

Privy Council Appeal No. 4 of 2001

**(1) CVC/Opportunity Equity Partners Limited and
(2) Opportunity Invest II Limited**

Appellants

v.

Luis Roberto Demarco Almeida

Respondent

FROM

**THE COURT OF APPEAL OF THE
CAYMAN ISLANDS**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 21st March 2002

Present at the hearing:-

Lord Bingham of Cornhill
Lord Hutton
Lord Hobhouse of Woodborough
Lord Millett
Lord Rodger of Earlsferry

[Delivered by Lord Millett]

1. The first appellant CVC/Opportunity Equity Partners Ltd. ("the Company") is a private company incorporated in the Cayman Islands. The second appellant Opportunity Invest II Inc. ("Opportunity") is its majority shareholder. It owns all but four of the issued shares in the Company. The respondent ("Mr Demarco") is a minority shareholder with a single share.

2. The appellants appeal from an order of the Cayman Islands Court of Appeal dated 17th August 2000. By their order the Court of Appeal allowed Mr Demarco's appeal from an order of Graham J made on 29th July 1999 and discharged an injunction which he had granted to the appellants. The injunction had restrained Mr Demarco from presenting a petition to wind up the

Company on the just and equitable ground. The appellants seek to have the injunction restored.

3. The judge granted the injunction on the ground that Mr Demarco had unreasonably refused a fair offer for the purchase of his shares and was threatening to bring winding-up proceedings for an improper purpose, that is to say in order to extract a still higher offer, a course which the appellants condemn as tantamount to blackmail and an abuse of the process of the court. The Court of Appeal allowed Mr Demarco's appeal because they were not satisfied that the offer for his shares was a fair one.

4. Two interrelated questions thus lie at the heart of the present appeal: (1) Was the offer to purchase Mr Demarco's shares a fair one so that it was unreasonable for him to reject it? (2) Were the threatened proceedings brought for an ulterior purpose and thus an abuse of the process of the court?

The Company's business.

5. The Company is a single venture vehicle which carries on business as the general manager of a venture capital limited partnership established under the law of the Cayman Islands. The limited partners, who provide the funds of the partnership, are Citibank N A and associated companies. The funds have largely been invested in Brazilian enterprises and are said to be worth in the region of US\$1 billion. They belong to the limited partners; the Company has no beneficial interest in them. It derives its substantial income from fees and commissions for making deals and acquisitions on behalf of the partnership.

6. Under the arrangements between the Company and the limited partners entered into in December 1997, the Company can be removed as general manager for cause by a simple majority of the limited partners or without cause by a 75% majority of such partners. "Cause" is defined to include the institution of proceedings seeking the liquidation or winding up of the Company where the proceedings are not dismissed or stayed within 30 days of their institution. The partnership is to be treated as dissolved upon the removal of the general manager unless 75% in value of the limited partners agree within 90 days upon the appointment of another general manager.

7. Since the limited partners are associated companies, their Lordships consider it unnecessary to consider whether the

presentation of the proposed petition would constitute "cause" to remove the Company as general manager. They propose to proceed on the footing that the Company's tenure as general manager is at the will of the limited partners and so relatively precarious in any event. At the same time they would observe that, while the limited partners may be free to remove the company as general manager, it does not follow that it is open to the individuals behind Opportunity to accept the substitution of another company with different shareholders without accounting for any benefit which they might themselves obtain by the substitution: see *North Holdings Ltd. v Southern Tropics Ltd.* [1999] BCC 746 and the cases there cited.

The Company's structure.

8. Mr Demarco, who is resident in Brazil, became a shareholder, director and employee of the Company in December 1997. The Company has 100 issued ordinary shares of \$1 each which are and have since then been held as follows:

Mr Demarco	1
Mr Andrade	1
Mr de Carvalho	1
Mr Wilson	1
Opportunity	96

The four individuals were all deal-makers engaged by the Company in late 1997 by written agreements on similar terms.

