EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2016/0039

BETWEEN:

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

Appellants

and

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

Respondents

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Anthony Gonsalves, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Paul Chaisty, QC, with him, Mr. Richard Evans and Mr. Adam Hinks for the Appellants
Mr. Christopher Parker, QC and Mr. Stuart Cullen for the Respondents

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2017: February 2;
June 30.

Commercial appeal – Unfair prejudice – s. 184I of the BVI Business Companies Act, 2004 (as amended) – Financial statements not provided to members of company contrary to Article 120 of company's Articles of Association – Article 120 amended by second appellant as majority shareholder to waive requirement for production of financial statements – Whether conduct of second appellant capable of amounting in law to unfair prejudice – Whether court ordered buy-out appropriate form of relief – Exercise of discretion of learned judge

This is an appeal against the decision of the learned judge in an unfair prejudice claim in the court below, which had been brought against the second appellant ("Lawrence") by the

three respondents ("Ronald", "Bertha" and "Tong"). The judge having found that Ronald, Bertha and Tong had made out the unfair prejudice claim, ordered that Lawrence, who was the majority shareholder of the first appellant company, J F Ming Inc. ("the Company"), buy-out the shares of Ronald, Bertha and Tong, the minority shareholders in the Company. Although Lawrence, Ronald, Bertha and Tong are siblings, Lawrence did not have the best of relationships with the other three; this had been the case for quite some time.

Lawrence became the sole director of the Company around May 2006. However, since that time, he had failed to provide his siblings with annual financial statements of the Company, as was required by Article 120 of its Articles of Association. Ronald, Bertha and Tong asserted that Lawrence had access to the financial statements in relation to the Company but chose not to provide them. Concerning this, there were ongoing disputes between the parties with varying unsuccessful efforts to resolve them. Eventually, in late 2013, a discussion between Lawrence and Bertha in relation to him purchasing her shares led to Bertha requesting the audited accounts of the Company in order to ascertain the value of her shares. These were not forthcoming. Bertha subsequently caused her lawyer to write to Lawrence, requesting the financial statements. Lawrence refused to provide any, on the basis that Bertha was not entitled to them as a minority shareholder. Eventually, Ronald and Tong joined Bertha in requesting the financial information from Lawrence but this was to no avail. In April 2014, Lawrence used his majority shareholding to amend Article 120 by way of resolutions in order to prospectively and retrospectively waive the requirement for the production of the financial statements. In May 2014, Ronald, Bertha and Tong issued proceedings for an order requiring that the Articles of Association be amended so that they would be returned to their state before the resolutions were passed by Lawrence. By an amendment to their claim, Ronald, Bertha and Tong alleged a series of breaches and wrongdoings on the part of Lawrence as majority shareholder, and extended the relief claimed so as to include an order that Lawrence purchase their minority shareholdings due to his unfair and prejudicial dealings with the Company.

The learned judge found that Lawrence had committed acts of oppression, unfair discrimination and unfair prejudice within the meaning of section 184I of the **BVI Business Companies Act, 2004**[1] so as to give rise to an entitlement to relief against him as the majority shareholder. Accordingly, the judge held that the appropriate order that should be made was that of a court ordered buy-out. He also made a number of orders compelling the provision of the financial statements and the alteration of the Articles of Association. Lawrence appealed the learned judge's decision. The issues raised on appeal were whether the judge was correct to rule that Lawrence's non-provision of the financial statements and alteration of Article 120 amounted in law to unfair prejudice, and if he was correct, whether the judge exercised his discretion properly in ordering the buy-out as the main remedy.

Held: dismissing Lawrence's appeal against the learned judge's finding of unfair prejudice; allowing Lawrence's appeal against the relief ordered by the judge to the extent that the

[1] Act No. 16 of 2004, Laws of the Virgin Islands (as amended by the BVI Business Companies (Amendment) Act, 2005, Act No. 26 of 2005, Laws of the Virgin Islands).

order below is varied and substituted with an order setting aside the Resolutions as of the dates on which they were passed, that is, 17th April 2014 and 22nd April 2014, and declaring the Resolutions to be null and void and of no effect; directing that Lawrence, in accordance with Article 120 of the Company's Articles of Association, provide to Ronald, Bertha and Tong, for the year 2006 and each year thereafter through to 2015, and thereafter, for 2016, a profit and loss account and a balance sheet as at the date to which the profit and loss account is made up, within 28 days of this order;; and directing the parties to provide written submissions on the issue of costs in the court below and on this appeal within 28 days of the date of this order, that:

1. Notwithstanding that Lawrence had a duty to provide financial statements to the members of the Company pursuant to Article 120 of the Company's Articles of Association, and that this duty was breached as a result of him not doing so, a claim in unfair prejudice could not have been properly founded before Ronald, Bertha and Tong had specifically requested that he provide them with this information. Accordingly, once Bertha had done this in 2013 and because Lawrence refused to comply with her request, even after the Ronald, Bertha and Tong had filed the claim against him in 2014, a claim in unfair prejudice was properly brought against him. Lawrence's refusal to provide the financial information was both unfair and prejudicial to the interests of the minority shareholders. Furthermore, unfair prejudice also arose from Lawrence using the rules to alter Article 120 in a manner which equity would regard as contrary to good faith, namely, to waive the obligation to provide the financial information.

   O'Neill and Another v Phillips and Others [1999] 1 WLR 1092 applied; **Re Phoenix Office Supplies Ltd.** [2002] EWCA Civ 1740 applied.

2. Ronald, Bertha and Tong failed to seek redress in the court during the period 2006-2013, when they were entitled to be provided with the financial information on the Company. The trial judge ought to have treated this delay as a material factor in his determination of the appropriate remedy. However, he failed to take this factor (among others) into account and seemed to have improperly minimised Ronald, Bertha and Tong's contribution to the state of affairs. They are also blameworthy in relation to the Company's present state of affairs, though to a lesser degree and these factors are to be taken into account in the court's determination of the appropriate remedy.

3. The justice of the case did not warrant that the judge make a buy-out order. That remedy was draconian and disproportionate to the breaches that were committed. Taking the totality of circumstances into account, including the conduct of Ronald, Bertha and Tong and juxtaposing that with the conduct of Lawrence, the judge did not exercise his discretion properly in ordering the buy-out.

   Grace v Biagioli [2006] 2 BCLC 70 distinguished; **In re H. R. Harmer Ltd.** [1959] 1 WLR 62 applied; **Re Metropolis Motorcycles Ltd** [2007] 1 BCLC 520 applied.

4. Insofar as the learned judge exercised his discretion improperly in making the buy-out order, he committed an error of principle. It therefore falls to this Court to exercise its discretion afresh. Exercising the discretion afresh and taking into account the totality of circumstances, the appropriate order would be to direct Lawrence to provide the financial information of the Company from 2006 to the present date to Ronald, Bertha and Tong. It would also be just and equitable that Lawrence be ordered to amend the Articles of Association to their pre-resolution state.

JUDGMENT

Introduction

[1] **BLENMAN, JA**: This is an appeal by Ming Shui Sum, Lawrence ("Lawrence") against the decision of a judge in the Commercial Court in which the learned judge, on a claim based on unfair prejudice,[2] held that the claim had been established and ordered that Lawrence, who was the majority shareholder, compulsorily buy out the shares of the minority shareholders, namely; Ming Siu Hung Ronald ("Ronald"), Shaw Siu Kuen, Bertha ("Bertha") and Ming Shiu Tong ("Tong").[3] Lawrence is dissatisfied with the decision and has appealed. His appeal is strongly resisted by Ronald, Bertha and Tong on the basis that the judge acted correctly in ordering the buy-out after finding that the unfair prejudice claim had been made out.

[2] I propose to address the relevant background.

Background

[3] Ronald, Bertha, Tong and Lawrence are siblings. J F Ming Inc. ("the Company") was set up in the British Virgin Islands as a holding company in respect of businesses originally founded and managed by their late father, Ming John Fook, with the assistance of Lawrence. All of the siblings owned shares in the Company, which was established in 1991. The relationship between the siblings seems to

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[2] In the claim relief was also sought on the basis that Lawrence's conduct was unfairly discriminatory and oppressive.

[3] In addition, the judge made various orders declaring the resolutions void and directing the provision of financial information. He also ordered Lawrence to personally pay Ronald, Bertha and Tong's costs.

have been uneasy during the lifetime of their father. Prior to his death, the father had recorded his wishes, on 29th 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 members of the family as the Chinese Memorandum. In the Chinese Memorandum the father dealt with the Company thus:

> "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."

[4] After the death of their father, the relationship between the siblings became even more strained and they seem to have had concerns about the lack of transparency in Lawrence's management and control of the Company. At the father's discretion, each of the seven children was issued 1,000 bearer shares in the Company. However, without ever telling the other children, the father had given Lawrence an additional 10,000 shares in the Company. Lawrence was therefore the majority shareholder in the Company and had significant influence and control over the affairs of the Company. The other siblings, including Ronald, Bertha and Tong, had very small, almost negligible, shareholding in the Company. The Articles of Association of the Company provided for the provision of financial information, namely, the profit and loss account and the balance sheet. It appears that for several years none of this information was provided by the Company and neither was any requested, even though the siblings had long fallen out with each other. Lawrence became the sole director of the Company around May 2006. One year after the father's death, the other siblings sought to remove Lawrence as director of the Company and it was only then that he indicated that their father had allocated him the additional 10,000 shares. This further strained the relationship between the parties and resulted in hotly contested litigation in Hong Kong in which the other siblings sought to challenge the authenticity of the 10,000 shares, among other things.

[5] It seems as though for approximately six (6) years the siblings were embroiled in

litigation in Hong Kong in relation to the 10,000 shares. The litigation was finally resolved in the Hong Kong Court of Appeal in favour of Lawrence. In the result, the court determined that the father had allocated the 10,000 shares to Lawrence. The upshot of all of this meant that Lawrence was in the position to overturn his siblings' vote to remove him as a director of the Company and that he had voting control of the Company. Ronald, Bertha and Tong were now the minority shareholders. Since 2006, Lawrence provided no financial statements or profit and loss accounts and, for what it is worth, no dividends were paid. Ronald, Bertha and Tong asserted that Lawrence had access to but did not provide the financial statements in relation to the Company. There were ongoing disputes between the parties with varying unsuccessful efforts to resolve them. Eventually there was a total standoff between the parties and no financial statements were received for the years 2006 to 2013. Over time, it seems as though Lawrence had purchased some of the other siblings' shares[4] in the Company and desired to purchase Bertha's. Towards this end, in late 2013 there was discussion between Lawrence and Bertha, in relation to purchasing her shares. It was in this context that Bertha asked Lawrence for the audited accounts of the Company in order to ascertain the value of her shares. None was forthcoming.

[6] As a consequence, in 2014 Bertha took steps to ensure that Lawrence provided her with the financial statements of the Company. She caused her lawyer to write to Lawrence requesting the financial statements. He, however, took the view that as a minority shareholder she was not entitled to receive same and he therefore did not provide any. Bertha persisted in her requests to Lawrence and to the Company to no avail. Allegedly, Ronald and Tong joined Bertha in requesting the financial information from Lawrence but they did not fare any better. Article 120 of the Company's Articles of Association stipulated that the directors of the Company shall provide to the members, annually, financial statements unless the requirement is waived by a resolution.[5] Surprisingly, on 3rd March 2014, Ronald,

[4] The siblings being referred to here were not parties to this litigation.
[5] This will be referred to in more detail shortly.

