was read out by one of the children at a family dinner convened for that purpose and attended by all but one of the children. The Father promised each of the children money (from companies) for attending the dinner (HK$ 5 million each).

[19] As translated, the Chinese Memorandum began:

> I am already old. I have worked hard for several decades. I am aware that my health is not as good as before.

[20] The Father proceeded to tell his children about his life, his past, his hardships, his "ups and downs to accomplish my achievements today … so that you may reflect upon them in your years to come." He reviewed the development of his business interests, telling them about his beginning in 1972 in the real estate property market in Hong Kong and moving on from there. He told his children about setting up the Company and transferring all of his assets into it. A schedule of the Company's assets and liabilities was attached.

[21] He then dealt with the shares of the Company, as follows:

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[12] Second Defendant's Witness Statement, paragraph 16.

[13] Second Defendant's Supplemental Witness Statement, paragraph 11, and also see paragraph 18. It should be noted that the children's mother, wife of the Father, had died in 1984.

> I have now decided to divide all of the shares of [the Company] into 7 lots; each to have the same number of shares and the same value. One lot (such being bearer share certificates) is distributed to each of my children.

[22] The Father went on to provide what should happen with the bearer share certificates during his lifetime and that they were to be distributed only upon his death. He specified that

> … before your bearer share certificates are distributed to you all of you are not shareholders of [the Company] and therefore all of you have no right whatsoever to enquire about any of the company's business, internal policy or decision making until you were distributed your lot of bearer share certificates. If you people want to deal with the assets of [the Company], your people should first seek the consent of Shui Sum [Second Defendant] because he knows all the procedures and is fully conversant with the real property market conditions in Hong Kong.

[23] He concluded the Chinese Memorandum by referring to the decades of hard work it took to accomplish the achievements, reminding his children of the difficulty of creating a business, acknowledging the whole hearted of assistance of Ka Foot and the Second Defendant, and leaving these final thoughts for his seven children:

> I know all of you are good people with a benevolent heart, and will definitely not do any wrongful act. However, all of you must remember this: you must not harbour any thought of avarice. My success today results from hard work and definitely not from greed.

[24] At the Father's direction, each of the seven children were issued 1,000 bearer shares in the Company.[14]

[25] Without ever telling the other children, the Father had given the Second Defendant 10,000 shares (5,000 ordinary shares and 5,000 bearer shares) in the Company.[15] Whatever the Father's motivation was for this, and for keeping it a secret from the other children, it soewed the seed of

[14] The children's applications for their respective 1,000 bearer shares were dated 18 September 1992, which was the date of the resolution approving the applications for the 7,000 bearer shares.

[15] The Second Defendant's applications for his 5,000 bearer shares and 5,000 ordinary shares were dated 8 August 1992, which was the date of the resolutions approving the applications.

long and bitter litigation in Hong Kong, discussed below, and disputes and bitterness that continue to this day in this proceeding.

[26] The Second Defendant said in his evidence that his additional 10,000 shares were given to him by his Father to avoid "a repeat of the 1977 Incident" (which this Court takes to mean to give him voting control to prevent him being removed or his decisions regarding the business overridden) and to compensate him for all of his hard work in building and developing the business. No finding is made on this latter assertion as it is not material to the issues presently before this Court but may become relevant in a further phase of this case regarding the Claimants' entitlements for their shares.

[27] 1994 – 2006 and the Hong Kong Litigation. Over a year after the Father's death, when the Claimants and other of Second Defendant's siblings sought to remove the Second Defendant as a director of the Company and to appoint themselves[16], the Second Defendant told his siblings that their Father had allotted an additional 10,000 shares to the Second Defendant. As stated above, the other children had not been aware of any such allocation, only of the Chinese Memorandum and the "equal treatment" approach reflected in it. Understandably in light of the Chinese Memorandum and the family dinner at which it was read out, the other siblings had serious concerns about the 10,000 shares.

[28] In the words of the Second Defendant, "This began a very painful and prolonged dispute between us."[17] While he may have been speaking only about his perspective, it appears to be a statement applicable to his siblings as well.

[29] Questions were raised about the authenticity of the documentation relating to the 10,000 shares and to the Father's circumstances (whether he knew what he was signing) when he signed the documentation.

[30] In 1994, the First Claimant raised the question of forgery with criminal authorities which did not lead to any criminal proceedings.[18]

[16] 21 February 1994.
[17] Second Defendant's Witness Statement, paragraph 24.

[31] Litigation was brought by the Claimants and another sibling against the Second Defendant in 1999 in Hong Kong challenging the 10,000 shares and in particular the genuineness of the Father's signature on the documents relevant to the allotment of those shares and if genuine, whether the Father knew what he was signing.

[32] After 6 – 7 years of litigation, the Hong Kong Court of Final Appeal on 23 May 2006 held in favour of the Second Defendant who had been unsuccessful before the Hong Kong Court of First Instance (judgment dated 30 April 2004) and the Hong Kong Court of Appeal (judgment dated 26 May 2005). In the result, the Hong Kong courts determined that the Father had allotted to the Second Defendant the additional 10,000 shares.

[33] The Hong Kong judgments did not determine the question of why the Father had given the Second Defendant the 10,000 shares.

[34] In the period March 2004 – May 2006, as a result of the initial Hong Kong judgment, the Claimants and the other sibling who brought the Hong Kong proceedings were directors of the Company with a receiver appointed by the Hong Kong Court of First Instance in charge of the Company's business and affairs.

[35] In the course of the Claimants' period as directors, and particularly in the latter part, certain things were done by them which were inappropriate and were remedied by them in about 2006, shortly after they occurred.

[36] The Second Defendant raised those actions in this proceeding as reflecting on the character of those involved and going to the Second Defendant's concern about the Claimants' motivations in relation to the Financial Statements and as going to their entitlement to the discretionary relief claimed.

[37] While those actions did not reflect well on those involved, they are of little or no relevance to the central issues in this litigation. In particular, they did not justify the Second Defendant's actions in

[18] Second Defendant's Witness Statement, paragraph 24.

relation to the Financial Statements, nor were they the reason for his actions regarding the Financial Statements, and those actions do not inform this Court on the relief that is appropriate.

[38] Confirmed ownership of the additional 10,000 shares meant that the Second Defendant was in a position to overturn his siblings' vote to remove him as a director and that he had voting control of the Company.

Common Positions of the Parties

[39] Before turning to the events from May 2006 (when the Second Defendant regained control of the Company as sole director and confirmed majority shareholder) onward to May 2014 (when these proceedings were commenced) and to the heart of the Claimants' complaints about not receiving Financial Statements, it may be helpful to set out the common positions of the parties, followed by the parties' respective positions.

[40] The parties agreed that this was not a "quasi-partnership" situation, a classic "family business" in which all members work, or a classic "legitimate expectations" case.

[41] The parties agreed that this was not a case of the Claimants having been unfairly excluded from management roles.

[42] Also they agreed that this Court cannot order a "no fault divorce"; a court-ordered buy-out of the Claimants absent a finding of unfair prejudice.

[43] The Claimants are minority shareholders in the Company with no greater – and no lesser – rights than those to which minority shareholders are entitled.

[44] Both sides considered that determination of the claim needed to be context dependent. This Court agrees. A determination of whether there was oppression, unfair prejudice and unfair discrimination, and if so, particularly the appropriate remedy or remedies, must have regard to the context.

[45] Both sides, albeit for different reasons, asserted various aspects of the long history of events and disputes between the Second Defendant and the minority. There was considerable detailed historic evidence and contextual background of the broken relationship, and actions, conduct and views of the parties. Less and more focused historic detail may have sufficed. However, the detail confirms this Court's conclusions on 'liability' and its conclusions in respect of the appropriate remedies.

Claimants' Positions **–** Unfairly Prejudicial and Unfairly Discriminatory

[46] Financial Statements. The Claimants' position was that it was unfairly prejudicial and unfairly discriminatory for the Company not to provide the Financial Statements to the Claimants since 2006. Counsel for the Second Defendant termed this "the cornerstone" of the Claimants' case.

[47] No Dividends. The Claimants submitted that without the Financial Statements, the Claimants have been unable to know whether the years of non-payment of dividends by the Company was justified.

[48] That was the nub of their complaint as it relates to dividends – it was not that they have not received dividends but that without the Financial Statements they cannot determine whether the Company was in a position to pay dividends and therefore whether it should have considered paying dividends and whether it should have paid them. They submitted that they are being unfairly deprived of the information to know whether there were good reasons not to pay dividends.

[49] Their argument proceeded on the basis that if there was no justification for not paying dividends, the members had and continue to have a legitimate interest in receiving dividends if the financial position of the Company was or is such that dividends should have been, or should be, declared and paid.

[50] The Claimants relied on the law that a director when deciding on whether to declare a dividend must have adequate regard to the rights of members to have profits distributed so far as commercially possible. Decisions taken by directors when recommending dividends without regard to the rights of members to have profits distributed so far as was commercially possible are open to

challenge. The payment of dividends is part of the conduct of the affairs of a company and it can be unfairly prejudicial to a member not to receive adequate dividends.[19]

[51] When cross-examined by counsel for the Second Defendant, the first Claimant put it this way:

> … what is the point of holding shares which have no right or I do not get any dividend or pay from them.