9. Although Mr Demarco holds only 1% of the issued shares, he claims in the draft petition to be beneficially entitled to 3.5% of the Company's issued share capital pursuant to an oral agreement between him and the Appellants entered into prior to his engagement. His claim is denied by the appellants, who advance a different case as to what was orally agreed between them. This dispute still remains to be resolved but is not material to the present appeal.

Mr Demarco's appointment.

10. Under the terms of his engagement, Mr Demarco was employed full time in the business of the Company, his employment was terminable on 3 days' notice by either party, and upon termination of his employment he was at the Company's request to resign immediately from office as a director without

any claim for compensation. While his employment continued he was entitled to (i) a director's salary of US\$12,000 per annum (ii) aggregate annual remuneration of US\$240,000 (inclusive of director's salary) and (iii) a performance bonus by way of a share in the profits on any deal he effected for the partnership.

11. Under the terms of a Shareholders' Agreement to which all the members of the Company were parties: (i) a director could be removed only by shareholders holding a majority of the shares in the Company; (ii) a shareholder should not sell any share in the Company except to Opportunity pursuant to Annex A to the Agreement; (iii) Opportunity granted each shareholder an irrevocable put option over his shares at a price and on the terms to be agreed pursuant to Annex A; and (iv) each of the individual shareholders granted Opportunity a call option over his shares on similar terms. Annex A was left blank.

12. On 4th February 1999 Mr Demarco was dismissed by Opportunity for alleged "bad performance". Since then he has been excluded from any part in the management of the Company. He has no longer been invited to attend board meetings or sent financial information in relation to the Company or the partnership. Mr Demarco accepts that he cannot challenge his dismissal or exclusion from management of the Company's business; but he does challenge Opportunity's right to exclude him therefrom without offering him a fair price for his shares.

Company Law in the Cayman Islands.

13. Section 94 of the Companies Act (1998 Revision) of the Cayman Islands provides that a company may be wound up by the court if

“... (d) the Court is of opinion that it is just and equitable that the company should be wound up.”

Corresponding provisions in identical terms have formed part of English company law since the first of the Companies Acts, viz. the Companies Act 1862. Indeed, it made its first appearance in the Joint Stock Companies Winding Up Act of 1848. The relevant provision is now contained in section 122 of the English Insolvency Act 1986. Despite its presence in that Act, it is well established that a shareholder with fully paid shares has no locus standi to present a winding up petition unless there is prima facie evidence that there would be a surplus on a winding up.

14. The statute law of the Cayman Islands contains no provision corresponding to section 210 of the Companies Act 1948 or its successors section 75 of the Companies Act 1980 and section 459 of the Companies Act 1985. These enable a shareholder to present a petition on the ground that the company's affairs are being or have been conducted in a manner which is oppressive (or in the later legislation unfairly prejudicial) to the interests of some part of the members including himself. They give the court wide powers to make such orders as it thinks fit with a view to bringing the matters complained of to an end, including a power to regulate the conduct of the company's affairs in the future, and a power to order the company or other members of the company to purchase the petitioner's shares. Under the Companies Act 1948 it was necessary for the petitioner to establish facts which would justify the winding up of the company on the just and equitable ground even though that was not the remedy which he sought; but this is no longer required.

15. Section 210 of the English 1948 Act implemented a recommendation of the Cohen Committee on Company Law Amendment which reported in 1945 (Cmd 6659 para 60). The Committee was anxious to strengthen the position of minority shareholders. It observed that the winding up of the company, which was the only remedy then available, would often not benefit the minority shareholder, since the break up value of the assets might be small, and the only available purchaser might be that very majority whose conduct had driven the minority to seek redress. Accordingly, the Committee recommended that the court should have a jurisdiction which it had previously lacked to impose a just solution on the parties. In practice, the courts have generally sought to bring the matters complained of to an end by requiring one party, usually but not invariably the majority shareholders, to buy the other parties' shares at a fair price, fixed in case of dispute by the court.