Bertha and Tong wrote to Lawrence and the Company seeking the audited accounts and financial statements since 2006 within 14 days. Lawrence responded by using his majority shareholding to amend Article 120 of the Articles of Association by way of resolutions in April 2014. In so doing, he prospectively and retrospectively waived the requirement for the production of the financial statements. Ronald, Bertha and Tong issued proceedings on 2nd May 2014 for an order requiring the amendment of the Articles of Association to their state before the April 2014 resolutions and for the production of financial and corporate information. A defence and reply was served and the matter was to be listed for trial any date from 1st July 2015. On 25th September 2015, Ronald, Bertha and Tong issued an application to amend their case. It seems as though Lawrence did not object to the amendments on the basis that the trial date was not to have been impacted. The amendments were substantial with Ronald, Bertha and Tong including new allegations, such as a series of alleged breaches and alleged wrongdoings on the part of Lawrence as majority shareholder, and extended the relief claimed so as to include an order that Lawrence purchase their minority shareholdings.

[7] The trial was held and the learned judge found that Lawrence had committed acts of oppression, unfair discrimination and unfair prejudice in relation to the Company within the meaning of section 184I of the **BVI Business Companies Act, 2004**[6] so as to give rise to an entitlement to relief against him as the majority shareholder. Accordingly, the learned judge held that the appropriate remedy that should have been granted was that of a court ordered buy-out and he so ordered. He also made a number of orders compelling the provision of the financial statements and the restoration of the Articles of Association. It is from that decision that Lawrence has appealed on seven grounds.

[8] I propose now to refer to Lawrence's grounds of appeal:

[6] Act No. 16 of 2004, Laws of the Virgin Islands (as amended by the BVI Business Companies (Amendment) Act, 2005, Act No. 26 of 2005, Laws of the Virgin Islands).

a) **Ground 1**

The finding of the learned judge that Lawrence had committed acts of oppression, unfair discrimination and unfair prejudice within the meaning of section 184I of the **BVI Business Companies Act, 2004** so as to give rise to an entitlement to relief on the part of Ronald, Bertha and Tong was wrong for the following reasons:

(1) there was no or no sufficient evidence to support such a finding;

(2) as a matter of law the learned judge erred in concluding that such facts as he found caused prejudice and were unfair to Ronald, Bertha and Tong and amounted to unfair prejudice, oppression or unfair discrimination within the meaning of section 184I; and

(3) the learned judge failed to take account of the conduct of Ronald, Bertha and Tong.

b) **Ground 2:**

The learned judge was wrong:

(1) as a matter in law, in accepting submissions and arguments on behalf of Ronald, Bertha and Tong which were outside of their pleaded case and was wrong, as a matter of law, in not confining them to their pleaded case; or

(2) alternatively, was wrong in exercising any discretion to such effect as to allow such submissions and arguments to be advanced and to accept the same.

c) **Ground 3**

The finding that Lawrence and the Company were not permitted to waive the requirement under Article 120 of the Company's Articles was wrong as a matter of fact and law – the learned judge failed to take account and to apply properly the evidence relevant to the issue of the exercise of the express

power within Article 120 to waive the requirement under the Articles and erred as a matter of law in concluding that the exercise of such power amounted to a fraud on the minority (Ronald, Bertha and Tong) and failed properly to apply the provision contained within Article 120.

d) **Ground 4**

The decision of the learned judge to order that Lawrence and the Company amend the Articles of the Company by removing the words 'unless such requirement be waived by resolution of members', to provide financial information to Ronald, Bertha and Tong and to buy out their interests was wrong as a matter of law and amounted to a failure to properly exercise his discretion because:

(1) the learned judge failed to take any or any proper account of the delay on the part of Ronald, Bertha and Tong;

(2) the learned judge failed to take any or any proper account of the conduct of Ronald, Bertha and Tong;

(3) the learned judge failed to take any or any proper account of Lawrence's explanation as to why the requirement under Article 120 was waived and why financial information was not provided in 2014;

(4) the learned judge failed adequately or at all to consider the requirements of section 184I that prior to making any order the court should first consider whether it was 'just and equitable' to do so and/or wrongly found that it was just and equitable to grant the relief ordered;

(5) insofar as the learned judge was correct to order any relief, the learned judge failed to apply properly, or at all, the principles relevant to the making of an order pursuant to section 184I which is that the relief be proportionate to the conduct complained of. The learned judge was wrong to order a buy-out of Ronald, Bertha and Tong's

interests rather than to order only that Article 120 be amended and that Lawrence provide the financial statements of the Company;

(6) insofar as relief should be granted, the relief should not include an order for the compulsory buy-out of Ronald, Bertha and Tong's interests as such was wrong and disproportionate to any fair and proper finding of unfair prejudice;

(7) the order to remove the said words from Article 120 was an unnecessary and disproportionate interference in the affairs of the Company and the relationship of Ronald, Bertha, Tong and Lawrence and further granted relief which had not been sought by Ronald, Bertha and Tong and formed no part of their originally pleaded claim.

e) **Ground 5**

The decision of the learned judge to order the compulsory buy-out of Ronald, Bertha and Tong's interests on the basis that such was the correct order was wrong in law and was against the weight of the evidence which was relevant to the issue of the appropriate order.

f) **Ground 6**

The learned judge failed to provide proper or adequate reasons to explain his conclusions as to facts and the rejection of submissions on behalf of the Company and Lawrence and his conclusions for finding in favour of Ronald, Bertha and Tong and making the orders which he made.

g) **Ground 7**

The learned judge was wrong as a matter of law in failing to consider the position of Ronald, Bertha and Tong separately and distinctly and making orders in favour of all three without regard to their individual positions.

Issues

[9] In my view, this appeal raises two principal challenges. Indeed, with no disrespect intended to learned Queen's Counsel, Mr. Chaisty, the grounds of appeal can be crystallised as follows:

(a) Whether the judge was correct to rule that Lawrence's non-provision of the financial statements as mandated by Article 120 of the Articles of Association and alteration of Article 120 amounted in law to unfair prejudice.

(b) If so, whether the judge exercised his discretion properly to order the buy-out order as the main remedy.

Appellant's Submissions

Issue 1 – Whether the judge was correct to rule that Lawrence's conduct amounted to unfair prejudice

[10] Learned Queen's Counsel, Mr. Chaisty, pointed out that Article 120 expressly provides for waiver by its members. He said that Ronald, Bertha and Tong hold only a 5.88% shareholding each. He pointed out that the remainder of the shares (82.36%) are held by Lawrence directly and through Fortune Keeper Investments Limited. As the controlling majority shareholder, Lawrence exercised the rights conferred by the Company's Articles of Association and the two resolutions were passed waiving the requirement to serve profit and loss accounts and balance sheets. He said that Ronald, Bertha and Tong asserted, in response to Lawrence's reliance on the express power within Article 120, that the waiver of the requirement under Article 120 amounted to a fraud on the minority. Mr. Chaisty, QC posited that Ronald, Bertha and Tong's primary case is that the non-provision of information was unfairly prejudicial, unfairly discriminatory and oppressive. Mr. Chaisty, QC said that it is important, in this context, to distinguish between the period before March 2014 and after March 2014. He said that as originally pleaded in their claim, Ronald, Bertha and Tong did not ask for orders for the compulsory purchase of their shares arising from these allegations. Further, Mr. Chaisty, QC pointed out that the allegations relating to the waiver of the

requirement under Article 120 and any failure to provide information, required therefore a consideration of three issues:

(1) whether such was unfairly prejudicial conduct, unfairly discriminatory, or oppressive at all;

(2) whether there was a fraud on the minority; and

(3) the relief to be granted if the allegations were made out.

[11] Mr. Chaisty, QC pointed out that a general request for information about the Company's financial affairs was raised at a meeting over dinner held between Bertha and Lawrence in November 2013. He referred to Bertha's statement, and reminded this Court, that Bertha noted that the dinner was the first time that she and Lawrence had met in fifteen years. He said that the meeting was 'very brief'. He pointed out that Bertha asserts that an offer was made by Lawrence to buy her shares for around US $1.4 million. At this meeting she asked for the first time for 'audited accounts', to which she was not in any event entitled, so as to 'assess' the value of her shares. Mr. Chaisty, QC said that no further request was made until Harneys' letters in March 2014, save for a short email on 26th January 2014. He pointed out that no communication or requests had previously been made by any of them for financial information.

[12] Mr. Chaisty, QC opined that it is necessary to provide a short explanation of the position from the early 1990s to 2015. He stated that in 1977 the late father of the parties insisted that Ronald, Bertha and Tong return to him shares which he had previously transferred to them as he was extremely angry as to their conduct towards Lawrence. In 1994, Ronald, Bertha and Tong became aware of Lawrence's additional shareholding. Until that time, they assert that they believed that the shares were held in one-sevenths between all of the siblings. Ronald, Bertha and Tong commenced proceedings in Hong Kong in 1996 to challenge the validity of Lawrence's additional shareholding. This led to judgments initially in their favour in April 2004, in the High Court, and in June 2005 in the Court of

Appeal. The decisions were unanimously overturned in favour of Lawrence by the Court of Final Appeal in May 2006. He said that during the period from May 2004 and October 2005, Ronald, Bertha and Tong were successful in having a Receiver appointed over the Company. During the period October 2005 to May 2006, the Company was controlled by Ronald, Bertha and Tong. During that period Lawrence ceased to act and Ronald, Bertha and Tong had whatever access they wanted to financial information. He said that Ronald, Bertha and Tong made unauthorised withdrawals, which were in clear breach of court orders and which were only remedied once they received lawyers' letters sent on behalf of the Company and Lawrence. After 2006 and his success in the Court of Final Appeal, Lawrence was restored as the sole director in control of the management and affairs of the Company.

[13] Mr. Chaisty, QC argued that Ronald, Bertha and Tong have not, save until 2014, concerned themselves with the management of the Company or its affairs. After defeat in the Court of Final Appeal in 2006, Ronald, Bertha and Tong did not ask for information. He maintained that the dinner in 2013 prompted a general request, by way of response, and this was followed up by the e-mail from Bertha, on 26th January 2014, asking for an 'audited account'. No other requests had ever been made by Ronald or Tong. No interest had ever been expressed otherwise after 2006. In March 2014, Harneys came on to the scene. He emphasised that the Company did not provide profit and loss accounts or balance sheets. However, he said that Ronald, Bertha and Tong obviously knew that they were not receiving such documents and prior to late 2013 they raised no complaints and made no requests; their only involvement was during the period 2004 to 2006 which arose from their invalid claims against Lawrence. He pointed out that the initial requests in late 2013 and early 2014 were said to be made in order that Bertha could assess the value of her shares. He highlighted the fact that when the proceedings were started, Ronald, Bertha and Tong did not ask for a court ordered buy-out but only for the performance of their alleged rights under Article 120. He urged this Court to accept that, in summary, Ronald, Bertha and Tong accepted

that they had a lack of interest in the 1990s and that no efforts were made to obtain information and that no requests, save as stated above, were made after 2006. Mr. Chaisty, QC posited that they also accepted that their interest arose solely because of the possibility of a sale being negotiated. He also posited that Ronald, Bertha and Tong also accepted that they had had access to financial information during the course of the receivership and that Ronald had had another accountant look through the books and records of the Company.