[52] Of course his point would only resonate if the Company had been in a position to pay dividends, which he cannot know without receiving the Financial Statements.

[53] The Second Defendant never explained or justified why dividends were not paid or that as sole director he ever considered whether the Company should pay dividends.

[54] The Claimants submitted that the Second Defendant's statement that "… all they [the Claimants] have wanted is money without having to put in the hard work to work for it" demonstrated that his thinking was that if the Financial Statements were provided, the Claimants would have wanted to receive dividends (as the Financial Statements would have shown that monies were available) and that as they did not work to grow the Company, and he did, they should not receive any profits from the Company by way of dividends.

[55] Inability to Value or Sell Shares. The Claimants asserted that they had and have a legitimate interest in being able to attempt to sell their shares in a fair process and at a fair price yet they cannot judge the value of their shares without the Financial Statements.

[56] Meanwhile, the unfairness was compounded because the most likely potential purchaser – the Second Defendant – had the information to enable him to assess the value of the Claimants' shares, making for an unfair bargaining process.

[57] Other Matters or Factors. The Claimants pleaded[20] and relied on eight other matters or factors, ranging from old to more recent, to support their claim that the affairs of the Company have been

[19] *Re Sam Weller & Sons Ltd (Re a company (No 823 of 1987))* [1990] BCLC 80 at 83 – 84 (Peter Gibson J), following *Re a company (*No 00370 of 1987), ex p Glossop* [1988] BCLC 570 at 575, [1988] 1 WLR 1068 at 1074 – 1075 (Harman J); also *Re McCarthy Surfacing Ltd, Hecquet v McCarthy* [2009] BCC 464, para 70.

and are likely to be conducted in a manner which is unfairly prejudicial, unfairly discriminatory and/or oppressive to them as members of the Company.

[58] They also relied on those matters/factors to support their claim that they justifiably lack trust and confidence in the Second Defendant's management of the Company such that a Court-ordered buy-out of their interests is the appropriate remedy in all the circumstances.

[59] The matters/factors appear to fall into five groups, and included the following:

A. Second Defendant Improperly Benefitting Himself: that the Second Defendant had improperly benefitted from the Company by transferring from the Company to himself in excess of HK $18 million without repaying same; by using the funds of two of the Company's subsidiaries amounting to HK $8,457,028.68 to meet his legal fees; and by purchasing the shares of the other three siblings with a purchase price reduced by the amount of their shareholder loans thus personally benefitting by the amount of those loans due to the Company [Amended Statement of Claims, paragraphs 12(c) and (g)];

B. Second Defendant Taking Inconsistent and Varying Positions: that the Second Defendant has taken inconsistent and varying positions relating to aspects of the affairs of the Company, namely in proceedings in Hong Kong in about 2004 (referred to in his Defence in this proceeding) and in his witness statement in this proceeding, regarding (a) the sum of HK $5 million paid by the Father to the siblings in October 1992, and (b) the sum of HK $5 million and HK $1 million paid to the siblings by the Company in February or March 1993 and on 28 January 1994 respectively, which at a minimum reflect negatively on how he, as sole director, was maintaining the records and handling the affairs of the Company [Amended Statement of Claims, paragraphs 12(a) and (b)];

C. Second Defendant Dealing with Other Shareholders Using Information He Wrongly Failed to Provide to Them: that the Second Defendant purchased the shares of the three other siblings, and desired to purchase the shares of the Claimants, when he had full access to the Financial Statements and other financial information of the Company

[20] Amended Statement of Claim dated 13 October 2015, paragraph 12.

reflecting the value of the shares while the others did not due to his wrongful failure as sole director of the Company to provide the Financial Statements to the minority members [Amended Statement of Claims, paragraph 12(d)];

D. Hong Kong Court Findings of Unreliability of Second Defendant: that the Hong Kong court found the Second Defendant's evidence unreliable and hence together with the matters above it may be concluded, in considering the appropriate remedy, that the Second Defendant is untrustworthy generally [Amended Statement of Claims, paragraph 12(h); and

E. **Second Defendant's** Desire to Purchase **Claimants'** Shares without Providing Financial Information and His Recognition of the Desirability of Ending Shareholder Relationship with Claimants: that the Second Defendant had recognized the desirability of his association with the Claimants as shareholders in the Company being brought to an end and hence it is appropriate for the Court to bring it to an end when it orders a remedy [Amended Statement of Claim, paragraph 12(f)].

Second Defendant's Positions

[60] The Second Defendant's position with respect to the Financial Statements was that the Claimants had not taken any interest in the Company since May 2006 and then only sought the Financial Statements when the subject of the Second Claimant selling her shares arose so that their rights to Financial Statements was waived by the Claimants not pursuing them.

[61] With respect to paragraphs 12(a) and (b) of the Amended Statement of Claim, which is matter/factors (B) above [Second Defendant Taking Inconsistent and Varying Positions] and paragraph 12(h) of the Amended Statement of Claim, which is matter/factor D [Hong Kong Court Findings of Unreliability of Second Defendant], the Second Defendant's position was that they were irrelevant, related to his own position and evidence in proceedings over ten years earlier, and that the Second Defendant has not pursued the Claimants on these matters. They were at most mere statements, not corporate actions.

[62] With respect to paragraph 12(d) of the Amended Statement of Claim, which is matter/factor (C) above [Second Defendant Dealing with Other Shareholders Using Information He Wrongly Failed to Provide to Them], the Second Defendant's position was that they relate to his own share dealings with third parties, the third parties have not complained, the events were many years ago, the Claimants adduced no evidence on the issue, and the acquisitions caused no prejudice to the Claimants.

[63] With respect to paragraph 12(e) and (f) of the Amended Statement of Claim, which are matter/factor (F) above [Second Defendant's Desire to Purchase Shares of Claimants without Providing Financial Information and His Recognition of Desirability of Ending Relationship with Claimants] the Second Defendant's position was that they cannot ground an unfair prejudice claim.

[64] With respect to paragraph 12(g) of the Amended Statement of Claim, which is part of matter/factor (A) above [Second Defendant Improperly Benefitting Himself (using funds of two of the Company's subsidiaries)] the Second Defendant's position was that the allegation did not relate to the Company but to subsidiaries and therefore as a matter of law cannot constitute unfair prejudice in respect of the Company (relying on Re a Company (001761 of 1986 at 144). Further, his position was that this matter goes back to the mid-1990s, no complaint or issue was raised after May 2006, and the complaints rely only on views expressed by the receiver in respect of which no final determination has ever been made.

[65] With respect to paragraph 12(c) of the Amended Statement of Claim, which is part of matter/factor (A) above [Second Defendant Improperly Benefitting Himself (by transferring funds to himself without repaying them)] the Second Defendant's position was that this matter goes back to the early 1990s, no complaints or issues were raised after May 2006, no prejudice in respect of this matter had been alleged or specifically identified, and a mere breach of fiduciary duty was not sufficient to constitute unfair prejudice.

[66] While denying that there should be any relief, the Second Defendant submitted that a Court-ordered buyout would be disproportionate and that if unfair prejudice were to be found, an order for provision of the Financial Statements would be the appropriate relief, being the relief which the Claimants originally sought in this litigation.

Determinations in Respect of Matters/Factors (A) – (E)

[67] It is convenient to set out at this point in this Judgment this Court's several determinations in relation to the five groups of Other Matters or Factors. The remaining matters/factors relate to the Financial Statements and are more conveniently and logically dealt with later in this Judgment.

[68] Matter/Factor A. With respect to the Second Defendant's position above concerning part of matter/factor (A) above that the Second Defendant improperly benefitted himself using funds of two of the Company's subsidiaries, this Court considers that the Second Defendant's position is not applicable, even if the authority cited in support was correct, which may not be the case.[21]

[69] His position that the allegation did not relate to the Company but to subsidiaries does not mean that as a matter of law it cannot constitute unfair prejudice in respect of the Company (based on Re a Company (001761 of 1986 at 144)). While improperly benefitting himself from subsidiaries of which the Claimants are not members may or may not be capable of constituting unfair prejudice, a failure of the Company and the Second Defendant as sole director of the Company, being the shareholder of the subsidiaries, to take action in respect of the alleged improper benefit can itself constitute oppression, unfair discrimination or unfair prejudice.

[70] With respect to the Second Defendant's further position above respecting both parts of matter/factor (A) above, this Court considers that despite the points raised by the Second Defendant, these matters are material in two ways.

[71] First, they heighten concerns about the Financial Statements not being provided to the minority so that the minority can raise any legitimate concerns about the affairs of the Company since May 2006.

[72] Second, those matters can be considered in the exercise of this Court's discretion in respect of the remedy/relief and should be considered together with other evidence supporting a Court-ordered buy out. While they may have been and may continue to be oppressive, unfairly discriminatory and unfairly prejudicial actions, this Court can and does determine the 'liability' issues in this

[21] *Re Grandactual Ltd* [2006] BCC 73 at 83 per Sir Donald Rattee.

proceeding without giving weight to those specific factors as conduct that was oppressive, unfairly discriminatory or unfairly prejudicial.