16. As their Lordships have already noted, no such jurisdiction has been conferred on the court in the Cayman Islands. The only remedy available to a minority shareholder is to have the company wound up. This is likely to be contrary to his own interests and proportionately more so to the interests of the majority, and it is not normally what the minority shareholder really wants. But the risk that the company may be wound up tends to concentrate minds and encourages the parties to negotiate an acceptable compromise. This usually consists of an offer by

the majority shareholders to buy out the minority at an appropriate price.

The proceedings.

17. Following his dismissal Mr Demarco made repeated but unsuccessful attempts to negotiate his withdrawal from the Company and the realisation of his interest. He has had numerous meetings with the persons who control Opportunity. According to his evidence, he provided them in January 1999 with a written calculation of the value of his 3.5% interest. When this was unproductive, he invited them to indicate their own assessment of the value of his interest, but received no response. Mr Demarco's lawyers were given to understand that Opportunity was not willing to acquire his interest or pay anything for it. If he was to realise his interest, he would have to resort to legal proceedings.

18. Mr Demarco was advised that, because Annex A to the Shareholders' Agreement had not been completed, his put option was unenforceable. In those circumstances, he was told, the only remedy available to him under the law of the Cayman Islands was to present a petition to wind up the Company. As he has since emphasised, this was not the remedy he wanted; but it was the only remedy he had.

19. By a letter dated 18th June 1999 Mr Demarco's lawyers alleged that there had clearly been a breakdown in the mutual trust and confidence between the participants in the business venture, and that they had advised him that the most appropriate course of action was for him to petition to wind up the Company on the just and equitable ground. They gave notice of his intention to present such a petition within 14 days unless he received full payment of the value of his interest.

20. Opportunity's lawyers responded by a letter dated 29th June 1999 in which they stated that they were authorised to confirm that Opportunity would purchase Mr Demarco's shareholding "at an appropriate price", and "in the light of the above" they sought confirmation that he would withdraw his threat to present a petition.

21. Mr Demarco's lawyers naturally assumed that this was an offer to negotiate a realistic price for his shares, for nothing less could be expected to induce him to withdraw his threat to

commence proceedings. Mr Demarco, however, rightly as it turned out, was more sceptical. On 1st July his lawyers wrote to say that as matters stood their instructions were to present a winding up petition on the following day. If Opportunity wished to make an offer to pay "the full value" of his interest this would have to be done and agreed that day.

22. On 2nd July Graham J granted an interim injunction restraining Mr Demarco from presenting a winding up petition against the Company before 19th July. Although the order was made ex parte, Mr Demarco's lawyers were notified of the hearing in advance and the order was made in their presence. It seems unlikely that they resisted the making of the order. Mr Demarco had no desire to have the Company wound up. His object was to bring Opportunity to the negotiating table, and his threat to present a winding up petition appeared to have had the desired effect. Opportunity presented the case to the judge on the basis that it would be wrong to allow a winding up petition to be presented when it had made an offer to buy Mr Demarco's shares at "an appropriate price". The judge may well have assumed that following his order the parties would open serious negotiations in relation to the price to be paid for Mr Demarco's interest.

23. Instead, as appeared from the evidence shortly afterwards filed on behalf of Opportunity and subsequently confirmed by its lawyers, by the "appropriate price" for Mr Demarco's share Opportunity meant its par value of US\$1. According to its evidence, there was an oral understanding that, if any of the individual shareholders wished to transfer his shares to Opportunity, the transfer would take place at par; and that if any of them was dismissed for misconduct or bad performance, Opportunity would exercise its call option by acquiring his shareholding at par. Opportunity deposed that Annex A was not in existence when the Shareholders' Agreement was signed, but this failed to explain the apparent inconsistency between the alleged understanding and the express terms of the put and call options contained in the body of the Shareholders' Agreement. Opportunity contended that the petition was bound to fail, since Mr Demarco's participation in the management of the Company was due to his position as an employee, and it had been agreed that upon his dismissal as an employee he would cease to be a director and would no longer be involved in the management of the Company.