[14] Mr. Chaisty, QC posited that it is against those matters that the lack of the provision of information could not be described as 'unfairly prejudicial' to Ronald, Bertha and Tong. He reminded this Court that any relevant failure would have to be both prejudicial and unfair. In support of his argument, he referred this Court to the statement of principles set out in **Hollington on Shareholders' Rights**.[7] He argued that any failure prior to 2014 had been accepted and tolerated since the 1990s and that any new interest in financial information was motivated not by concerns as to the conduct of the affairs of the Company but solely to be used to negotiate a sale. He maintained that Ronald, Bertha and Tong had been content to leave Lawrence to deal with the management and affairs of the Company, save for the very limited period of the receivership. He opined that receivership only arose because of Ronald, Bertha and Tong's allegations as to Lawrence's additional shareholdings; which allegations proved to be wrong and which failed. He opined that no application would have been made for a receiver save for such misguided proceedings. He said that it was for Ronald, Bertha and Tong to make out a case of unfair prejudice in respect of the lack of the provision of financial information, which they failed to do. He submitted that the assertion of unfair prejudice is the basis for Ronald, Bertha and Tong's claims for relief both as to orders in respect solely of Article 120, that is to say its restoration to its previous terms before the resolutions, and performance of that Article by the provision of information. Mr. Chaisty, QC reminded this Court that when considering the

[7] Robin Hollington, QC, MA, LLM: Hollington on Shareholders' Rights (7th edn.,Sweet & Maxwell 2013) para. 7-01.

grounds for relief and the order, if any, to be made, it is necessary to consider carefully whether what is complained of is:

(1) conduct relating to the affairs of the Company;

(2) prejudicial;

(3) unfair; and

(4) if so, whether such justifies any particular form of relief and that such relief, if granted, is proportionate in all the circumstances.

[15] Mr. Chaisty, QC argued that any failure to provide financial information is clearly to be considered and balanced against Ronald, Bertha and Tong's complete lack, until the end of 2013 (prompted only by way of response to a point said to have been raised by Lawrence) and early 2014, of interest in the affairs of the Company and prolonged failures to request information or make any complaint or even reference to the lack of the provision of information over very many years. He maintained that it is to be considered in the context of Ronald and Tong never having made requests for such information before 2014 and such requests by Bertha were belatedly made only to assist her in negotiations for the sale of her shares, which she otherwise wanted to pursue. He submitted that Lawrence was under no obligation to buy their shares and was under no obligation even to negotiate and this could not be taken into account. In support of this position Mr. Chaisty, QC referred this Court to **Re R A Noble & Sons (Clothing) Ltd**[8] and **Re Phoenix Office Supplies Ltd.**[9] Mr. Chaisty, QC submitted it cannot be correct for a shareholder to take no active position for many years in respect of the affairs of a company and to be content, at least objectively and outwardly, to raise no issues as to the provision of information and then, out of the blue, suddenly seek information and complain and assert unfair prejudice from its non-production over the past years during which they remained silent. Any one-off failure, if that is what it was, in 2014 would not amount to unfair prejudice, he argued.

[8] [1983] BCLC 273, at pp. 294 and 291-292.
[9] [2002] EWCA Civ 1740 paras. 34 to 36.

[16] Mr. Chaisty, QC said that Ronald, Bertha and Tong also argued, in response to reliance on the express provisions, that the waiver of the requirement under Article 120 amounted to a fraud on the minority. In this context, he said that it is important to consider **Citco Banking Corporation NV v Pusser's Ltd and Another**,[10] a case relied on heavily by Ronald, Bertha and Tong. He reminded this Court that a number of points emerge from **Citco Banking Corp NV**:

(1) The burden of proof is on the person who challenges the validity of the amendment.

(2) The test of whether an amendment is valid is one which requires consideration of the approach and belief of those making the amendment and that it is not for a court to review a decision and substitute its own views.

He specifically referred to paragraphs 1 to 17 and the references to **Shuttleworth v Cox Brothers and Company (Maidenhead) Limited and Others**:[11]

> "… when persons, honestly endeavouring to decide what will be for the benefit of the company and to act accordingly decide upon a particular course, then, provided there are grounds on which reasonable men could come to the same decision, it does not matter whether the court would or would not come to the same decision or a different decision. It is not the business of the court to manage the affairs of the company. That is for the shareholders and directors …"

He also said that as stated in paragraph 17 of **Citco Banking Corporation NV** of these principles:

> "[T]he same principle must apply when an amendment which the shareholders bone fide consider to be for the benefit of the company as a whole also operates to the particular advantage of some shareholders."

[17] Mr. Chaisty, QC also referred this Court to **Staray Capital Limited et al v Cha, Yang (also known as Stanley)**.[12] He reminded this Court that in his witness statement, at paragraph 66, Lawrence said:

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[10] [2007] UKPC 13.
[11] [1927] 2 KB 9.
[12] BVIHCMAP2013/0009 (delivered 9th January 2014, unreported), at paras. 40 to 42.

> "I wanted to protect the interests of the Company in passing these resolutions. Their collective behaviour [referring to Ronald, Bertha and Tong] detailed above showed that they have never acted in the best interests of the Company. They have been hostile to me throughout most of my life and all they have wanted is money without having to put in the hard work for it … Should they have access to the financial statements of the Company, I am deeply concerned that they will misuse them to start another round of disputes for no good reason. They have already started the BVI proceedings even though it has been over 20 years since they tried to remove me as a director of the Company. I believed that passing the resolutions in question was a proper use of my voting powers at the shareholders' level."

[18] Mr. Chaisty, QC pointed out that the above views expressed by Lawrence (he did not give oral evidence due to ill health) are to be considered in the context of the evidence as to Ronald, Bertha and Tong's conduct. He said that their conduct is also relevant to the issues of what is just and equitable under section 184I of the **BVI Business Companies Act, 2004** and hence the Court's discretion in granting any relief. Mr. Chaisty, QC said that Lawrence's concerns as expressed above can be clearly seen to be justified. He asserted that Ronald, Bertha and Tong in the past have conducted themselves badly. He referred to their conduct in 1977 towards the Company which angered their father and led to him requiring the return of shares. Mr. Chaisty, QC said that the Hong Kong court (which heard oral evidence from Ronald, Bertha and Tong) took the view that Ronald, Bertha and Tong's evidence on this issue was discredited. Mr. Chaisty, QC said that Ronald, Bertha and Tong expressed a wholly unreasonable and unjustified lack of trust in Mr. Robinson, the receiver appointed by the court and nominated by them. He complained that they caused the Company to incur significant expense by taking unreasonable positions during the receivership. He said that Ronald, Bertha and Tong embarked on wasted litigation in Hong Kong after efforts to remove Lawrence. Also, he complained that they failed to act in accordance with court orders in the Hong Kong litigation and set out to act in deliberate breach of the same. They adopted an unreasonable attitude to the inspection of original documents. Queen's Counsel, Mr. Chaisty, said that Ronald expressed the view in very strong terms that he would never trust documents produced by Lawrence.

In addition, they wrongly sought to award themselves money payments and to increase their shareholding in anticipation of the decision of the Hong Kong Court of Final Appeal. Mr. Chaisty, QC was adamant that they showed a total lack of concern for the interests of the Company. He argued that all of their bad conduct towards another brother, Alex, was motivated by a desire to damage Lawrence and not to benefit the Company. He argued that all of this conduct, coupled with the commencement of proceedings and hostile demands "out of the blue", fully justified the concerns expressed by Lawrence. Mr. Chaisty, QC complained further that Ronald, Bertha and Tong's conduct was completely downplayed by the judge when looking overall at the claim.

[19] Learned Queen's Counsel, Mr. Chaisty, said that Article 120 expressly permitted for the waiver effected in April 2014. He argued that Ronald, Bertha and Tong failed to satisfy the burden placed on them to prove that the amendment was wrongful. He purported to rely on **Citco Banking Corp NV** in support of his contention. He stated that the position adopted by Lawrence was a reasonable one and one which he was entitled to take. Mr. Chaisty, QC submitted that it is not for the Commercial Court to interfere in that process. He argued that there was no fraud on the minority. He said that Ronald, Bertha and Tong were shareholders in a company which contained the express provision in Article 120, which Lawrence applied. He posited that given the absence of any interest for years, Lawrence was entitled, on behalf of the Company, to be suspicious as to Ronald, Bertha and Tong's motives and intentions and to seek to protect the Company from their likely disruptive future conduct.

[20] Mr. Chaisty, QC also addressed the other allegations that were made by Ronald, Bertha and Tong. He said that in the amendments to their claim Ronald, Bertha and Tong raised further allegations. Mr. Chaisty, QC briefly considered each in turn. Before turning to the judgment he referred to paragraph 12 of the amended statement of claim. He highlighted the allegations as to 'varying descriptions' allegedly placed by Lawrence on money paid to Ronald, Bertha and Tong. Mr.

Chaisty, QC said that these allegations are clearly irrelevant. He opined that they do not relate to any relevant corporate acts.

[21] He also referred to the complaint that Lawrence allegedly paid HK$18 million to himself. Mr. Chaisty, QC reminded this Court that this allegation relates to 1993-1997. He said that Ronald, Bertha and Tong have, on their own case, had knowledge of this fact since April 2005, yet none of them raised any issues after April 2005 until September 2015; over ten and a half years later. He pointed out that the transactions relate to the early to mid-1990s. He opined that the precise allegation is important, i.e. that Lawrence purchased the shares of three other siblings 'for less than the value he ascribed to them' without providing financial records. This relates to events in 2007-2008. Mr. Chaisty, QC pointed out that the relevant siblings are not parties to this litigation and have never raised any issues. He said that it is a transaction between Lawrence and the siblings which was completed many years ago without any disputes between the transacting parties but is alleged, as pleaded, to be wrongful in some non-defined way.

[22] He next turned to Lawrence's alleged desire to purchase Ronald, Bertha and Tong's shares at the price he wants without the provision of financial information. Mr. Chaisty, QC argued that there is no evidence that Lawrence ever asked to buy Tong's shares and Ronald accepted that he had never been asked to sell. He said that, in any event, a request to purchase, if made, cannot be a ground to assert unfair prejudice. It was up to Bertha to choose if she wanted to sell and Lawrence could not be forced to buy. In support of his contention he referred to **Re Phoenix Office Supplies Ltd.**[13]

[23] Turning next to Lawrence's alleged recognition of a desirability of ending any association with Ronald, Bertha and Tong, Mr. Chaisty, QC underscored the fact that a mere desire clearly adds nothing to an allegation of unfair prejudice. In relation to the alleged use of funds of subsidiaries of the Company by Lawrence to

[13] [2002] EWCA Civ 1740 at para. 48.

meet legal costs amounting to HK $8.4 million, Mr. Chaisty, QC argued that there was no evidence before the court to establish that the allegation was made out, i.e. use of the funds to meet his own legal costs. Mr. Chaisty, QC said that the issue related to the mid-1990s. In any event, he submitted that the issue had been known to them for over ten years; the amended pleading refers to correspondence in January 2005. He submitted that in any event any expenditure to meet costs to defend the Company adds nothing to the claim that was brought.

[24] Mr. Chaisty, QC took strong issue with the fact that the learned judge decided that Lawrence's failure to provide the financial information amounted to unfair prejudice. He emphasised that Ronald, Bertha and Tong were aware that they were not receiving the financial information and took no interest in the affairs of the Company until the time had come when Bertha's shares arose for discussion at a dinner. Moving along, Mr. Chaisty, QC maintained that since Ronald, Bertha and Tong did not ask for the information until then they could not argue that it was unfairly prejudicial for them not to have been provided with the financial information.

[25] Mr. Chaisty, QC argued that in the determination of whether the act/omission that was complained about amounted to unfair prejudice, the judge had incorrectly utilised his subjective views. He said that instead of treating with the matter as a commercial law matter, much of the judge's comments trespassed into the area of 'family morality', with the judge imposing his subjective views. Mr. Chaisty, QC submitted that this was not in keeping with section 184I of the **BVI Business Companies Act, 2004**. He complained that many of the comments that were made by the judge were baseless and amounted to the judge indicating his own subjective views in a manner that was unfair and judgmental. Mr. Chaisty, QC also stated that some of the matters to which the judge referred had nothing to do with the corporate acts of the Company. He therefore argued that the judge could not properly take them into account and that his decision was wrong, as a consequence.