[73] Matter/Factor B. With respect to the Second Defendant taking inconsistent and varying positions relating to aspects of the affairs of the Company raised as matter/factor (B), this Court considers that despite the points raised, these matters reflect negatively on how the Second Defendant, as sole director, maintained the records and handled the affairs of the Company and is likely to do so in the future.

[74] Matters/Factors (D), (E) and (F). This Court does not consider it is appropriate to give weight in this proceeding to matters/factors (D), (E) and the part of (F) focused on by the Second Defendant.

[75] With respect to matter/factor (D), given the appellate outcome, but even without it, it goes too far to say that those findings made over a decade ago should be given any material weight on either 'liability' or relief.

[76] With respect to matter/factor (E) and matter/factor (F) to the extent the Second Defendant's position focused on the Second Defendant's desire to acquire per se, it would be a rare unfair prejudice case in which the majority shareholder considered that a continuing relationship with the dissatisfied minority should be continued in and of itself.

[77] It is almost always a matter of price. Most common is that the majority does not want to pay the price sought by the minority, or does not want to pay anything and would prefer to live with the consequences of an unhappy and assertive minority. Perhaps in a rare case the factor could work the other way – if a majority shareholder had an objectively sound reason that the minority should not be able to end the shareholder relationship through the Court's intervention. But of course that is not this case, nor need the question be considered here.

Events from May 2006 – May 2014

[78] The most relevant period in relation to the issues in this litigation begins in about May 2006 when the Hong Kong litigation and the receiver's role ended, and the Second Defendant assumed the position of sole director of the Company.

[79] Second Defendant in Sole Control. Since about May 2006, when interim control of the Company by other siblings ended following the judgment of the Court of Final Appeal, the Second Defendant has been the Company's sole director[22] and has run the Company.

[80] Share Acquisitions in 2006 – 2007. In 2006 – 2007 the Second Defendant purchased the other three minority shareholdings[23], leaving the three Claimants as the only minority members.

[81] The Claimants asserted (as part of other issue/matter (C) above) that the Second Defendant took advantage of the other three siblings' lack of information about the value of the Company and their shares when he acquired those shares.

[82] Without having the Financial Statements for the period prior to the acquisitions and hearing evidence about the three transactions, this Court cannot make a finding that the Second Defendant took advantage per se.

[83] Save for the finding made below regarding the financial information that the Second Defendant as the purchasing member had which the vendors lacked, in this proceeding this Court can make no further finding of wrongdoing in that regard.

[84] The Claimants also complained that the Second Defendant's admitted appropriation, for his own benefit, of monies that the three selling members owed to the Company was improper.

[85] The Second Defendant stated in his evidence "I deducted their shareholders' loans and the outstanding share capital that they owed to the Company from the value of their shareholdings."[24] No justification or further explanation was provided in the evidence or by counsel for the Second Defendant.

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[22] Except between 9 August 2013 and 28 February 2014 when the Second Defendant's daughter, Alice Ming, was also a director of the Company.

[23] Hubert Ming and Alex Ming and the Estate of Kenneth Ming (Kenneth Ming died in 1998) (see Second Defendant's Witness Statement, paragraph 57).

[24] Second Defendant's Witness Statement, paragraph 57.

[86] The effective result in economic terms must have been that the Claimants involuntarily partly paid the purchase prices. This was wrongful conduct by the Second Defendant.

[87] No Participation in or Information About Company**'s** Operations and Business after May 2006. After the conclusion of the Hong Kong litigation, the Claimants and other siblings did not participate in the operation of the Company or its business and affairs, nor realistically was there any opportunity for them to do so even if they had wanted to do so. As noted above, the Claimants did not take the position in this litigation that they were entitled to participate.

[88] As detailed below, the Claimants were kept in the dark about the Company by the Second Defendant. They received no information and, in particular, no Financial Statements from the Company.

[89] The Claimants did not seek any information about the Company or its businesses or affairs from the Company or the Second Defendant.

[90] Not surprisingly, after the outcome of the years of bitter litigation in Hong Kong, for many years the Claimants did not challenge the Second Defendant for information about the Company. They should not be criticised for not having done so and for not having been more assertive by pursuing Financial Statements. As explained below, the onus to provide members with Financial Statements was on the Company and the Second Defendant as its sole director. The submissions of the Second Defendant to the contrary are rejected.

[91] It seems understandable that following the years of bitter litigation in Hong Kong, the confirmation in the Hong Kong proceedings that the Second Defendant had been allocated more shares than they had been, and the animosity between the Claimants and the Second Defendant, that the Claimants left the Second Defendant to run the Company which the Hong Kong courts ultimately held he had the right to do, and did not actively seek the Financial Statements when the Second Defendant failed to provide them.

[92] Given how the Second Defendant reacted in 2014, some seven or eight years after he assumed control and began not providing the Financial Statements or any information to the other members – described below – it seems even more understandable that the Claimants, who from decades of

experience had their understandings of the nature of the Second Defendant, left the Company to be run by the Second Defendant. As a matter of law, they were entitled to rely on the Company's obligations to them as minority shareholders, and the Second Defendant's required compliance with his duties and obligations as the sole director.

[93] In that regard, this Court rejects the assertion by the Second Defendant that the Claimants' own conduct and inaction – by not demanding or requesting the Financial Statements previously, and by never relying on Article 120 – was a waiver of their rights to Financial Statements or an acceptance that they would not seek the Financial Statements pursuant to Article 120.[25]

[94] Apart from anything else, and in addition to what is stated above, the requirements for waiver were not met. In addition to what is stated above, it would not have been reasonable for the Second Defendant to view the situation that way at any point from May 2006 to 2014, nor is there any reasonable or realistic basis to conclude that the Claimants or any of them ever intended to relinquish their rights to annual Financial Statements.

[95] Second Defendant Chose How He Would Conduct of **the Company's Affair in Relation to the** Minority. One might have expected that a person in the position of the Second Defendant in May 2006 and thereafter, knowing that the Company's minority members, to put it mildly, were discontent with him and did not trust him, would have conducted the Company's affairs "by the book" so that the minority would have no basis to complain. This was not to be the case.

[96] The reasons for him not doing so are harder to assess in the absence of the Court seeing him (as discussed below, he was not present to be cross-examined) but it appears to result from a combination of his view that the Company was his own – he had built it; the siblings had not worked in the business and had not even paid for their shares but had been given their shares by the Father; and of course the animosity that existed between the Second Defendant and the Claimants.

[25] Skeleton Argument of the Second Defendant dated 8 October 2015 ("**Second Defendant's Skeleton**"), paragraph 16.

[97] While responsibility for the animosity may be shared, as sole director of the Company with minority members, the Second Defendant had certain duties which as a matter of law required him to set aside the personal and shareholder baggage in dealings with the minority members.

[98] The above conclusions are supported by very telling words in the Second Defendant's witness statement.

[99] He appears to have gone out of his way to make that very telling point by saying that the shares issued to his siblings were "at the insistence of my Father" and that "[t]hese bearer shares were gifts to my siblings – they never paid for these shares."

[100] For the purposes of the issues in this litigation, there was no need to try to hammer home those facts. But it appears the Second Defendant has very strong and long held views that the Claimants should be entitled to nothing, that the Father was misguided in giving shares to the siblings, and that rather than being grateful for the gifts made by the Father, the Claimants interfered, were jealous, and harassed the Second Defendant in corporate maneuvers and in litigation.

[101] The Second Defendant did not pay for his shares either, nor for the 10,000 undisclosed shares, but it seems clear that he felt that his years of work in the business gave him an entitlement which the siblings totally lacked.

[102] Consistent with the Second Defendant's theme throughout this litigation, and in his running of the Company, he appears to have felt strongly that having worked with his Father to build the business, he deserved his equity interest in the Company whereas the Claimants and the other siblings did not work to build the business and received their shares as misguided gifts.[26]

[103] Failure to Provide the Required Financial Statements. The Company, under the Second Defendant's sole management, year after year after year – from about May 2006 when the Second Defendant reassumed control – did not provide Financial Statements to the minority members, namely the Claimants (and the other siblings while they were members), despite a then unquestionable obligation in the Company's constating documents to do so, as set out below.

[26] Second Defendant's Witness Statement, paragraphs 18 – 21.

[104] The Claimants did not receive Financial Statements for 2006, 2007, 2008, 2009, 2010, 2011, 2012 or 2013.

[105] Second Defendant Seeks to Purchase Second Cla**imant's Shares.** An approach by the Second Defendant in November 2013 to explore the interest of the Second Claimant, Bertha[27], in selling her shares, led the Claimants to seek the Financial Statements which the Second Defendant and Company had failed to provide to them.