24. In his evidence in answer, Mr Demarco categorically denied the existence of any understanding that he should dispose of his shares at par. He alleged that his beneficial interest in the Company was 3.5%, and not merely the 1% represented by his registered shareholding. On advice he did not deal with the contention that a petition was bound to fail, but reserved his right to file evidence in support of the petition when the time came.

25. Meanwhile, Opportunity commenced proceedings against Mr Demarco in the Grand Court in the Cayman Islands, seeking repayment of moneys lent and other relief. Although pleading the oral as well as written agreements which it claimed constituted the arrangements under which Mr Demarco had been engaged by the Company, Opportunity did not allege any understanding that he would transfer his share at par if dismissed for misconduct or bad performance, but pleaded the terms of a written agreement which set out the consequences of Mr Demarco's dismissal, including the fact that his shares would remain his property in that event. When Opportunity's application to continue the injunction came before Graham J on 29th July, however, its story had changed again. According to the Judge, its case now was that Mr Demarco's share had been registered in his name by mistake and belonged beneficially to Opportunity.

26. In the course of the hearing it evidently became clear that the judge was not disposed to restrain the presentation of the petition whether on the basis that it was doomed to fail or on the basis of an offer of US\$1 founded upon a disputed oral understanding. After obtaining his client's instructions, counsel for Opportunity informed the Judge that it would agree to purchase Mr Demarco's shareholding in the Company at a price equivalent to that which he would have obtained as a contributory on the liquidation of the Company. Mr Demarco rejected the offer as inadequate. He submitted that, as Opportunity was offering to acquire his interest with the intention that the Company should continue to carry on business, the price should be based on the value of the Company as a going concern.

27. The judge found that Opportunity had made a bona fide and fair offer which it was unreasonable for Mr Demarco to reject, and granted the injunction as prayed.

28. Shortly afterwards, Opportunity's lawyers wrote to confirm and clarify the terms of its offer. Since Mr Demarco was seeking to wind up the Company, Opportunity was prepared to calculate

and pay him whatever he would receive if his petition were successful. The sum in question would represent 3.5% of the net asset value of the Company together with 3.5% of the dividends which had accrued or become payable. The valuation should be carried out either by separate experts to be appointed by each party or by a jointly agreed court expert, and made on the assumption that the Company had ceased to trade as the general partner of the limited partnership. In that event not only would the Company's future stream of income be brought to an end, but it would also incur additional liabilities to refund some of the income it had previously received. Before the Board counsel for Opportunity indicated that the assumption should be expressed to be that the Company had been ordered to be wound up. The relevant assumption, however expressed, would clearly exclude, and was intended to exclude, a valuation on the basis of a going concern.

29. The Court of Appeal allowed Mr Demarco's appeal, but continued the injunction pending the hearing of an appeal to their Lordships' Board. In the meantime, the parties exchanged valuations showing, as might be expected from the nature of the Company's business, a very substantial difference between break up and going concern valuations.

30. Since the hearing in the Court of Appeal, Opportunity has amended its pleadings in the action in the Grand Court. It now pleads an oral agreement that if Mr Demarco should cease for any reason to be employed by the Company as a deal-maker he would relinquish his interest in the Company "at its then value". It also pleads that, so long as he was so employed, he would be incrementally entitled to become a 3.5% shareholder over a period of five years. Thus the Company has variously alleged (i) that Mr Demarco's shareholding belongs beneficially to Opportunity (ii) that there was an oral understanding that if he were dismissed for misconduct or bad performance he would transfer it to Opportunity at par and (iii) that it was orally agreed that if he ceased for any reason to be employed as a deal maker he would relinquish his interest at its current value, presumably (if the Company was likely to continue to carry on business in the foreseeable future) on a going concern basis. The action is due to be heard in April of this year, and accordingly their Lordships content themselves with observing that Opportunity's latest version of what was orally agreed between the parties sits uneasily with its contention that it was unreasonable of Mr

Demarco to refuse its offer to buy his shares on a different and less favourable basis.