[26] Mr. Chaisty, QC reiterated that for several years Ronald, Bertha and Tong were aware that they had not received the financial information and yet they did absolutely nothing to try to obtain the information. He said that there was serious delay on their part. He complained that in determining whether the claim of unfair prejudice had been made out, the judge seemed to have been pre-occupied with the fact that there was non-payment of dividends, even though this factor was not a basis upon which the unfair prejudice claim was brought. He highlighted the fact that neither did the pleadings nor the witness statements indicate that this was an issue which was joined between the parties. Mr. Chaisty, QC submitted that the judge's approach was incorrect and that he improperly used this factor as one of the reasons for ordering the buy-out, even though the judge recognised that the denial of the information was 'the cornerstone of the claim'. Mr. Chaisty, QC was adamant that if this Court were to read the judgment below very closely it would be apparent that the judge 'stepped into the arena' and was expressing his disapproval with aspects of Lawrence's conduct which the judge perceived were unlawful.

[27] Mr. Chaisty, QC advocated that the judge got it wrong and that he took into account irrelevant matters and omitted to take into account matters which he ought to (such as the delay by Ronald, Bertha and Tong in seeking the information). He also stated that the judge should have taken into account their conduct in his determination of whether the unfair prejudice claim had been established. He argued that had the judge done so he would have reached the conclusion that it had not been established. Mr. Chaisty, QC was adamant that the changing of the Articles of Association was Lawrence's response to the letter written on his behalf threatening litigation if the financial information was not forthcoming. Mr. Chaisty, QC maintained that much of the language that was utilised by the judge was emotional and clearly indicates that the judge superimposed his subjective views as distinct from seeking to determine objectively whether the Company was impacted negatively. This, he argued, was an error of principle and he referred to **Citco Banking Corp NV** in support of his conclusion. He underscored the point

that on the evidence before the judge it was not open to him to conclude that the claim for unfair prejudice had been established. Mr. Chaisty, QC argued, further, that even though the judge had earlier said that he had treated the claim as a no fault divorce later he resiled from that position and seemed to have placed all of the blame at the footstep of Lawrence and even punished him in the costs order he made – to be made personally by Lawrence. Mr. Chaisty, QC said that the costs order was unfair. He reminded this Court that the breakdown of trust and confidence without more is insufficient to establish a claim for unfair prejudice.

[28] In seeking to buttress his position that the claim for unfair prejudice was not made out, Mr. Chaisty, QC then turned to the judgment and analysed specific paragraphs. In order to prevent the unnecessary lengthening of this judgment I will only refer to some of his complaints. He said that in relation to paragraph 6, the judge states that Ronald, Bertha and Tong's primary remedy as sought is a buy-out. He said that this misses the point that such was added by their very belated amendment and did not feature in the initial relief claimed. Next, he said that in paragraph 12, the judge refers to the '1977 incident' which features as part of the Company and Lawrence's case and his experience of Ronald, Bertha and Tong and their conduct and attitude, but does not appear to identify, at this stage at least, what relevance he attaches to the points addressed. He submitted that the 1977 incident and the conduct of Ronald, Bertha and Tong are very significant matters and impact significantly on the relationship and views to be taken of Ronald, Bertha and Tong as to their position in the past and likely conduct in the future.

[29] Mr. Chaisty, QC pointed out that in paragraph 35 of the judgment the judge said that this refers to the period 2004-2006, during part of which a receiver was in place. The judge said that in this period Ronald, Bertha and Tong did things that were "inappropriate". He said this is an understatement, based on his observations above. He reinforced the allegation that Ronald, Bertha and Tong failed to comply with court orders and sought to award themselves money and

shares without notice to or with the consent of Lawrence. He said that the breaches were obvious and were only remedied by them when they had no choice. Mr. Chaisty, QC submitted that the judgment fails to acknowledge that matters were only remedied because the wrongs were pointed out to them and they had no choice but to remedy them. The significance of their conduct is underplayed and the judge is substituting his views as to its relevance for the views of Lawrence.

[30] Mr. Chaisty, QC said that in the judgment at paragraph 37 the judge said whilst the actions do not reflect well on those involved 'they are of little or no relevance to the central issues in this litigation'. Mr. Chaisty, QC stated that that is incorrect. To the contrary, he said that the actions are of direct relevance to the alleged 'fraud on the minority', and the reasons why Lawrence waived the requirement under the Articles to protect the interests of the Company, as they were matters pointing to Ronald, Bertha and Tong's conduct and concerns as to Ronald, Bertha and Tong and their intentions in seeking the information. Mr. Chaisty, QC said that it shows that Ronald, Bertha and Tong have never been motivated by the interests of the Company or the business but only by their own interests. Mr. Chaisty, QC asserted that the conduct of Ronald, Bertha and Tong is clearly a matter which did require consideration in the context of Lawrence's waiver of the requirements under Article 120 and the assessment of his evidence.

[31] Learned Queen's Counsel, Mr. Chaisty, further examined the judgment and opined that it is important to consider the pleaded case. As amended, the statement of claim raised the lack of information. Mr. Chaisty, QC said that what was relied on was the denial of information and the waiver of requirement under Article 120. The statement of claim did not assert any consequences beyond the non-provision itself. The amended statement of claim also raised various new allegations relating to events which occurred many years ago in paragraph 12; the non-payment of a dividend simply stated as a fact but without making any allegation that such was or might be wrong; and a general/vague and un-particularised

allegation that the affairs of the Company have been conducted in an unfairly prejudicial way but without making any specific allegation or raising any specific point for determination or any case for Lawrence to answer.

[32] While Mr. Chaisty, QC extensively examined several other paragraphs of the judgment and commented on them, I am of the view that it is undesirable and unnecessary to reproduce all of his complaints. I will only address a few of his other complaints.

[33] Mr. Chaisty, QC complained that paragraphs 87-88 of the judgment miss the point. He said that the fact is Ronald, Bertha and Tong never asked for information. They knew that they were not getting information. They had been in effective control during the years 2004-2006. The absence of participation is irrelevant. This was not part of the complaint. Ronald, Bertha and Tong were not kept in the dark. It is correct that they were not given a profit and loss account or balance sheet. However, he reminded this Court that in over twenty years they never asked for such. When Bertha did ask for the information she asked for audited accounts which do not exist. Ronald did not ask for the information. Tong never asked for the information. Hence the judge wrongly treated Ronald, Bertha and Tong alike. Mr. Chaisty, QC complained that the judge ordered a buy-out in favour of Tong. He said that there is no relevant evidence relating to Tong at all and therefore argued that the judge was wrong in failing to distinguish between Ronald, Bertha and Tong.

[34] In relation to paragraph 116 of the judgment, Mr. Chaisty, QC submitted that it is wrong to say that Lawrence did not explain. He referred to paragraph 66 of Lawrence's statement and also the last sentence of the passage quoted at paragraph 107 of the judgment. Mr. Chaisty, QC said that the Articles do not provide for the provision of audited statements. Bertha was not entitled in fact under Article 120 to audited statements. With respect to paragraph 117 of the judgment, he said that the judge failed to consider the evidence as to Ronald,

Bertha and Tong's conduct. He submitted that the explanations from Lawrence are to be considered in the context of Ronald, Bertha and Tong's conduct in the past and motivations.

[35] Mr. Chaisty, QC submitted that despite correctly accepting that there is no principle of no-fault divorce, the judge appears to have proceeded on that basis, that as family members some remedy was required. He said that the judge appears to have placed undue emphasis on findings of a lack of trust and confidence when such is by itself insufficient. In this regard, he relied on **Re Neath Rugby Limited**.[14] The judge should have found that unfair prejudice had not been established. He therefore urged this Court to allow the appeal.

Remedies

[36] Turning his attention next to the appropriate remedy, Mr. Chaisty, QC submitted that even if this Court were to conclude that the claim of unfair prejudice had been established, this would have been premised on Lawrence's failure to provide the financial statements. He reiterated that even if there is a finding that there is a breakdown of trust and confidence this does not automatically give rise to a court ordered buy-out. In this regard, he referred this Court to **Re Phoenix Office Supplies Ltd.** and **Chemtrade Limited v Fuchs Oil Middle East Limited et al**[15] in support of this contention. He submitted that the appropriate remedy based on a claim for unfair prejudice, on the basis of the failure to provide the financial information, was for the Court to have ordered that the information be provided. Mr. Chaisty, QC said that in determining the appropriate remedy the judge ought to have paid regard to Ronald, Bertha and Tong's conduct which, he said, contributed greatly to the strained relationship. Instead, he complained that the judge quite improperly dismissed that as being irrelevant. He further stated that the judge went too far in making the orders that he did since some of them were not sought by Ronald, Bertha and Tong. Mr. Chaisty, QC therefore argued that

[14] [2009] EWCA Civ 291 at paras. 110-111.
[15] BVIHC (COM) 158 of 2010 and 89 of 2011 (delivered 12th March 2013, unreported).

the appeal should be allowed in its entirety. Alternatively, he submitted that the appeal should be allowed to the extent that this Court should substitute the remedy of the buy-out by that of an order stating that Lawrence should provide the financial information.

[37] Mr. Chaisty, QC argued that even if, contrary to the preceding submissions, the judge was correct to find unfair prejudice in some or all respects, his order for a buy-out was disproportionate. Further, he suggested that it was inappropriate and wrong in any event given the delays in the raising of complaints. He argued that the relief in respect of any court ordered buy-out should have been refused by reason of delay. He reminded this Court that the relief initially sought was for the correction of the Articles and the provision of financial information. He argued that the amendments, on the basis of findings made, could not by themselves fairly convert the initial relief into a buy-out order.

[38] Mr. Chaisty, QC was adamant that the proper relief, if any, is to have given what Ronald, Bertha and Tong first asked for, i.e. the information. If the information is given, the alleged prejudice, if any, will be removed. Mr. Chaisty, QC submitted that it cannot be correct to order the provision of information and immediately a buy-out order. Further, it was wrong to order the amendment of Article 120 by removing the waiver provision. He said that the waiver provision forms part of the Articles to which Ronald, Bertha and Tong are bound. There can be no justification for removing this express provision in effect for all time. It is a provision which may in the future be felt as required and which should be exercised. The judge cannot foresee future situations and the removal of that provision goes far beyond what is, on any analysis, required to meet the reasonable expectations of Ronald, Bertha and Tong. It may well be justified in the future to deny the members financial statements whatever the judge may think of the present position. He highlighted the fact that this order is an unnecessary and unjustified interference in the affairs of the Company. This is not an order

which Ronald, Bertha and Tong asked for; it is not part of the prayer for relief. It is outside of their own pleaded case.

[39] Mr. Chaisty, QC reiterated that, if any, the relief should be proportionate and that originally sought would be proportionate to the findings made. He referred this Court to **Bennett v Bennett**,[16] **Re Phoenix Office Supplies Ltd.**,[17] **Chemtrade Limited v Fuchs Oil**.[18] Mr. Chaisty, QC said that Ronald, Bertha and Tong can have no real complaint if they are restored to the position pre-April 2014 and information in the form of profit and loss accounts and balance sheets provided: on their case, that is their entitlement. Mr. Chaisty, QC submitted that the judge failed to consider properly what was the proper and proportionate remedy considered against any prejudice found to exist. Insofar as he exercised a discretion, in ordering a buy-out straight away, he exceeded reasonable parameters. In further support of his argument, Mr. Chaisty, QC referred to **Grace v Biagioli**.[19] The judge misapplied the principles and failed to apply such properly to the present context. He said that by referring to a breakdown in the relationship, the judge appears clearly to have in mind no-fault divorce, which he earlier rejected. There is no analysis of the reasons for any breakdown. It occurred in the 1990s. It cannot be said to be the fault, or at least not exclusively the fault, of Lawrence. The reasoning here shows that the judge did precisely what he should not do, i.e. take a moralistic and not legalistic view and conclude that it was better for the parties to go their separate ways. He posited that there is no explanation as to the elements relied on in paragraph 203 said to justify any lack of trust and confidence.