[106] After no direct contact between the Second Defendant and the Second Claimant for 15 years, they had dinner together in Hong Kong around 26 November 2013. At the dinner, the Second Defendant offered to buy the Second Claimant's shares (for US $1.4 million, being the amount he said he paid for each of her two brothers' shares in 2006 - 2007).

[107] The Second Claimant and the Second Defendant describe what transpired in their conversation similarly in that both said she asked to see the audited accounts to assess the value of her shares and he declined to make them available. The Second Defendant told it this way:

> However Bertha wanted to have access to audited financial statements of the Company and all the Group companies, which I did not consider she was entitled to as a minority shareholder of the Company only … More significantly, given the history, I feared that her request was made as a foundation of another round of litigation attacks.

[108] In relation to the issues in this proceeding, the meeting was between two members of the Company regarding one possibly acquiring the shares of the other.

[109] The Second Claimant, like other minority members, had not received or had access to the Financial Statements since 2006. The Second Defendant had access to the Financial Statements that existed for the years from 2006. Either the Financial Statements were provided by the Second Defendant on behalf of the Company to himself as member, but not to the other members, or the Second Defendant used, in his capacity as a member seeking to acquire the shares of another

[27] In the course of these proceedings, the parties often referred to the Claimants and the Second Defendant by their first names as a matter of convenience.

member, the information in the Financial Statements to which obviously he had access in his sole director and operational capacity or capacities.

[110] Whichever the case, the Second Defendant obtained and was able to use in those circumstances the Financial Statements information in his capacity as member. Doing so was inappropriate, and prejudiced unfairly the Second Claimant.

[111] There is no indication that the Second Defendant came to appreciate that his actions were inappropriate. To the contrary, in his evidence and through his counsel he defended these actions.

[112] On the same reasoning, the Second Defendant as the purchasing member had financial information about the Company, and hence the value of shares, which the 2006 – 2007 vendors (discussed above) lacked because the Second Defendant, as sole director of the Company, wrongly failed to provide it to them.

[113] This was inappropriate on the part of the Second Defendant irrespective of whether the vendors received the objective value of their shares.

[114] While there is no complaint by the vendors before this Court regarding those transactions, the Second Defendant's conduct may be considered in relation to the appropriate remedy/relief.

[115] With respect to the Second Claimant's request for audited Financial Statements, the Second Defendant's evidence referenced above seemed to indicate that there were audited Financial Statements.

[116] Whether there were or not, the Second Defendant did not explain in any cogent manner in his evidence why the Second Claimant would not be entitled, at the times she asked, and over the years since 2006, to Financial Statements of the Company or why he did not offer to provide those, which he had failed to provide since 2006.

[117] Nor did he explain to the Second Claimant at the time, or to this Court in his evidence, why he would fear "another round of litigation attacks" after some eight years of having no attacks of any kind from any of the Claimants.

[118] As pointed out by the Claimants' counsel at trial, logically if the Second Defendant wished to avoid litigation, he could have and would have provided the required Financial Statements when they were requested or soon thereafter when this litigation was commenced in which the Claimants complaint was about the Financial Statements not being provided.

[119] On 26 January 2014 the Second Claimant sent an email to the Second Defendant in which she referred to the dinner meeting, and to the Second Defendant's insistence that he did not need to provide her with "an audited account". She continued:

> … but you also did not tell me anything about the condition of [the Company] whether it is earning money or loosing [sic] money. I do have a right to know the fair value of my shares.

She referred to the offer price based on the transactions seven years earlier, adding:

> I am sure the value of the company has to be higher, and yet you still offered me the same amount!!

She again requested the financial information:

> After careful consideration I would still like you to provide me with an audited account so that I can determine whether to accept or not.

She ended by asking the Second Defendant:

> Please respond as soon as possible, as we are not getting any younger.

He never responded.[28]

[120] No Dividends. The Claimants did not receive a dividend from the Company since 1994, if ever. Focusing on the period from about May 2006 when the Second Defendant resumed control of the Company and its business and affairs, and the Claimants ceased to have access to or be provided with any financial information, the Company never paid a dividend and there was no evidence that the Company ever considered whether it was commercially possible for it to distribute profits to members by way of dividends.

[28] Witness Statement of Second Claimant, paragraphs 14 – 19.

[121] The Claimants were never given any information about the ability of the Company to do so, and if it had the ability to do so, they were never informed of any reason why the Company may have concluded that non-payment of dividends was justified.[29]

[122] Consistent with the Second Defendant's views in relation to the shares that his Father gave to his siblings, the evidence of the Second Defendant suggested that he considered members who do not work to contribute to building the business should not receive dividends: "… all they have wanted is money without having to put in the hard work for it." As pointed out by the Claimants' counsel in closing, the Second Defendant's counsel's cross-examination of the First Claimant was that the Second Defendant "feels that all you want from him is money for all the work that he's done."[30]

[123] As the Claimants' counsel in effect put it: that is what dividends are.

[124] A minority shareholder has limited rights: limited information rights, limited dividend rights, a right to a proportionate share of the company upon a winding up, and a right (sometimes limited) to sell or otherwise transfer the shareholder's shares. A minority shareholder also has the protections of Section 184I of the Act.

Request for Financial Statements and **Second Defendant's** 'Non-Response'

[125] These proceedings resulted, at least in terms of a 'culminating incident', from the request in March 2014[31] by the Claimants for, among other things, the Company's Financial Statements, which (as noted above) had not been provided to the Claimants as members of the Company, as required by the Company's Articles and which the Second Claimant had effectively requested in November 2013 and again in January 2014. (While she requested audited Financial Statements, if there were no audited Financial Statements, the Second Defendant could have, and should have, said so and provided unaudited Financial Statements.)

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[29] *Re a Company (No. 00370 of 1987) ex p Glossop* at 83h – 84f: directors must give adequate consideration to the question of what proportion of the profits of the company should be distributed by way of dividends; payment of dividends is part of the affairs of a company and it can be unfairly prejudicial to a member not to receive adequate dividends; decisions taken by directors when recommending dividends without regard to the rights of members to have profits distributed so far as was commercially possible are open to challenge.

[30] Transcript Day 2, page 159, lines 14 – 15.

[31] Letter from Harney Westwood & Riegels, on behalf of the Claimants, to the Company dated 3 March 2014.

[126] The Company's Memorandum and Articles of Association, Article 120, requires the directors of the Company to provide to members annually Financial Statements, unless the requirement is waived by a resolution of members.

[127] Specifically, Article 120 provides as follows:

> The directors shall unless such requirement be waived by resolution of members cause to be made out and shall serve on the members or lay before a meeting of members ... once at least in every calendar year a profit and loss account ... since the preceding account ... and a balance sheet shall be drawn up so as to give respectively a true and fair view of the profit or loss of the Company for that financial period, and a true and fair view of the state of affairs of the Company as at the end of that financial period.

[128] The obligation of the directors – in this case the obligation of the Second Defendant as sole director – as stated in Article 120, was to serve the Financial Statements on members (unless there was a members' meeting, which there was not).

[129] As stated above, and upon which there was no dispute, the Second Defendant did not do so.

[130] He failed to do so year after year after year.

[131] Nor did the Second Defendant provide to the Claimants and other members any reason, explanation or excuse for not doing so during the many years during which they did not receive Financial Statements. He did not even say to them, as he tried to justify his failure in this litigation, that he was concerned they would misuse the information by being disruptive or difficult – that is, cause trouble for him.

[132] Nor did he provide any meaningful explanation to this Court for why the Financial Statements were not provided in each of the years prior to March 2014.

[133] It is not a legitimate reason for not providing the Financial Statements to assert that the Claimants' request was "nothing more than a fishing expedition"[32], even if that were the case which here it

[32] Defence, paragraph 32.

clearly was not, or baldly that they "wish to engage in disruptive and difficult behavior towards the [Second] Defendant without good reason and are not acting in the bests interests of the [Company]."[33]

[134] Notably the Second Defendant's asserted concerns, even if justified (which this Court has concluded was not the case) were not about "disruptive and difficult behavior" towards the Company but about such behavior towards himself, as sole director. Notably, in his evidence quoted above, the Second Defendant referred to his meeting with the Second Claimant and that his fear "that her request was made as a foundation of another round of litigation attacks" was not focused on attacks on the Company but on himself in respect of his conduct as sole director.

[135] The listing in the Second Defendant's Skeleton and the detailed review of the evidence in the Second Defendant's Closing Notes dealing with the First Claimant's "Conduct" was focused on certain specific actions in the period 1977 – 2006[34], not on "Conduct" between 2006 and March 2014. These matters do little to substantiate the Second Defendant's asserted concern about disruptive or difficult behavior as a reason not to provide the Financial Statements in 2014 or later. Further, this Court does not consider these matters of any relevance in the exercise of its discretion regarding the appropriate relief/remedy.

[136] The Second Defendant was not focused on the interests of the Company when as sole director he failed to provide the Financial Statements over the years, or when he denied and then ignored the Second Claimant's express request for the Financial Statements.

[137] There was no requirement on members in Article 120, or elsewhere, to request the Financial Statements from the Second Defendant or the Company.

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[33] Defence, paragraph 33.