The just and equitable ground.

31. In his often cited speech *In re Westbourne Galleries* [1973] AC 360 Lord Wilberforce explained the rationale of the “just and equitable ground” for winding up a solvent company at the suit of a minority shareholder. At p 379 he said

“The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The ‘just and equitable’ provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.”

32. Companies where the parties possess rights, expectations and obligations which are not submerged in the company structure are commonly described as “quasi-partnership companies”. Their essential feature is that the legal, corporate and employment relationships do not tell the whole story; and that behind them there is a relationship of trust and confidence similar to that obtaining between partners which makes it unjust or inequitable for the majority to insist on its strict legal rights. The typical characteristics of such a company are that there should be (i) a business association formed or continued on the basis of a personal relationship of mutual trust and confidence; (ii) an understanding or agreement that all or some of the shareholders should participate in the management of the business; and (iii) restrictions on the transfer of shares so that a member cannot

realise his stake if he is excluded from the business. These elements are typical, but the list is not exhaustive.

33. Opportunity denies that the Company is such a company or that Mr Demarco was anything more than an employee and director who was given a share as an inducement to work for the company. This was the basis of the submission, made below and repeated before the Board, that the threatened petition is doomed to fail. But Mr Demarco clearly claims that the Company did possess the relevant characteristics. His case is that there was formerly a relationship of trust and confidence between the parties which has since broken down and which makes it unjust or inequitable for Opportunity to exclude him from the business without offering him an opportunity to realise his interest at a fair price. This will be a critical issue in the case if it is allowed to proceed to trial. Mr Demarco may or may not succeed in establishing it, but the petition itself has not yet been presented and the evidence in support has not yet been filed. It is impossible in the present state of the evidence to say that the petition is manifestly unfounded, and accordingly their Lordships reject this ground of appeal.

34. In *O'Neill v Phillips* [1999] 1 WLR 1092 at p 1107 Lord Hoffmann explained that the unfairness did not lie in the exclusion of the petitioner from the management of the company but in his exclusion without a reasonable offer for his shares. If the respondent has plainly made a reasonable offer, he said, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out. Their Lordships draw attention to the requirement that the offer must plainly be reasonable: a respondent is not entitled to have the petition restrained or struck out if the reasonableness of his offer is open to question.

35. As his reference to unfair prejudice shows, Lord Hoffmann was speaking in the context of a petition for relief under section 459 of the Companies Act 1985, rather than a petition for a winding up on the just and equitable ground. Their Lordships will consider hereafter whether this affects what amounts to a reasonable offer; but there is no difference in principle. If the company possesses the relevant characteristics, then it is unfair for the majority to insist on their legal right to exclude the petitioner without making a reasonable offer for his shares. It is no less accurate to describe such conduct as unjust or inequitable than it is to describe it as oppressive or unfairly prejudicial to the

interests of the minority. As their Lordships have already noted, a petitioner could not obtain a remedy under section 210 of the Companies Act 1980 unless he alleged facts which would justify the court in making a winding up order. The section provided an alternative remedy but the wrong was often the same.

The basis of valuation.

36. The parties cannot be expected to agree upon the monetary value of Mr Demarco's interest. This is a matter of judgment and opinion, and their respective advisers may be expected to disagree. But there should be no difficulty in agreeing the basis of valuation and the machinery for resolving any disagreement.

37. There are essentially three possible bases on which a minority holding of shares in an unquoted company can be valued. In descending order these are: (i) as a rateable proportion of the total value of the company as a going concern without any discount for the fact that the holding in question is a minority holding; (ii) as before but with such a discount; and (iii) as a rateable proportion of the net assets of the company at their break up or liquidation value.