[40] Mr. Chaisty, QC opined that if the Court orders the Articles of Association to be restored and orders that the original Article 120 be performed, Lawrence will have no choice in the matter. He said that this is Ronald, Bertha and Tong's complaint.

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[16] 2002 WL 820106, paras. 140-142.
[17] [2002] EWCA Civ 1740 at paras. 35-36 and 51.
[18] BVIHC (COM) 158 of 2010 and 89 of 2011 (delivered 12th March 2013, unreported) at paras. 185-188.
[19] [2006] 2 BCLC 70 at para. 199.

Their complaint would disappear. They cannot simply say there may be problems in the future to justify a buy-out. No complaints are made as to economic benefits in this case. If an issue arose in the future, Ronald, Bertha and Tong would be entitled to take whatever course they see fit. Mr. Chaisty, QC posited that if orders as to Article 120 and financial information are made there is no basis to say Lawrence will not comply with the orders. He will comply. Mr. Chaisty, QC complained that the judge makes conclusions as to dividends which are unjustified and which are not based on pleadings. The judge went well beyond his remit and speculated on what may or may not happen. He did so even where Ronald, Bertha and Tong themselves did not venture. At the end of the day, the judge appeared to be simply saying the parties do not get on, there is no trust and confidence, therefore Lawrence should buy them out. This is not a legal analysis, opined Mr. Chaisty, QC.

[41] Mr. Chaisty, QC said that Ronald, Bertha and Tong have asserted, rights under Article 120. That is where they started. He said that should be the remedy if there is to be one. It is unclear what are the "inevitable disputes" that the judge has in mind. Mr. Chaisty, QC said that the judge again paid lip service to the need to reject no-fault divorce principles. The judge made certain orders. Mr. Chaisty, QC stated that it is wholly contradictory to order these matters and in essence say that future disputes are inevitable and that the parties cannot deal with such and that the court cannot supervise. Mr. Chaisty, QC argued therefore that the reasoning which has led to a buy-out order is lacking and flawed. He said that if any order is to be made, it should be limited to that at paragraphs 229-235.

[42] In conclusion, Mr. Chaisty, QC advocated that the appeal should be allowed and the claim should be dismissed. He argued that the judge was wrong to find any unfair prejudice. He said that the requirement under Article 120 was waived in accordance with the express power in Article 120. The complaints were raised far too late in the day and the allegations in paragraph 12 of the amended pleading were either not made out or did not justify relief or findings of unfair prejudice in

any event. Finally, he submitted that even if relief should be granted, that of a court ordered buy-out is wrong and disproportionate to any fair and proper findings of unfair prejudice. Ordering that parts of Article 120 be deleted was an unjustified interference in the affairs of the Company and the relationship of shareholders and with the original intention of Lawrence and the parties' late father as founders of the Company. Mr. Chaisty, QC reiterated that the judge gave Ronald, Bertha and Tong something they did not even ask for.

Respondents' Submissions

Issue No.1: Whether the judge was correct to rule that Lawrence's conduct amounted to unfair prejudice

[43] Learned Queen's Counsel, Mr. Parker, submitted that the judge did not err in finding that unfair prejudice had been established. He referred this Court to the judgment at paragraphs 142, 145, 161 and specifically, he referred to paragraph 171:

> "[T]he Company's failure to provide Financial Statements to minority members in each year from 2006 [about which there was no dispute] was not for the benefit of the Company or for any proper purpose but rather for the improper benefit of [Lawrence], including to keep from [Ronald, Bertha and Tong] and other minority shareholders information about the financial affairs, operations and state of the Company (including in relation to [Lawrence] 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 [Ronald, Bertha and Tong's] shares in the Company. The failure to provide Financial Statements based on the Resolutions was oppressive, unfairly discriminatory and unfairly prejudicial to each of [Ronald, Bertha and Tong] in their capacities as members of the Company."

[44] Mr. Parker, QC pointed out that as against Bertha there was the further unfair prejudicial conduct in trying to have her negotiate the sale of her shares to Lawrence in such circumstances. He referred to the judgment at paragraphs 110 and 142. Mr. Parker, QC pointed out that Lawrence says this was not unfairly prejudicial because he did not have to buy: but it is not his wanting to buy that is prejudicial but his depriving the minority of all benefits from the shares and the

financial information with which to question why he had deprived them of all benefits that is prejudicial. Mr. Parker, QC said that Lawrence argued, purporting to rely on **Re Phoenix Office Supplies Ltd.**, that a shareholder cannot decide that he wants to be bought-out and then complain that the Company will not provide him with the financial information he would like to assist him in negotiating a sale of his shares at a proper price. He said that case was readily distinguishable in that there the information which the petitioner complained of not receiving was information he was not entitled to as a director and, as such, he therefore had no sustainable complaint. Mr. Parker, QC argued that this was not a case where Ronald, Bertha and Tong had no cause for complaint and simply determined that they wished to be bought-out on a non-discounted basis. It was not a case where, having determined to be bought-out on a non-discounted basis, Ronald, Bertha and Tong sought extensive financial information to enable them to value their shares and then complained when they did not receive such extensive financial information. He argued that obviously if Lawrence had done nothing wrong he would not have been ordered to buy Ronald, Bertha and Tong's shares. He stated that in **Re Phoenix Office Supplies Ltd.** there had not been unfairly prejudicial conduct by not providing the information to which the minority was entitled. He referred to Auld LJ at paragraph 36 and Jonathan Parker LJ at paragraph 49.

[45] Learned Queen's Counsel, Mr. Parker, was adamant that the learned judge in the present case was entirely correct to hold that:

> "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 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." (paragraph 141)

[46] Mr. Parker, QC pointed out that Lawrence complains that "[t]he learned judge failed to take account of the conduct of Ronald, Bertha and Tong". He submitted that the complaint is misplaced. Mr. Parker, QC maintained that the learned judge took account of the conduct of Ronald, Bertha and Tong at paragraphs 35-37, 89-

94 and 135 of his judgment. He just did not think that it justified Lawrence in withholding the Company's financial statements from Ronald, Bertha and Tong. He said that the amended statement of claim characterises the fact that they did not ask for the financial statements (which the Articles provided that they should be provided with without their having to ask) as 'apathy'. He said that the judge expressly held that he found it unsurprising 'after the outcome of the years of bitter litigation in Hong Kong'. In this regard, he referred to the judgment at paragraph 90. Learned Queen's Counsel, Mr. Parker, urged this Court to dismiss the appeal. He criticised much of the arguments that were advanced on behalf of Lawrence (which need not be repeated in detail) in imploring this Court not to interfere with the decision of the court below and in particular the judge's exercise of discretion. Mr. Parker, QC said that it is not disputed that Lawrence was the sole director of the Company and its majority shareholder since 2006 and that he had failed to provide the minority shareholders with the financial information. He said that this is in clear breach of Article 120 of the Articles of Association of the Company. He said that the trial judge also found this to be so; and that Lawrence had no proper basis for not providing the information. Mr. Parker, QC urged this Court not to interfere with the trial judge's findings. He accepted that Ronald, Bertha and Tong have always indicated that they were not complaining about dividends since absent the financial information, which Lawrence failed to provide, they were not in a position to ascertain whether or not they were entitled to be paid dividends.

[47] Nevertheless, Mr. Parker, QC maintained that Lawrence in his capacity as the majority shareholder failed to provide the requisite information on behalf of the Company as mandated by Article 120. This omission, Mr. Parker, QC was adamant, amounted to unfair prejudice. He asserted that the trial judge acted properly in rejecting the reasons proffered by Lawrence (in his witness statement) for not providing the financial information as not being good ones. He said that the learned judge was correct in finding that Lawrence had no proper basis for not providing the financial information. Mr. Parker, QC highlighted the fact that Lawrence also failed to provide this Court with any proper reasons for not

providing the financial statements. He reminded this Court of Lawrence's indication that the reason why he failed to provide the information was to prevent mischief making. Mr. Parker, QC opined that Lawrence concealed from the judge at first instance the real reasons for not providing the accounts. He said that Lawrence was sitting on the evidence and that the judge was entitled to draw adverse inferences against Lawrence. Mr. Parker, QC accepted that the claim was not based on the Company's failure to pay a dividend. However, he underscored the fact that the claim for unfair prejudiced was based on the failure to provide the financial information and the judge was correct in rejecting the reason advanced by Lawrence after he had examined all of the evidence that was adduced.

[48] In relation to Ronald, Bertha and Tong's conduct, Mr. Parker, QC reminded this Court that even in the face of the litigation, Lawrence had failed to provide the financial information which Article 120 mandates, and this was so despite his receipt of the lawyer's letter in this regard. Based on the evidence and on Lawrence's utterances as found by the judge, Mr. Parker, QC said that the judge was entitled to conclude that Lawrence treated the Company as if it belonged to him. Indeed, Mr. Parker, QC sought to provide this Court with a different version of events that led to the Hong Kong litigation. He indicated that Ronald, Bertha and Tong were unaware that their father had given Lawrence the extra shares and, in fact, Lawrence had misled his siblings into thinking that each of them owned an equal amount of shares. He said that it was only when they had taken steps to have him removed as the director of the Company, much to their surprise, he disclosed that he had an extra 10,000 shares. This, Mr. Parker, QC said necessarily raised the suspicions of the other siblings and the police were called in to investigate. He said that the litigation which was commenced in Hong Kong was aimed at ascertaining the authenticity of the shares. He pointed out that Lawrence lost at first instance but ultimately prevailed in the Court of Appeal. However, he said, Lawrence was found to be dishonest.

[49] Mr. Parker, QC said that Lawrence had taken out moneys from the Company unbeknownst to the other shareholders and they made a desperate attempt to give shares to themselves to put themselves on parity with him. Once the appeal in Hong Kong was determined in Lawrence's favour, this state of affairs was corrected by Ronald, Bertha and Tong.

[50] Mr. Parker, QC also said that the judge was also correct in holding that even if Bertha wanted the financial information on the Company in order to be able to ascertain the value of the shares that was a legitimate reason. He further advocated that at all times the judge utilised the objective assessment in his determination of whether unfair prejudice had been established. Mr. Parker, QC reminded this Court that the judge rejected Lawrence's reasons on two bases: (a) they were not reasonable; and (b) if the action of the majority or reason given to the court is not reasonable, the court could draw the inference that this was not his reason if it was one that no reasonable shareholder would have held. Mr. Parker QC, relied on **Shuttleworth v Cox** in support of this proposition.