[34] As set out in the Second Defendant's Skeleton, the conduct included the 1977 attempt to remove the Second Defendant as managing director of Ming Hsing; the 1994 passing of resolutions to remove the Second Defendant; the increase in share capital and allotting themselves shares in May 2006, the awarding to the First and Second Claimants HK $6 million in breach of Court orders; purporting in 2006 to award themselves HK $2 million interest-free loans; removing Alex as a director because he sided with the Second Defendant; making unreasonable demands on the receiver; and failing themselves to provide information. The improper financial actions after the Claimants lost the Hong Kong proceedings were reversed – at no point in their evidence did the Claimants seek to justify those improper actions.

[138] There was no requirement on members, in Article 120 or elsewhere, to justify to the Company or the directors of the Company any desire or need for the Financial Statements in order to be entitled under Article 120 to be served with the Financial Statements.

[139] There was no requirement on members, in Article 120 or elsewhere, to have demonstrated any interest or concern for the Company or its business in order to be entitled under Article 120 to be served with the Financial Statements. In any event, in light of the bitter history, the Claimants cannot be faulted for not pressing for Financial Statements after the Second Defendant became sole director in about May 2006.

[140] There was no caveat, in Article 120 or elsewhere, that a member was not required to be served with the Financial Statements if she or he already had some information about the financial position of the Company, or had the ability to guestimate the value of her or his shares in the Company. The Second Defendant sought in these proceedings either to excuse his failings, or to question the Claimants' motives, because the Claimants had a limited amount of dated financial or value information from many years before (2004 – 2006 in particular).[35]

[141] There was no caveat, in Article 120 or elsewhere, that a member was not required to be served with the Financial Statements if she or he wanted to use it to ascertain the value of his or her shares or to use it in connection with a possible sale of his or her shares. Indeed, that objective would be all the more reason why the Financial Statements should be provided.[36]

[142] When the possible purchaser was the Second Defendant, it was abusive of the Second Defendant not to provide the information to which the member, in this case the Second Claimant, wanted to have and was entitled to have. The abusive actions of the Second Defendant, as sole director of the Company, in and of itself were oppressive, unfairly prejudicial and unfairly discriminatory to the Second Claimant initially and then to all the Claimants.

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[35] Likewise it matters not that the Claimants' counsel make a submission on the ballpark value of assets based on overall property inflation figures in Hong Kong.

[36] The Second Defendant's criticism that the real motivation for the request did not relate to the Company's interests but the decision and desire of the Claimants to sell was misguided. A minority member can be unfairly prejudiced when deprived of information to which the member is entitled and which the minority member wants to exercise or protect the minority member's right as a member. The member does not need to have sought the information for the Company's interests. See Second Defendant's Skeleton, paragraph 18.

[143] There was no proper basis to justify the Second Defendant deciding that the Company should operate under cover of darkness and as if the Company were his alone. There was no proper basis for the Company to do so.

[144] The Company's failure to provide Financial Statements in each year from 2006 was not for the benefit of the Company or for any proper purpose but rather for the improper benefit of the Second Defendant, including to keep from the Claimants and other minority shareholders information about the financial affairs, operations and state of the Company (including in relation to the Second Defendant himself as sole director and operator of the Company and in respect of matters about which he could potentially be called upon by minority shareholders to explain and justify) and its ability to pay dividends, and the value of the Claimants' shares in the Company.

[145] The failure to provide Financial Statements was oppressive, unfairly discriminatory and unfairly prejudicial to each of the Claimants in their capacities as members of the Company.

Formal Request for Financial Statements; Passage of Resolutions; Commencement of Litigation

[146] On 3 March 2014 the Claimants, through their BVI legal practitioners, wrote to the Company seeking, within 14 days, among other things, the "audited accounts and financial statements" of the Company since 2006 which the Second Defendant had not provided to them as required by Article 120.[37] (Article 120 did not require audited Financial Statements if the Company did not have audited Financial Statements prepared. As indicated above, the Second Defendant seemed to imply that the Financial Statements were audited.)

[147] The Second Defendant's position in this litigation was that "[t]he demands for information came totally out of the blue."[38] This Court completely rejects that assertion. While the Second Defendant modified the submission by referring to the absence of requests or demands between 1992 and the

[37] The Second Defendant, at trial, sought to make much of the aggressive approach taken on behalf of the Claimants. While there was a lot of unhappy history between the parties, the Second Defendant may be right that the aggressive approach of the letter was not particularly productive, although it may be that a more cooperative and conciliatory approach would not have resulted in a different substantive response. Certainly the response on behalf of the Second Defendant did not seem to be aimed at finding a businesslike resolution.

[38] Second Defendant's Skeleton, paragraph 16; Defendants' Closing Notes, paragraph 13. (The name of the document notwithstanding, it contains submissions of the Second Defendant only.)

commencement of the Hong Kong proceedings and since 2006, it is clear that the Second Claimant's requests came months before and in the context of the Second Defendant's interest in acquiring her shares. So it is not right to say that the requests or demands came out of the blue, whether the reference is to the Second Claimant's initial request when she met with the Second Defendant, to her follow up email to him, or to the letter to the Company from the Claimants' legal practitioners (which appears from the Defendants' Closing Notes to be what the Second Defendant was focusing upon).

[148] The Company did not provide any Financial Statements to the Claimants in response to the request. The Second Defendant did not provide any Financial Statements to the Claimants.

[149] In a response through its BVI legal practitioners to the Claimants' legal practitioners dated 3 April 2014, the Company stated, apparently correctly, that there was no obligation to audit the Company's accounts. While apparently correct, it was a deliberately coy response that appears to this Court to have been designed to avoid responding to the heart of the request. The minority members deserved better than that.

[150] The Claimants' legal practitioners, in a letter in response dated 11 April 2014, referred to and quoted Article 120, and continued to request audited Financial Statements. At no point in that process did the Company or the Second Defendant provide any unaudited Financial Statements to which the Claimants were unquestionably entitled.

[151] Nor did either the Company or the Second Defendant provide a reason for not providing the Financial Statements as required, nor seek any condition, term or commitment that would allay the suggestion, made during the course of this litigation, that there might be misuse of the Financial Statements. While there was no legal basis to seek a condition, term or commitment, it would have gone some distance to showing that the position being expressed by the Second Defendant was being expressed in good faith.

[152] Resolutions Waiving Financial Statements Obligations Retrospectively and Prospectively. On 17 April 2014 the Second Defendant's legal practitioners wrote two letters to the Claimants' legal practitioners, the first saying they were seeking instructions in respect of the 11 April 2014

letter and the second forwarding "a copy of a member's resolution passed today" that was signed by the Second Defendant "being a Member holding a majority of the shares of the Company", dated 17 April 2014, and provided his consent to the adoption of the following ordinary resolution:

> 1. WAIVER OF REQUIREMENT UNDER ARTICLE 120
>
> NOTED THAT pursuant to Article 120 of the Company's Articles of Association, there is a requirement that the sole Director of the Company serve on the Members a copy of the profits and loss account for the Company each calendar year.
>
> RESOLVED THAT pursuant to Article 120 that this requirement is hereby retrospectively and prospectively waived.

[153] On 23 April 2014, the Second Defendant's legal practitioners wrote a further letter to the Claimants' legal practitioners, referring to the above resolution of 17 April 2014 and providing a copy of a further member's resolution that was signed by the Second Defendant "being a Member holding a majority of the shares of the Company", dated 22 April 2014, and provided his consent to the adoption of the ordinary resolution, similarly worded, that referred to the prior resolution and then waived, "retrospectively and prospectively" the Article 120 requirement to provide a balance sheet.[39]

[39] The Act provides for written resolutions in Section 81(1)(b) and 88. Article 68 provided that an action that may be taken by the members at a meeting may also be taken by a resolution of members consented to I writing or in other specified electronic means, "without any need for notice, but if any resolution of members is adopted otherwise than by the unanimous written consent of all members, a copy of such resolution shall forthwith be sent to all members not consenting to the resolution." No issue was raised whether for the written resolution process, all members' consent needs to be sought (even though the Act does not require "any notice" (Section 88(1), which presumably refers to type of notice for meetings, as set out in Section 83). Seeking the consent of all members would forewarn minority members who may be opposed that the resolution has been proposed, and may give them an opportunity to make their case to the majority (even if only informally) as to why the resolution should not be adopted, in a manner comparable to their opportunity to do so if the resolution had been proposed at a meeting of members. Also, generally speaking although not applicable here due to the Second Defendant's percentage of the votes based on his shareholding, there appears to be an unresolved issue of the manner in which a determination is made of requisite proportion of consenting members required. This is discussed in British Virgin Islands Commercial Law, Third Edition, sections 2.159 and 2.160. It appears that implicit in the discussion of the issue is that the consent of all members would be sought. The issue of seeking the consent of all members, and hence the validity of any written resolution adopted without seeking the consent of all members, need not be determined in this case as not only was it not raised and argued but this Court's decisions on the claims made respecting the Resolutions determines their fate.