[51] In relation to the resolutions that were passed, Mr. Parker, QC said that they were both retrospective and prospective. He submitted that the content and nature of the resolutions were so oppressive and that there was sufficient evidence before the judge to cast doubt on the question of whether or not it was done in Lawrence's interest and that he had amended the Articles of Association in order to further his (Lawrence's) own interests. Mr. Parker, QC emphasised that insofar as Lawrence was obligated to provide the financial information and the mere fact that he used his power as the majority shareholder to pass the oppressive resolutions to amend Article 120 was sufficient basis for the judge to have concluded that the unfair prejudice claim had been made out. He said that the resolutions were so extreme in application that it would be impossible for anyone to accept that Lawrence honestly felt that what he did was in the Company's interests. In support of this proposition, Mr. Parker, QC referred to **Citco Banking Corporation NV** and **Staray Capital Ltd. v Cha, Yang.**

[52] Learned Queen's Counsel, Mr. Parker, opined that Lawrence's bold assertion that he took those actions in the interest of the Company is familiar and does not advance the matter any further and it was open to the judge to examine it for its authenticity and to reject it as he did. Mr. Parker, QC said that even though the claim was not based on the non-payment of dividends, insofar as Lawrence failed to provide the requisite financial information, Bertha and Tong indicated that they were not in a position to determine whether dividends should be paid and it was open to the judge to refer to this concern. The judge, he said, critically examined the evidence that Lawrence presented and found him wanting. Mr. Parker, QC indicated that Ronald, Bertha and Tong had adequate reason for not trusting Lawrence based on the history of their relationship.

[53] Mr. Parker, QC argued that even if Lawrence was entitled to alter the Articles of Association, the manner in which he did it amounted to an unfair prejudice action and this was correctly impugned by the judge. He acknowledged that the claim before the judge was not one to set aside the resolutions on the basis of a fraud on the minority. Nonetheless, Mr. Parker, QC submitted that the judge was entitled to take the circumstance of the resolutions into account in determining whether Ronald, Bertha and Tong were justified in concluding that there was a lack of confidence in the probity of the management of the Company. He reiterated that Lawrence's conduct clearly amounts to unfair prejudice. He submitted that it would never be in the interests of the Company to withhold the financial information from the minority shareholders. In relation to the question of delay, Mr. Parker, QC disputed that Ronald, Bertha and Tong were uninterested in the affairs of the Company after 2006. He asserted that, to the contrary, they all remained interested in the Company. He however said that they were "battle weary" as a consequence of the protracted litigation in Hong Kong. In any event, he asserted, Ronald, Bertha and Tong were unaware of Lawrence's whereabouts for several years and therefore were not in a position to make any requests of him.

[54] Queens Counsel, Mr. Parker, complained that nowhere in his witness statement did Lawrence offer as a reason for his non-provision of the financial information that he thought Ronald, Bertha and Tong did not want it. Mr. Parker, QC posited that it was the opposing Queen's Counsel who, on his own volition, was offering that as a reason. Mr. Parker, QC said that the judge was correct to reject the suggestions that were advanced by Mr. Chaisty, QC since there was clear evidence that Robert was always interested in receiving the information. However, both himself and Bertha, who was equally interested in receiving the information, were upset with the turn of events. He was adamant that Ronald, Bertha and Tong's loss of confidence in Lawrence was well founded. He said that the judge was correct in his conclusions. Mr. Parker, QC said that Lawrence's failure to provide the financial information, even in the face of this litigation, clearly reinforces the correctness of the judge's conclusion that the unfair prejudice claim had been made out. He urged this Court not to interfere with the judge's conclusion.

Remedies

[55] Turning next to the question of remedy, Mr. Parker, QC asserted that the determination of the appropriate remedy is within the discretion of the trial judge. He reminded this Court that an appellate court ought not to interfere with the exercise of discretion by the judge in the court below unless it concludes that the order is so unreasonable that no reasonable judge would have made such an order, in view of the circumstances of the case. He urged this Court to accept that the learned judge acted within his discretion when he made the buy-out order. Mr. Parker, QC argued that the factual circumstances in the case at bar are similar to those in **Loch v John Blackwood Ltd**.[20] He said that he had brought this authority to the attention of the judge in seeking to persuade him that the appropriate order was a buy-out order. Mr. Parker, QC acknowledged that in **Loch v Blackwood** the remedy provided was a winding up order. He said that the facts of that case are similar to the facts in the case at bar. He reminded this

[20] [1924] AC 783.

Court that at the time of the determination of **Loch v Blackwood** the unfair prejudice claim was not in existence. He, however, argued that conduct which would give rise to a winding up order under the "old Act" would now give rise to buy-out order under the "new Act".

[56] Mr. Parker, QC said that it is beyond argument that should the majority shareholders fail to provide financial information to the minority shareholders this, without more, would result in the loss of confidence in the commercial probity and management of the Company. He said that Lawrence had failed to provide the financial information over a number of years, and argued that the judge was entitled to take the behaviour of Lawrence into account in determining what the appropriate remedy is. Mr. Parker, QC sought to impress upon this Court that the buy-out order was the appropriate order and that this Court should not interfere with that order. In support of his argument he referred to **Grace v Biagioli**.

[57] Mr. Parker, QC took issue with the contention that the judge was obliged to treat with the claim on the same basis as a no-fault divorce. He countered that in the case where the relationship between the majority and minority shareholders had broken down irretrievably, the court is entitled to examine the circumstances in order to determine the appropriate remedy. He reminded this Court that once unfair prejudice is established, the court is given a wide discretion to determine the appropriate relief. Mr. Parker, QC submitted that the judge could not be properly criticised for examining Lawrence's conduct over the years in relation to the other shareholders, especially Ronald, Bertha and Tong, and his management of the Company in the exercise of the judge's discretion. Mr. Parker, QC admitted that the unfair prejudice claim was grounded on the failure to provide the financial statements but said that the court must take all of the relevant circumstances into account. He highlighted **Re Sunrise Radio Ltd**[21] as authority for the proposition that the provision of financial accounts is important in the context of an unfair prejudicial claim. He reminded this Court that the test is an objective one and

[21] [2009] EWHC 2893.

argued that the learned judge applied the objective test and not a subjective test, as was urged on behalf of Lawrence.

[58] Mr. Parker, QC said that given Lawrence's history and how he treated the other shareholders, namely Ronald, Bertha and Tong, it was unnecessary for the judge to differentiate in relation to them since they were all basically in the same position. Mr. Parker, QC urged this Court to accept that in relation to the buy-out order it was the appropriate remedy and that this Court should not interfere with that order. Mr. Parker, QC said that one of Lawrence's complaints is that the judge, in fashioning a remedy, went far beyond that requested by Ronald, Bertha and Tong. However, he said that he had absolutely no complaints with the order. In fact, Ronald, Bertha and Tong are quite satisfied with the judge's orders.

[59] On the issue of costs, Mr. Parker, QC underscored the settled principle that costs are within the discretion of the judge. He submitted that the judge exercised his discretion properly in ordering that Lawrence personally pay the costs in the court below and this Court should not interfere. Therefore, he urged this court to dismiss the appeal and to award costs on this appeal to Ronald, Bertha and Tong.

Discussion

[60] Before addressing the first issue, I will briefly refer to the relevant statutory provision.

[61] Section 184I of the **BVI Business Companies Act, 2004** ("the Act") provides:

> (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 such order as it thinks fit, including, without limiting the generality of this subsection, one or more of the following orders:

(a) in the case of a shareholder, requiring the company or any other person to acquire the shareholder's shares;

(b) requiring the company or any other person to pay compensation to the member;

(c) regulating the future conduct of the company's affairs;

(d) amending the memorandum or articles of the company;

(e) appointing a receiver of the company;

(f) appointing a liquidator of the company under section 159(1) of the Insolvency Act on the grounds specified in section 162(1)(b) of that Act;

(g) directing the rectification of the records of the company;

(h) setting aside any decision made or action taken by the company or its directors in breach of this Act or the memorandum or articles of the company.

Issue 1 – Whether the judge was correct to rule that Lawrence's conduct amounted to unfair prejudice

[62] It is noteworthy that section 184I of the Act is in pari materia with sections 994(1) of the UK **Companies Act 2006** and sections 459-461 of the UK **Companies Act 1985**.

[63] Article 120 of the Company's Articles of Association provides that:

> "The directors shall unless such requirement be waived by resolution of members cause to be made out and shall serve on the members on some date not later than eighteen months after the incorporation of the company and subsequently once at least in every calendar year a profit and loss account for a period in the case of the first account since the incorporation of the company and in any other case since the preceding account, made to a date not earlier than the date of the notice by more than twelve months, and a balance sheet as at the date to which the profit and loss account is made up. The company's profit and loss account and 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 the affairs of the Company as at the end of that financial period."

[64] As mentioned above, the analogous sections in the UK **Companies Act 1985** to section 184I of the British Virgin Islands Act are sections 459-461. Section 184I of the Act has two roles. Lord Hoffmann in **O'Neill and Another v Phillips and Others**,[22] in addressing section 459 of the 1985 Act, gave judicial acknowledgment to this. He stated that, first, it protects shareholders against the breach of the terms on which they have agreed that the affairs of the company should be conducted, through the articles of association or, say, some collateral agreement. Second, it protects them against some inequity that makes it unfair for those conducting the company's affairs to rely upon their strict legal powers.

[65] It is also settled that the conduct complained of must consist of an act or omission of the company (including an act or omission on its behalf) and the shareholder's interests as a member must have been prejudiced unfairly. See **Re A Company**,[23] a decision of Harman J, where he said at page 144:

> "All these cases together, in my judgment, lead one clearly to the understanding that the conduct to be complained of must be in the affairs of the very company in respect of which the petition is presented."

[66] It is trite law that the act or omission complained about must be in relation to the company conduct "dehors" the company. The leading authority on the interpretation and operation of the equivalent section to section 184I of the Act is

[22] [1999] 1 WLR 1092 at 1098G-1099.
[23] [1987] BCLC 141.

the decision of the House of Lords in **O'Neill v Phillips**. From Lord Hoffmann's speech one can further deduce the following: unfair prejudice claims can arise if the shareholder can demonstrate prejudice to his interests as a shareholder. This will usually include a breakdown of trust and confidence, save where it can be shown that the minority has done something seriously wrong so as to justify the treatment that it had received. This, however, does not negate the fact that the courts, in seeking to determine whether the majority was justified in the conduct, had to examine the underlying facts of the case.

[67] In **Re Saul D Harrison & Sons plc**,[24] Hoffmann LJ, addressing the question of what amounts to unfair prejudice for the purposes of section 459 of the **UK Companies Act, 1985**, had this to say:

> "In deciding what is fair or unfair for the purposes of s 459, it is important to have in mind that fairness is being used in the context of a commercial relationship. The articles of association are just what their name implies: the contractual terms which govern the relationships of the shareholders with the company and each other. They determine the powers of the board and the company in general meeting and everyone who becomes a member of a company is taken to have agreed to them. Since keeping promises and honouring agreements is probably the most important element of commercial fairness, the starting point in any case under s 459 will be to ask whether the conduct of which the shareholder complains was in accordance with the articles of association."

[68] The allegedly unfair prejudicial remedy is summarised in the recent decision of **Grace v Biagioli**.[25]

> "From Lord Hoffmann's speech [in **O'Neill v Phillips**] one can deduce the following principles:
>
> (1) The concept of unfairness, although objective in its focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually take the form of the articles of association and any collateral agreements between shareholders which identify their rights and obligations as

[24] [1995] 1 BCLC 14 at pp. 17-18.
[25] At para. 61.

members of the company. Both are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable;

(2) It follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann's words, 'consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith' (see [1999] 2 BCLC 1 at 8, [1999] 1 WLR 1092 at 1099); the conduct need not therefore be unlawful, but it must be inequitable;

(3) Although it is impossible to provide an exhaustive definition of the circumstances in which the application of equitable principles would render it unjust for a party to insist on his strict legal rights, those principles are to be applied according to settled and established equitable rules and not by reference to some indefinite notion of fairness;

(4) To be unfair, the conduct complained of need not be such as would have justified the making of a winding-up order on just and equitable grounds as formerly required under s 210 of the Companies Act 1948;

(5) A useful test is always to ask whether the exercise of the power or rights in question would involve a breach of an agreement or understanding between the parties which it would be unfair to allow a member to ignore. Such agreements do not have to be contractually binding in order to found the equity;

(6) It is not enough merely to show that the relationship between the parties has irretrievably broken down. There is no right of unilateral withdrawal for a shareholder when trust and confidence between shareholders no longer exist. It is, however, different if that breakdown in relations then causes the majority to exclude the petitioner from the management of the company or otherwise to cause him prejudice in his capacity as a shareholder."

[69] From the above, it is clear that once unfair prejudice is established the court is given a wide discretion as to the relief which should be granted.[26] The court has to look at all of the relevant circumstances in deciding what kind of order it is just and equitable to make. It is not limited merely to reversing or putting right the immediate conduct which has justified the making of the order.[27]

[70] I now come squarely to address the main question: what is the nature of the conduct which is cognizable under the Act. The authorities are clear that there can be no exhaustive list of the types of conduct which will be recognised as amounting to unfairly prejudicial conduct. However, by way of emphasis, one thing is clear – the complaint which is made must be that in relation to the affairs of the company to which the claim is brought. Indeed, it must be demonstrated that the affairs of the company in question have been or are likely to be conducted in a manner which is unfairly prejudicial to the interests of the shareholder or the shareholders generally, but the categories of unfair prejudice are not closed. I wish to borrow from the words of Arden J in **Macro and Others v Thompson and Others**:[28]

> "[T]he jurisdiction under [section 184I] has an elastic quality which enables the courts to mould the concepts of unfair prejudice according to the circumstances of the case."

A breach of the Articles of Association is, prima facie, a ground for relief. Indeed, the members agreed that the affairs of the company should be conducted based on the Articles of Association. Provided it is not of a trivial nature, an unfair prejudice claim may be well founded. The ways in which a member's interests may be prejudiced are almost unlimited.

[71] In the case at bar, there is no doubt that where Article 120 stipulated that the financial information should have been provided. Any failure to do so would amount to an egregious departure from what the parties have agreed and, in so

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[26] See s. 184I(2) of the Act.
[27] See Grace v Biagioli [2006] 2 BCLC 70 at para. 73.
[28] [1994] 2 BCLC 354 at 404.

doing, would breach the agreement as provided in Article 120. It is clear that Article 120 enabled Lawrence to waive the requirement to provide the financial information. However, that is not the end of the matter. Indeed, the next question is whether there are equitable considerations which bind Lawrence. In determining what equitable obligations arise between the parties, the court must look at all the circumstances, including the company's constitution, any written agreement between the shareholders, and the conduct of the parties. These matters were explained by Lord Hoffmann in **O'Neill v Phillips**:

> "[T]here will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using rules in a manner which equity would regard as contrary to good faith. … But this form of unfairness is also based upon established equitable principles and it does not arise in this case."[29]

[72] It is settled law that it is not necessary to show a course of conduct, nor one continuing at the date of filing of the claim. An isolated past act or omission is sufficient to give the court jurisdiction to intervene. The general rule that is extrapolated from the above is that, a minority shareholder is entitled to complain of unfairness and prejudice in relation to which he agreed that the affairs of the company should be conducted. However, there are cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus, unfairness may consist of a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith. Indeed, one of the most important matters to which the courts will have regard is the terms on which the parties agreed to do business together. These are commonly found in the company's Articles of Association.

[73] On the question of whether the judge correctly held that the unfair prejudice claim had been established, I am of the view that Lawrence's conduct must be analysed in relation to two periods: pre-2013 and post-2013. In relation to the pre-2013 period, when no request was made, I am not of the view that a claim could be

[29] At pp. 1099 to 1102.

brought retroactively for unfair prejudice. However, when in 2013 they requested the financial information, which Lawrence refused to furnish them with and even subsequently when they filed their claim in 2014 (at which point in time he still had not provided the requested information), they had a very good basis for a claim for unfair prejudice. That claim was well founded. In coming to this conclusion, there is no doubt that his refusal to provide the financial information strikes at the very heart of the contract in the Articles of Association. I have no doubt that Lawrence's refusal to provide the financial information was unfair and prejudicial to the interests of the minority shareholders. Also, he used his power in an inequitable manner and breached Article 120.

[74] Insofar as Article 120 obliges the directors to provide the balance sheet and the profit and loss account annually, in my view it is not open to Lawrence to say that Ronald, Bertha and Tong had a duty to ask for it. To the contrary, the constituent document required that they be provided with them and Lawrence (the majority) cannot hope to be absolved from his liability for what is clearly a breach of Article 120 by asserting that the documents were not requested for several years. Leaving aside the period immediately before the 2014 request for the financial information, Lawrence, and by extension the Company, was obligated to provide the financial information in 2014 when it was requested. They failed to do so. I therefore accept Mr. Parker, QC's arguments in this regard. It was clearly open to the judge, applying the principles in **O'Neill v Phillips** and **Citco Banking Corporation NV**, to have determined that the unfair prejudice claim had then been made out.

[75] Despite Mr. Chaisty, QC's criticisms of the judgment, Lawrence's conduct cannot be excused based on the evidence that was before the judge. However, I have no doubt that some of the observations that the judge made of Lawrence's conduct were justified but perhaps could have been put differently. Also, I have no doubt that in seeking to determine the appropriate remedy the learned judge was entitled to subject the conduct of the parties to scrutiny. In this regard, the judge cannot

be faulted for concluding that Lawrence felt that the minority shareholders were not entitled to receive the financial statement since the judge was provided with evidence which substantiated this. I am far from persuaded that the learned judge applied his subjective views to the matter. To the contrary, he was at all times cognizant of the role of the court in seeking to ensure that there was an objective assessment of matters, applying established principles. This much is evident from a close reading of the judgment.

[76] Further, I am of the view that the learned judge was at all times alive to the issue or basis of the unfair prejudice claim; namely, the non-provision of the financial statement. While he did spend a bit of time addressing matters that may be considered as peripheral, it was clear that he was keen at all times throughout the judgment to underscore that 'the cornerstone of the claim was the non-provision of the financial information'. I, therefore, do not accept Mr. Chaisty, QC's complaint that in coming to the conclusion that the unfair prejudice claim had been established the judge must have improperly taken into account that the Company had not paid Ronald, Bertha and Tong dividends; even though it may have been better for the judge to have only referred to the matter of dividends in passing since it was not a live issue.

[77] I nevertheless hold, by applying the principles stated in **O'Neill v Phillips**, that it is beyond doubt that once the request for the financial information was made in 2014, Lawrence ought to have provided the financial information. The non-provision of the financial information in 2014 suffices to establish the unfair prejudice claim and the judge was entitled to so conclude. This omission was made more egregious by the alteration of Article 120 of the Articles of Association, which purported to waive the requirement to provide the financial information both retrospectively and prospectively. It is clear to me that unfair prejudice also arose from Lawrence using the rules to alter Article 120 in a manner which equity would regard as contrary to good faith.

[78] In addressing the complaints that the learned judge utilised a subjective assessment of unfairness, we are guided by the principles that were enunciated in **O'Neill v Phillips** and which recognised that "unfairness" for the purposes of unfair prejudice is not to be judged by reference to subjective notions of fairness but, rather, by testing whether, applying established equitable principles, the majority has acted, or is proposing to act, in a manner which equity would regard as contrary to good faith. It is settled that both elements must coexist; namely, unfairness and prejudice. Indeed, section 184I(1) of the Act, so far as relevant, acknowledges this. In my view, there is no difference in substance between the unfair prejudice claim that is cognizable under section 184I of the Act and that which is available under section 994 of the **UK Companies Act, 2006**. The key phrase in section 184I is "unfairly prejudicial". This comprises two elements – unfairness and prejudice, but both of these must be understood in the context of company law. The concept of fairness inherent in the phrase is flexible and open-textured but it is not unbounded. However, the court must act on a principled basis even though the concept is to be approached flexibly. There is very helpful guidance from Lord Hoffmann in **O'Neill v Phillips** on the question of fairness. Lord Hoffmann, at page 1098, enunciated that:

> "In section 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history (which I discussed **In re Saul D. Harrison & Sons Plc** [1995] 1 BCLC 14, 17-20) that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles."

[79] I am not of the view that Ronald and Bertha should be given separate treatment from Tong based on the fact that they have all been unfairly prejudiced by the non-provision of the financial information and the alteration of Article 120 of the Articles of Association. Equally, I am of the considered view that their remedy under section 184I is not confined to that which is necessary to put right the wrong, however, in view of the totality of the circumstances, I have no doubt that they are

entitled to receive the financial information and to obtain an order restoring the Articles of Association to its pre-alteration state.[30] In my judgment, in the case at bar, the judge was entitled to conclude that the unfair prejudice claim was well founded and it is unfair to criticise him by saying that he applied his own subjective assessment in so doing. To the contrary, the clear evidence that was presented to the judge would lead to the conclusion that the business of the Company was not being conducted in accordance with the principles of commercial administration as stipulated by the Articles of Association; which provide some guarantee of commercial probity and efficiency. The minority shareholders were placed in a position where these conditions were deliberately and consistently violated by Lawrence who had an overwhelming voting power. This resulted in the extinction of their rights as shareholders. The judge clearly indicated that this was the conclusion that was arrived at even though the judge may have spent a considerable amount of time on other related matters.

[80] Based on everything I have foreshadowed, there is no doubt that Lawrence's non-provision of the important financial information as mandated by Article 120 amounted to unfair prejudice. I will forego the unnecessary details since I have referred to most of the relevant details in Mr. Parker, QC and Mr. Chaisty, QC's submissions. Accordingly, in my judgment, the judge did not err in concluding that the claim for unfair prejudice had been established. I do not need to go into the details insofar as I accept that the unfair conduct was the non-provision of the financial information as found by the learned judge. The judge did not err in so holding and cannot be properly criticised for so doing. I agree with Mr. Parker, QC in this regard.

[81] I have no doubt that it was open to the judge to conclude that the non-provision of the financial statements and the alteration of Article 120 of the Articles of Association were not for the benefit of the Company. It is not open to an appellate court to dictate to the courts of first instance the style which should be adopted in

[30] See Re Phoenix Office Supplies Ltd. per Jonathan Parker LJ at para. 48.

judgment writing. That having been said, Mr. Chaisty, QC's criticism in relation to the lack of clarity in many parts of the judgment is well founded. I, however, will not dwell on this aspect since nothing will be gained from so doing. There can however be no legitimate complaint as to the reasons why the judge held that the claim of unfair prejudice was well founded. While the learned judge could properly and fairly be criticised for some of the comments that he made in the judgment (some may describe them as unnecessary), in my respectful view he was nevertheless entitled to conclude that the claim for unfair prejudice had been made out based on the factual circumstances. By way of emphasis, Lawrence breached the contract as provided in Article 120 by not providing the financial information and his alteration of Article 120 was contrary to good faith, applying traditional equitable principles. On both grounds, individually and collectively, the claim for unfair prejudice had been established. The appeal in relation to this issue therefore fails.

[82] As indicated earlier, the second issue relates to the remedy which the judge granted. I now turn to address the issue of appropriate relief.

Remedies

[83] The court's main purpose when granting relief in such cases is to remedy the unfair prejudice suffered by the petitioner. The court will exercise its wide discretion, in circumstances where unfair prejudice has been established, so as to correct the unfair prejudice.[31] In the exercise of its discretion in granting relief, as well as in determining fairness of the conduct complained of, the court will take into account all of the circumstances of the case, including any misconduct on the part of the claimants such as delay in the commencement of proceedings. Critically, the remedy granted should be proportionate to the prejudice suffered by the petitioner and is not by way of punishment for bad behavior.[32] In the present case, insofar as the trigger for the unfair prejudice claim was the failure to provide

[31] See Grace v Biagioli at para. 73.
[32] See Jonathan Parker LJ in Re Phoenix Office Supplies Ltd. at para. 51.

the financial information coupled with the alteration of Article 120, it is clear to me that the remedy that should be provided must be proportionate to those breaches.