[154] Until the Resolutions were passed by the Second Defendant in April 2014, the Company and its sole director, the Second Defendant, year after year was unquestionably in breach of Article 120's mandatory requirement to provide Financial Statements to members. No legal justification was even advanced apart of an assertion that the Claimants waived their rights to the Financial Statements by not pursuing the Defendants when they were not provided. The waiver allegation is rejected, as explained in this Judgment.

[155] Even if the Second Defendant acted within his legal rights to pass the Resolutions that retrospectively as well as prospectively waived the Financial Statements requirement – he caused, and should have appreciated that he would cause, legitimate concern that at least in part his justification was to keep from the Claimants information that might have justifiable led them to have concerns about the Second Defendant's conduct of the affairs of the Company.[40]

[156] The Resolutions appear to have been motivated in large measure by the Second Defendant's desire to take advantage of the Claimants' lack of information, particularly the immediate lack of information of the Second Claimant and her desire to obtain the most basic information about the Company – the Financial Statements – in order to assess the value of, and then to attempt to sell, her shares to the Second Defendant.

[157] The Second Defendant's counsel pointed in cross-examination to what he termed a sudden interest in getting information after no requests for information from 2006 – March 2014. It seems clear that the Claimants' request for information, including in particular the Financial Statements, was motivated by a legitimate desire to know the value of their shares of the Company, not by a desire by the Claimants to fish for information to make trouble or commence unjustified proceedings.

[158] Commercial morality if not legal obligations would have led the Second Defendant to willingly provide that Financial Statements for that purpose, not to suggest, as he repeatedly did through his counsel's cross-examination of the Claimants, particularly the First Claimant, that the 8-year old

[40] Shaw Shiu Kuen, Bertha, the Second Claimant testified at trial in cross-examination "If he [the Second Defendant] wasn't hiding something, why wouldn't he give us the financial report", Transcript Day 2, page 191, lines 13 – 14.

information (2006 information) about assets and liabilities was adequate to make informed and reasoned judgments about 2014 share values. It seems surreal.

[159] As noted above, it was no excuse whatsoever that one of the Claimants said that he had been able at one point to work out – this Court would say "guestimate" – a value of his shares, or that the First Claimant had in mid 2006 a general knowledge or awareness of the assets and liabilities of the Company, whether or not there was a general belief that they had not changed, or that the First Claimant in 2006 had accountants go through the books and records of the Company. Article 120 does not provide that Financial Statements need not be served on members who at some point in the past think they may have been able to estimate a value of their shares or had a general knowledge of the Company's assets and liabilities.

[160] The removal of a member's entitlement to financial information, and in particular to Financial Statements, must have a depressing effect on any arms' length prospective purchaser's interest in acquiring shares in the Company, and on the price that the prospective purchaser would pay if there was any interest at all. The prospective purchaser would be buying "a pig in a poke"; the prospective purchaser could have no reasonable basis to know the value of the shares.

[161] While there was no evidence here of any such arm's length prospective purchaser, all other things being equal, the market price of the Claimants' shares was prejudiced by the passage of the Resolutions. It is yet another reason why the Resolutions were unfairly prejudicial.

[162] The Second Defendant chose to pass the Resolutions in a manner designed to inflame the situation between himself and the Claimants, and without regard to the likelihood that it would lead to litigation rather than avoid it. He had determined to "play hardball".

[163] If the Second Defendant's concern was possible misuse, a proportionate response short of 'dropping a nuclear bomb' on the Claimant's rights to the Financial Statements could have been used. There could have been discussions to provide more limited information beyond the Financial Statements; to put restrictions on its use; to provide information in stages; to reach a "without prejudice" arrangement; to utilize the Claimants' legal practitioners as a buffer; and so on.

[164] Or, even if the Second Defendant considered he needed the Resolutions to negotiate from a 'position of strength', he could have had his legal practitioners provide the Resolutions accompanied by an offer – either with or without prejudice – to discuss what information could be provided and on what terms.

[165] The Second Defendant's bald statement in his witness statement that "I wanted to protect the interests of the Company in passing these resolutions" was not helpful to this Court's understanding of what interests of the Company were sought to be protected or how any such interests would be protected.

[166] Interestingly the Second Defendant did not pass the Resolutions when he resumed control of the Company in about May 2006 – while it may not have occurred to him at that time, certainly from his perspective that was the time to be concerned about possible motivations and actions of the Claimants and other minority members if there ever was a time.

[167] While reference was made by the Second Defendant to positions taken by the Claimants, particularly the First Claimant, after the Resolutions were passed that the Second Defendant termed unreasonable, those actions must be viewed through the prism of the Second Defendant's aggressive response to a reasonable request for the Financial Statements and other financial information.

[168] Financial Statements are the principal source of a shareholder's understanding of a company's financial affairs – particularly for a minority shareholder who is not involved in management. They enable a minority shareholder to understand, among other things, how the business is performing, the manner in which the affairs of the Company are being conducted, whether there may be funds for the payment of dividends, and the value of their shares.

[169] There is nothing from which this Court could conclude that the Resolutions were passed for the benefit of the Company or for any proper purpose. While the Second Defendant as member was

entitled to vote his shares with malice, it is not the act of a member in voting that constitutes unfair prejudice but the result of that act if it produces action, or inaction by the company.[41]

[170] In summary, this Court finds that the Resolutions were passed for the benefit of the Second Defendant, not at all for the benefit of the Company, and for the detriment of the minority members, the Claimants.

[171] As found above, the Company's failure to provide Financial Statements to minority members in each year from 2006 was not for the benefit of the Company or for any proper purpose but rather for the improper benefit of the Second Defendant, including to keep from the Claimants and other minority shareholders information about the financial affairs, operations and state of the Company (including in relation to the Second Defendant himself as sole director and operator of the Company and in respect of matters about which he could potentially be called upon by minority shareholders to explain and justify) and its ability to pay dividends, and the value of the Claimants' shares in the Company. The failure to provide Financial Statements based on the Resolutions was oppressive, unfairly discriminatory and unfairly prejudicial to each of the Claimants in their capacities as members of the Company.[42]

[172] Resolution Process. While no issue was made by the Claimants of the resolution process, a sole director interested in being forthright with the minority, might have chosen to convene a meeting at which he would explain his reasoning for the resolution and all members could speak to the resolution if they wished to do so. Or, even if he was not legally required to do so (a point on which no decision is made, as discussed in footnote 39) he might have informed them of his proposed resolutions and afforded them an opportunity to provide a reasoned objection.

[173] Commencement of this Litigation **and Second Defendant's Response**. This Claim was commenced on 2 May 2014.

[174] The commencement of litigation did not lead the Second Defendant to reconsider his hardball approach.

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[41] *Unisoft Group (No 3)* [1994] 1 BCLC 609 ("***Unisoft***") at 611 and 622-623; *Loch and Another v John Blackwood, Limited* [1924] AC 783 (PC) at 788.
[42] *Citco Banking Corp NV v Pusser's Ltd* [2007] UKPC 13; [2007] 2 BCLC 482 (PC).

[175] To the contrary, he "circled the wagons", sought to defend his actions and failings, and took positions designed to make the Claimants go through all possible hoops to obtain the Financial Statements, taking the position that if they succeed in their claim, their relief should be an order requiring the Financial Statements to be provided.

[176] To what end?

[177] If he considered that the Financial Statements would disclose clean operations and affairs, and no basis for minority shareholders to assert that payment of dividends had not been properly considered, what was his legitimate objective?

[178] As repeatedly pointed out by counsel for the Claimants, the Second Defendant's justification for the Resolutions of a concern that it was a "fishing expedition" and that the Claimants would use the information to commence litigation lost its force once this litigation was commenced. Once he was faced with litigation that he had hoped to avoid, his justification for not providing the Financial Statements weakened from a practical, if not a legal, perspective.

[179] As stated in relation to the failure to provide of the Financial Statements over the years, the Second Defendant, in all of his capacities, knew well that he had minority members who might prove vigilant on his conduct as sole director and in relation to the operation of the Company. He had fair warning – if he needed any 'warning' beyond the duties imposed upon him by the Act – that he may be called upon to account for any improper actions. If as he claimed, he did nothing wrong, his tactics in relation to the Financial Statements, were seriously ill-conceived.

[180] A majority member who wishes to operate a company as if it were his own, has only one proper option[43]: to make it his own by consensually acquiring the interests of the minority and to do so

[43] An exception is if the majority has a statutory right to compulsorily acquire the interest of a small minority, as is the case pursuant to section 176 of the Act. Section 176 permits "members of the company holding ninety percent" of the outstanding shares (as specified in the subsection) to instruct "the company … to redeem the shares held by the remaining members". Provisions of this nature exist in many modern company statutes. They reflect a policy decision to give companies, and in particular their shareholders with a specified high (here 90%) majority, flexibility to do things which they would not be able to do with small minority shareholders as members of the company. It has been described as an 'expropriation' right whereby the interests of a small minority are

without oppressing or unfairly prejudicing them as the means to do so. Such treatment cannot be used so that the minority member who wants to get on with his or her life feels that there is no choice but to sell below what the shares are worth or face long and expensive litigation.