[84] It is accepted that section 89 of the **BVI Business Companies Act, 2004** empowers a majority of the shareholders to amend the Articles of Association of a company. While the section does not indicate any limitation on the exercise of this power, it is common ground that the test applied in determining whether an amendment to the Articles of Association of a company was valid is that which was laid down in **Citco Banking Corporation NV**; that is, whether in the opinion of the shareholders the alteration of the Articles was for the benefit of the company and whether there were grounds on which reasonable men could come to the same decision. Applying that test in the case at bar, the alteration of the Articles of Association would not be found to have satisfied those requirements. I therefore find very attractive and persuasive Mr. Parker, QC's submissions in this regard. Without condescending into the details of Lawrence's misconduct it must be emphasised that both sides are blameworthy. Though Lawrence shares the greater portion of the blame, I would refrain from any temptation to apportion the blame as enjoined by **O'Neill v Phillips**. I am guided by that principled approach and eschew the temptation to preside over a protracted and expensive contest of virtue between the shareholders, as urged on behalf of Lawrence. I will adopt the very pragmatic approach as endorsed by the House of Lords in **O'Neill v Phillips** and avoid the need to attribute blame for the breakdown of relations.

[85] I have already concluded that the actions that were taken by Lawrence were not for the benefit of the Company but for his own purposes. He has acted in breach of the Articles of Association and in altering Article 120 he has used the rules in a manner which equity would regard as contrary to good faith.[33] If the resolutions were so oppressive as to cast suspicion on the honesty of those responsible for it or so extravagant that no reasonable man could really consider them for the

[33] See O'Neill v Phillips at page 1099A. See also Citco Banking Corporation NV which indicated that the test is whether in the opinion of the shareholders the alteration of the Articles was for the benefit of the company and whether there were grounds on which reasonable men could come to the same decision.

benefit of the Company then they should be struck down. In the case at bar, as indicated earlier, it cannot be held to be a proper exercise of the power to withhold from certain members all of the financial information indefinitely. See **Re Sunrise Radio Ltd.** where conduct of a similar kind was held to amount to unfair prejudice.

[86] This leaves me now to look at Ronald, Bertha and Tong's conduct, in particular, in relation to the filing of the claim. It is settled law that there is no statutory period of limitation applicable to unfair prejudice claims. However, delay by the petitioner would remain relevant in the context of the issues of unfair treatment of the minority by the majority and the appropriate remedy. Indeed, Hollington at page 273 states that:

> "It is inconceivable that a court would grant relief under section 994 in respect of a transaction in which the petitioner had participated without protest over nine years before the petition."

[87] The court in the exercise of its discretion must do what is just and equitable, and that discretion must be exercised judicially and on rationale principles. Insofar as this appeal also represents a challenge to the basis upon which the judge came to exercise his discretion in relation to the remedy he granted, it is settled that in relation to the remedy for unfair prejudice the prospective nature of the jurisdiction is reflected in the fact that the court must assess the appropriateness of any particular remedy as at the date of the hearing and not at the date of presentation of the petition and may even take into account conduct which has occurred between those two dates. The court is entitled to look at the reality and practicalities of the overall situation – past, present and future.[34] Also, there is much learning on the principles that in granting relief the court should take into account any delay by those affected in seeking to correct the unfair prejudice that they have suffered. At the very least, from 2006 to 2013 Ronald, Bertha and Tong were entitled to be provided with the financial information and, if it was not forthcoming, to seek redress in the court. They failed to do so. In my view, the judge ought to have treated this delay as a material factor in his determination of

[34] See Grace v Biagioli at para. 73.

the appropriate remedy. He failed to do so and rather, seemed to have improperly minimised their contribution to the state of affairs. In my view, Mr. Chaisty, QC's complaint in this regard is well founded.

[88] It is accepted by both sides that Ronald, Bertha and Tong, while they had effective control of the Company pre-2006, gave themselves shares and took money out of the Company. Even though Mr. Parker, QC stated that this was in response to Lawrence's own misconduct, be that as it may, this is a factor that the learned judge should have taken into account in his determination of the appropriate remedy. In addition, the judge ought to have placed more weight on the fact that for several years Ronald, Bertha and Tong did not make any requests of Lawrence for the financial information until 2014 when the matter of the sale of Bertha's shares was being discussed. The judge failed to do so. While there is no doubt that Lawrence's own conduct indicated serious infractions and wrongdoing, it must be emphasised that Ronald, Bertha and Tong are also blameworthy in relation to the present state of affairs, though to a lesser degree. It nevertheless behooved the learned judge to take all of the material misconduct on both sides into account in determining the remedy. Accordingly, there is much force in Mr. Chaisty, QC's complaint in this regard.

[89] I am not persuaded that the justice of the case warranted the learned judge making a buy-out order. In fact, I have no doubt that that remedy was draconian and disproportionate to the breaches that were committed. I do not share the view of the judge that anything short of the buy-out remedy would leave Ronald, Bertha and Tong at the mercy of Lawrence. In any event, there is no basis upon which this Court can conclude that if it were to make an appropriate order Lawrence would not abide by its terms. In that respect, the case at bar is clearly distinguishable from **Grace v Biagioli**. In that case, the English Court of Appeal had good reason to believe that the minority shareholder's future interests in the company would have been prejudiced had the buy-out remedy not been ordered. The appellant and three respondents in **Grace v Biagioli** agreed to set up three

companies, one in each of the countries USA, UK and France, in which they were each equal shareholders and directors. The appellant was later removed as a director by a vote of the majority shareholders after being found to have entered into secret negotiations to acquire the assets of a competitor company. Further, dividends that had already been declared in the UK company were subsequently cancelled by another majority vote and redistributed as "management fees" among the other three shareholders. The appellant instituted proceedings on a claim for unfair prejudice pursuant to s. 459 of the **Companies Act, 1985**. The Court of Appeal found that the removal of the appellant as a director had been justified by his misconduct. Thus, a claim for unfair prejudice on this basis had not been made out. However, unfair prejudice was established by the appellant being denied the dividends to which he was entitled. In ordering a buy-out, the court took into account the totality of the circumstances, including the likelihood of future disputes between the appellant and the other three shareholders. The court was of the view that the buy-out order was most appropriate to ensure that the appellant's 'rights are respected in the future'.[35]

[90] Indeed, taking the totality of circumstances into account, including the conduct of Ronald, Bertha and Tong and juxtaposing that with the conduct of Lawrence, I am not of the view that the judge exercised his discretion properly in ordering the buy-out. Indeed, the learned judge was obliged to consider the whole range of possible remedies and choose one which on his own assessment of the current state of relations between the parties was the most likely to remedy the unfair prejudice and deal fairly with the situation which has occurred. It is settled that even where the conduct of the majority is both prejudicial and unfair, the petitioner's conduct may nevertheless affect the relief which the court thinks fit to grant.[36] In my view, therefore, the learned judge was wrong to have concluded that the conduct of Ronald, Bertha and Tong was not relevant in determining whether Lawrence's conduct was justifiable and proportionate. A buy-out order is

[35] At para. 83.
[36] See Re Noble & Sons Clothing.

not a remedy that should be granted lightly unless the circumstances so warrant. This much is settled law.

[91] I have no doubt that based on the width of the court's power it can make an order to regulate the conduct of the Company's affairs in the future.[37] In the case of **In re H. R. Harmer Ltd.**[38] the court also held that the appropriate remedy would be other than by way of a buy-out order. I can see no good reason for the judge to have made the buy-out order. It is noteworthy that in **In re H. R. Harmer Ltd.**, the court made detailed orders for the future regulation of the company's affairs. This was an option available to the learned judge. Also, in **Re Metropolis Motorcycles Ltd**[39] it was held that a failure to consult had led to some degree of unfair prejudice, although not enough to justify a buy-out order.

[92] Insofar as the learned judge has exercised his discretion improperly he committed an error of principle in so doing. It therefore falls to this Court to exercise its discretion afresh. Exercising the discretion afresh and taking into account the totality of circumstances, I am of the view that the appropriate order is to direct Lawrence to provide the financial information of the Company from 2006 to the present date to Ronald, Bertha and Tong within 28 days. It is also just and equitable that he be ordered to amend the Articles of Association to their pre-resolution state within 14 days of this Order. I am not of the view that this Court should direct him to delete the power of waiver from the Articles of Association. This latter remedy was exorbitant in view of the fact that the parties had initially contracted in Article 120 of the Articles of Association to enable the waiver to be granted; it should be retained in its pristine form.

[93] It is usual for the court in unfair prejudice claims to grant relief against the current members of the company, particularly those who bear the requisite degree of

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[37] See ex p. Guinness in which the directors of a public company were ordered to convene an extraordinary meeting of the company on a specified date and to appoint a firm of accountants as independent scrutineers.
[38] [1959] 1 WLR 62.
[39] [2007] 1 BCLC 520.

responsibility for the unfair prejudice that was occasioned. Insofar as the judge has made the purchase order, I have no doubt that in all of the circumstances of this case, the purchase order was not the appropriate remedy. It was totally disproportionate. In the circumstances, the appeal against the remedy is allowed to the extent that the order of the learned judge is substituted by the below order:

(1) It is hereby ordered that the Resolutions shall be set aside as of the dates on which they were passed, that is, 17th April 2014 and 22nd April 2014, and are hereby declared to be null and of no effect;

(2) Lawrence Ming Shui Sum shall, in accordance with Article 120 of the Articles of Association provide to Ronald, Bertha and Tong, for the year 2006 and each year thereafter through to 2015, and thereafter, for 2016, a profit and loss account and a balance sheet as at the date to which the profit and loss account is made up, within 28 days of this judgment.

Costs Below

[94] Costs have been reserved and they have not been assessed, but insofar as Ronald, Bertha and Tong have prevailed in the unfair prejudice claim, the question of the appropriate costs order arises for consideration and the parties are directed to file and serve written submissions on the question of costs in the court below within 28 days of this judgment.

Costs on Appeal

[95] Insofar as Lawrence has prevailed in relation only to the issue of the remedy and has lost on the unfair prejudice issue, the issue of costs on this appeal arises for our consideration. The parties are directed to file and serve written submissions on costs on this appeal within 28 days of this judgment.

Conclusion

[96] For the above reasons:

(1) I would dismiss Lawrence's appeal against the finding of unfair prejudice.

(2) Lawrence's appeal against the relief is allowed to the extent that the order below is varied and substituted with the following:

(a) It is hereby ordered that the Resolutions shall be set aside as of the dates on which they were passed, that is, 17th April 2014 and 22nd April 2014, and are hereby declared to be null and of no effect;

(b) Lawrence Ming Shui Sum shall, in accordance with Article 120 of the Articles of Association provide to Ronald, Bertha and Tong, for the year 2006 and each year thereafter through to 2015, and thereafter, for 2016, a profit and loss account and a balance sheet as at the date to which the profit and loss account is made up, within 28 days of this order.

(c) The parties are directed to provide written submissions on the issue of costs in the court below and on this appeal within 28 days of this order.

[97] I gratefully acknowledge the assistance of all learned counsel.

I concur.
Paul Webster
Justice of Appeal [Ag.]

I concur.
Anthony Gonsalves, QC
Justice of Appeal [Ag.]

By the Court

Chief Registrar