[181] As the Second Claimant said to the Second Defendant in her email on 26 January 2014, to which she received no response, "Please respond as soon as possible, as we are not getting any younger."

Absence of Second Defendant at Trial

[182] While the Second Defendant provided a witness statement, he did not attend at trial to be cross-examined. It was said that his non-attendance was for medical reasons.

[183] The Claimants' counsel made various submissions about the Second Defendant's absence but the matter was never raised with the Court directly. For reasons that were not really explained to the Court, the Claimants effectively accepted the situation and rather than pressing for a video cross-examination, for example, seemed to leave it to the Second Defendant's counsel to propose some alternative if he wanted the Second Defendant's evidence not to be discounted.

[184] The Claimants' counsel seemed generally content to leave the Second Defendant's direct evidence as it stood and to make submissions about its flaws (in submissions and in a version of submissions that came to be called during the trial "a virtual cross-examination" – the questions he would have put – a catalogue of what were submitted to be unanswered or unanswerable questions, implausibilities and the like).

[185] At the end of the day, the Court takes the evidence for what it was. The Second Defendant's evidence has not been discounted or given less weight than if he had been cross-examined.

[186] There may have been "points that could have been scored" in a cross-examination of the Second Defendant but it appears likely that it would have been more of an argument of the case through the witness (which, to a point, is fair game).

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required, as a matter of public policy, to give way to the large majority. The offsetting policy decision is to treat the expropriated shareholder(s) "fairly".

[187] While the Court might have obtained a somewhat better sense of the Second Defendant from an 'in person' appearance, the Court cannot know whether it would have been left with a more favourable or a less favourable view of the plausibility and credibility of the Second Defendant.

Remedies/Relief

[188] As stated at the outset of this Judgment, in accordance with the agreed bifurcation, this Judgment needs to determine the remedy or remedies (relief) upon a finding of oppression, unfair discrimination and/or unfair prejudice, and whether the remedies should or should not include a Court-ordered buyout (acquisition) of the Claimants' interests in the Company.

[189] Subsection 184I(2) of the Act confers discretionary jurisdiction on this Court "to make such order [one or more] as it thinks fit" if "the Court considers that it is just and equitable to do so."

[190] The discretionary remedies for unfair prejudice need to be ones that deal appropriately and justly with the oppression, unfair discrimination and/or unfair prejudice and deal fairly and equitably with the situation which has occurred. The relief needs to be proportional.

[191] **Claimants' Pos**ition on Remedies. The Claimants' position regarding the appropriate remedies was that they must extend beyond obtaining the financial information sought.

[192] If the financial information provided raises issues of possible misconduct (of whatever kind) on the part of the Second Defendant having occurred or occurring now, further proceedings will ensue.

[193] Even if the Financial Statements do not indicate that any possible misconduct (of whatever kind) on the part of the Second Defendant may have occurred or be occurring, the Claimants submitted that they will be "at the mercy" of the Second Defendant going forward if there is no Court-ordered buy out.

[194] They submitted that they should not be left as shareholders in the Company that is being run by the Second Defendant; that objectively the Claimants, and the Court, cannot have trust or

confidence in his management of the Company, and that because of all that has happened there is no possibility of the trust and confidence being restored.

[195] **Second Defendant's Position of Remedies.** The Second Defendant's position was that any remedy should be proportionate and that an order for a compulsory acquisition of the Claimants' shares would be disproportionate in the circumstances of this case.

[196] Counsel for the Second Defendant added that this is particularly so in the context of the "extraordinary delays" in raising some of the allegations in the Amended Statement of Claim (but presumably not the passage of the Resolutions).

[197] He further submitted that it may be necessary to consider each of the Claimants separately if the Court were to consider an acquisition of the shares of any of the Claimants.

[198] **Court's Reasoning** and Findings on Remedies. Once unfair prejudice is established, the Court is obliged to consider the whole range of possible remedies and choose the remedy or remedies which on its assessment of the current state of relations between the parties is the most likely to remedy the unfair prejudice and deal fairly with the situation which has occurred. The principles respecting remedies submitted by both sides are not disputed and are accepted by this Court.

[199] The English Court of Appeal in Grace v Biagioli stated as follows:[44]

> In most cases, the usual order to make will be the one requiring the respondents to buy out the petitioning shareholder at a price to be fixed by the court. This is normally the most appropriate order to deal with intra-company disputes involving small private companies … The reasons for making such an order are in the most cases obvious. It will free the petitioner from the company and enable him to extract his share of the value of its business and assets in return for foregoing any future right to dividends. The company and its business will be preserved for the benefit of the respondent shareholders, free from his claims and the possibility of future difficulties between shareholders will be removed. In cases of serious prejudice and conflict between shareholders, it is unlikely that any regime or safeguards which the court can impose will be as effective to preserve the peace and to safeguard the rights of the minority. Although, as Lord Hoffmann

[44] *Grace v Biagioli* [2006] 2 BCLC 70, [3].

> emphasised in O'Neill v Phillips, there is no room within this jurisdiction for the equivalent of no-fault divorce, nothing less than a clean break is likely in most cases of proven fault to satisfy the objectives of the court's power to intervene.

[200] There are orders that this Court can make, and makes below, which meet the requirements for remedies discussed above, and which this Court "thinks fit" to deal with the legitimate reasons for the Claimants – for members – to be provided with Financial Statements and to prevent a recurrence of the removal of their right to Financial Statements.

[201] However, in this case, those orders are insufficient to deal with the oppression, unfair prejudice and unfair discrimination, and alone are not just and equitable to the Claimants. They cannot alone remedy the unfair prejudice or deal fairly with the situation which has occurred.

[202] The Court is entitled to look at the reality and practicalities of the overall situation.[45] Where the relationship has broken down and there is a history of unfair prejudice (as opposed to a one-off act) an order for share purchase is much more preferable to orders directing future conduct.[46] Here there is a history extending over decades, as discussed in this Judgment.

[203] In this case, beyond the Resolutions, on an objective assessment, the Claimants reasonably, legitimately and justifiably lack of trust or confidence in the Second Defendant's future management of the Company, and in his future conduct as sole director, insofar as the interest of the Claimants as members is concerned. As noted, assessed objectively, they are justified in that lack of trust and confidence.

[204] This Court agrees.

[205] There is real reason for concern, based on all that has occurred, that the Second Defendant will not serve as sole director of the Company without recurrences of oppressive, unfairly discriminatory and unfairly prejudicial conduct towards the Claimants.

[206] His misguided beliefs on matters of shareholders' rights and his attitudes towards the Claimants as minority members are too engrained. His patterns of conduct in defending the indefensible, his

[45] *Grace v Biagioli* [2006] 2 BCLC 70, [73]
[46] See also *Re Cumana Ltd* [1986] BCLC 430, 442b-442d; *Irvine v Irvine* (No 1) [2007] 1 BCLC 349, [356-357].

hardball tactics, his repetition in his evidence of those beliefs and attitudes make it abundantly clear to this Court that a Court-ordered buyout is needed.

[207] The reasons include, first, the Second Defendant's completely unjustifiable failure to provide the Financial Statements over many years, even when asked by the Second Claimant and then all the Claimants, and even when he had access to them in discussions with the Second Claimant about an acquisition of her shares (as he did in the 2006 – 2007 acquisitions); and second, the Second Defendant's long and strongly-held misguided perspective that the Claimants are not entitled to the economic benefits of their shares as they were given the shares and as they did not work to build the Company, as did the Second Defendant.

[208] The Court has no confidence that the Second Defendant, as sole director, will comply with his obligations to the Claimants, or will cause the Company to comply with its obligations to them as members (albeit minority members) of the Company.

[209] After two years of litigation, and the availability of high quality legal advice, the Second Defendant has never suggested to this Court that he has seen the light, that he appreciates the legal requirements associated with, as an important example, consideration of the payment of dividends – that being so, objectively how can a minority shareholder – or this Court – have trust or confidence in him or in the Company under is sole management.

[210] The Second Defendant's view of the position of the minority would apply to whomever held the shares of the Claimants – it is not a view tied to his views about the Claimants, which of course are not views that can justify non-compliance with his duties as the sole director.

[211] These concerns are reasonably heightened by his conduct over the years in relation to the Company, referenced above, and his personal animus for the Claimants.

[212] While it is not necessary to reach this conclusion to look at the Second Defendant's conduct a shareholder or personally, as discussed in this Judgment, the Court can consider those matters when fashioning the most appropriate remedy to the extent the conduct causes concern about how the Second Defendant may be anticipated to conduct himself as sole director and in relation to the Company. This is a different use of the information than founding the unfair prejudice, which is not

permissible.[47] However it is not necessary to do so to reach the conclusions on remedies that this Court has reached.

[213] For over 35 years on both side there have been disagreements and disputes, behaviours that an objective observer might question, aggressive tactics, poor exercises of judgments, and no doubt disappointments, hurt feelings and bitterness.

[214] However nothing done by any of the Claimants, even as perceived by the Second Defendant, justifies the Second Defendant not causing the Company to afford to the Claimants their fundamental rights as minority shareholders, as limited as they may be.

[215] A 'trapped' minority in a Company – that is, a minority that has no practical exit mechanism or for which the Company has no compulsory acquisition mechanism – may be inconvenient for the majority and for the Company. The existence of the minority constrains the ability of the majority to deal with the Company as if it was his or hers alone.

[216] The Company and its directors must be mindful of both the legitimate rights and interests of the minority and the constraints of their respective actions, and must at all time act appropriately. Of course, the practical solution may be to seek to negotiate an acquisition of the minority's interests.

[217] Despite the Second Defendant's views about and feelings towards the Claimants at a shareholders or on a personal level, as sole director he must fairly regard their interests, such as they are, as minority members. He must do so despite the litany of criticisms he has about the Claimants, particularly the First Claimant. The litany of criticisms came through loud and clear in the Second Defendant's evidence, in his counsel's cross-examinations and in his submissions.

[218] This Court has concluded that the Second Defendant no longer has the ability to deal with the minority appropriately, and has not had that ability for some time. The situation in untenable.

[219] It is not practical for the Court to supervise or micromanage the way in which the sole director conducts himself in relation to the minority. This is not a situation that this Court considers suitable

[47] See *Unisoft, supra*.

for an order "regulating the future conduct of the company's affairs".[48] The Court lacks trust and confidence, given the history and the Second Defendant's long-held mindsets about his contribution and the Claimants' lack of contribution and desire for money without having purchased their shares, that the Second Defendant will conduct himself as sole director in an appropriate manner in relation to the Claimants as members.

[220] At the same time, the minority members and the Court lack the information and resources to ensure that the Second Defendant conducts himself appropriately in relation to the minority members. Neither the Court nor the parties have unlimited resources to deal with the inevitable disputes that will arise.

[221] In theory there are remedies other than an acquisition of the Claimants' interests in the Company that would be less attractive to the Second Defendant and less likely to lead to a self-regulating resolution of the situation. Those include changes in the governance structure of the Company, which likely would have the same kinds of drawbacks as this Court's attempt to regulate the future conduct of the Company's affairs, or the more extreme remedies specifically contemplated by subsection 184I(2) of appointing a receiver or appointing a liquidator. This would not be justified on the record as it stands at this point.

[222] The fairest and most sensible resolution must include an order for the Claimants' interests in the Company to be acquired so that there is a reasonably clean break. It is in the interests of all concerned.

[223] The Claimants submitted that this is especially the case where an opposite party, as is the case with the Second Defendant, desires a clean break with the Claimants. However, this Court considers that this factor must be utilized with caution. A commercial party may be willing to be a purchaser but almost always it is "at the right price". The Second Defendant demonstrated, as pointed out by the Claimants, that he is a price-conscious purchaser. So this factor has not been given any weight in this Court's determination of the appropriate remedies.

[48] Subsection 184I(2)(c) of the Act.

[224] On the other hand, this is not a situation where the natural purchaser, the Second Defendant (or the Company) has submitted that for whatever reason, he (or it) cannot afford to purchase or for some other reason it would be unfair to him (or it) or detrimental to the ongoing business for him to be required to purchase.

[225] The Claimants submitted, and this Court agrees, that the fact that the Claimants are not active managers of the business (a point on which the Claimants and the Second Defendant agreed), did not pay for their shares, or knew they were "locked into" the Company absent a court-ordered purchase of their shares, does not constitute any reason to deny the Claimants such an order.[49]

[226] For the avoidance of doubt, the remedy is not a no-fault divorce. Having found sufficient fault on the part of the Second Defendant to constitute unfair prejudice and unfair discrimination, the issue was the determination of the appropriate remedy in all of the circumstances. The appropriate remedy in all of the circumstances is a court-ordered buy out of each of the Claimant's shares.

[227] While there are differences in the three Claimants' histories and involvements with the Company and with the Second Defendant, and in their respective roles in relation to the litigation, this Court sees no reason that each of them should not be entitled to have their shares acquired. Each would face comparable futures without an acquisition of his or her shares.

[228] **Court's Decisions on Remedies** and Relief. Accordingly, this Court considers that it is just and equitable to grant the following four remedies and forms of relief.

[229] First, Setting Aside of Resolutions. The Resolutions of the Company shall be set aside effective as of the dates on which they were passed and shall be declared never to have been of any force or effect.

[230] Second, Amending Article 120. Article 120 shall be amended, effective as of this date, by removing the words "unless such requirement be waived by resolution of members". The members of this Company should not be deprived of Financial Statements.

[49] *Grace v Biagioli* [2006] 2 BCLC 70, [84].

[231] Third, Provision of Financial Statements. (This remedy shall be referred to and defined as the "Provision of Financial Statements Remedy".) First, the Second Defendant shall provide to each of the Claimants, for the year 2006 and each year thereafter through 2015, and thereafter for 2016 and each year thereafter so long as each Claimant shall be a member of the Company, or if not a member, to his or her successor(s) as a member, existing (whether in hard copy or electronic format) Financial Statements "drawn up so as to give respectively a true and fair view of the profit or loss of the Company for that financial period, and a true and fair view of the state of affairs of the Company as at the end of that financial period."

[232] The Financial Statements shall be in each case the "best available" Financial Statements for the year in question, which means they provide the best "true and fair views". If the Financial Statements have been audited or otherwise reviewed independently, those Financial Statements shall be provided.

[233] The Financial Statements shall be provided in both hard copy and an electronic format such as Word or Excel, if they exist.

[234] If for any year there are no Financial Statements in existence or that can be readily generated/compiled, the Second Defendant shall provide to the Court and the Claimants an affidavit or affirmation to that effect, and in such event the question of whether the Second Defendant should be required to cause Financial Statements for such prior year or years to be prepared shall be reserved to the hearing at which the Court will consider the bases of the buyout ordered below and the processes for the determination of the buyout amounts.

[235] All costs and expenses involved in compliance with the provision of the Financial Statements shall be paid by the Second Defendant, not the Company, and he shall not either directly or indirectly seek or obtain reimbursement from the Company or in any manner that may affect the value of the Company.

[236] Fourth, Acquisition of the **Claimants'** Shares. (This remedy shall be referred to and defined as the "**Acquisition of the Claimants' Shares Remedy**".) The Second Defendant shall acquire, or cause the Company to acquire or redeem, or cause or arrange for a third party to acquire the

shares of each of the Claimants, provided that an acquisition by anyone other than the Second Defendant, or a redemption, shall not have any adverse financial or other implications for any of the Claimants.

[237] In accordance with the bifurcation agreement, there shall be a further hearing, at the earliest date workable for the parties and this Court, to determine the bases of the buyout, the effective date of and processes for any valuation(s), the determination expeditiously of any substantive or procedural issues that may arise in the course of any valuation(s), the processes and bases for the determination of the acquisition amounts (including any minority discount issue), the proportionate interest of each of the Claimants in the en bloc value of the Company (the Claimants' having foreshadowed that each of them intends to seek one-seventh as opposed to one-seventeenth of the en bloc value of the Company), the date for completion of the acquisition, and all undermined or incidental issues, steps and matters.

[238] The Court will give such directions for the hearing as may be necessary, including in relation to the issues to be determined, the materials to be filed and any necessary timetable leading to the hearing.

[239] It is expected that pending such further hearing or further order of this Court, neither of the Defendants will take any action of any kind that reasonably may adversely affect in a reasonably material way the value of the Company or the Claimants' shares, the ability for a determination of the value of the Company (en bloc) or of the Claimants' shares to be made efficiently, or otherwise affect adversely the Claimants, or any of them, as members of the Company, or affect adversely the ability of the Second Defendant to acquire for cash the Claimants' shares on a fair value basis, without minority discount, in the event a buyout on that basis is ordered. It is not intended that this expectation will form part of the Order arising from this Judgment.

[240] For greater certainty, no such determination of the bases of the buyout has been made, and such provision simply contemplates what likely would be the higher end of possible purchase prices.

Costs of Claim to Date

[241] The costs of the Claim to date are reserved to be determined following receipt of submissions thereon, unless agreed.

Orders

[242] Accordingly, for the reasons set out above in this Judgment, in summary this Court orders as follows:

1. The Resolutions shall be set aside effective as of the dates on which they were passed and are declared to be of no force or effect.

2. Article 120 of the Company's Articles shall be amended, effective as of this date, by removing the words "unless such requirement be waived by resolution of members" and the Defendants shall forthwith take all necessary steps to implement this remedy, and shall in any event complete doing so no later than a date to be fixed in the formal sealed Order arising from this Judgment.

3. The Provision of Financial Statements Remedy shall be implemented by the Defendants forthwith and in any event, no later than a date to be fixed in the formal sealed Order arising from this Judgment.

4. The Acquisition of the Claimants' Shares Remedy shall be implemented by the parties expeditiously.

5. The costs of this Claim to date shall be reserved pending submissions thereon.

Justice Barry Leon
Commercial Court Judge
16 August 2016