38. Which of these should be adopted as the appropriate basis of valuation depends on all the circumstances. The choice must be fair to both parties, and it is difficult to see any justification for adopting the break up or liquidation basis of valuation where the purchaser intends to continue to carry on the business of the company as a going concern. This would give the purchaser a windfall at the expense of the seller.

39. If the going concern value is adopted, a further question arises: whether a discount should be applied to reflect the fact that the holding is a minority one. An outsider would normally be unwilling to pay a significant price for a minority holding in a private company, and a fair price as between a willing seller and a willing purchaser might be expected to reflect this fact. It would seem to be unreasonable for the seller to demand a higher price from an unwilling purchaser than he could obtain from a willing one. Small private companies commonly have articles which restrict the transfer of shares by requiring a shareholder who is desirous of disposing of his shares to offer them first to the other shareholders at a price fixed by the company's auditors. It is the common practice of auditors in such circumstances to value the shares as between a willing seller and a willing buyer

and to apply a substantial discount to reflect the fact that the shares represent a minority holding.

40. The context in which the shares fall to be valued in a case such as the present is, however, very different. Mr Demarco is not desirous of disposing of his shares; he would rather keep them and continue to participate in the management of the Company. It is Opportunity's conduct in excluding him from management that has driven him, however reluctantly, to seek to realise the value of his investment. In this situation the case law in England is that normally the shares should be valued without any discount: see for example *In re Bird Precision Bellows Ltd.* [1986] Ch 658 CA; *Re Abbey Leisure* [1990] BCLC 342 CA; and *O'Neill v Phillips*, above. In *In re Bird Precision Bellows Ltd.* at p 667 Oliver LJ cited with evident approval the observations of Nourse J at first instance where he said:

“I would expect that in a majority of cases where purchase orders are made under section 75 in relation to quasi-partnerships the vendor is unwilling in the sense that the sale has been forced upon him. Usually he will be a minority shareholder whose interests have been unfairly prejudiced by the manner in which the affairs of the company have been conducted by the majority. On the assumption that the unfair prejudice has made it no longer tolerable for him to retain his interest in the company, a sale of his shares will invariably be his only practical way out short of a winding up. In that kind of case it seems to me that it would not merely not be fair, but most unfair, that he should be bought out on the fictional basis applicable to a free election to sell his shares in accordance with the company's articles of association, or indeed on any other basis which involved a discounted price. In my judgment the correct course would be to fix the price pro rata according to the value of the shares as a whole and without any discount, as being the only fair method of compensating an unwilling vendor of the equivalent of a partnership share. Equally, if the order provided, as it did in *In re Jermyn Street Turkish Baths Ltd.* [1970] 1 WLR 1194, for the purchase of the shares of the delinquent majority, it would not merely not be fair, but most unfair, that they should receive a price which involved an element of premium.”

To require Mr Demarco to submit not only to his exclusion from the Company but to the acquisition of his shares at less than their going concern value by a purchaser which intends to carry on the business is hardly less unfair.

41. The rationale for denying a discount to reflect the fact that the holding in question is a minority holding lies in the analogy between a quasi-partnership company and a true partnership. On the dissolution of a partnership, the ordinary course is for the court to direct a sale of the partnership business as a going concern with liberty for any of the former partners who wish to bid for the business to do so. But the court has power to ascertain the value of a former partner's interest without a sale if it can be done by valuation, and frequently does so where his interest is relatively small: see *Syers v Syers* (1876) 1 App Cas 174. But the valuation is not based on a notional sale of the outgoing partner's share to the continuing partners who, being the only possible purchasers, would offer relatively little. It is based on a notional sale of the business as a whole to an outside purchaser.

42. In the case of a company possessing the relevant characteristics, the majority can exclude the minority only if they offer to pay them a fair price for their shares. In order to be free to manage the company's business without regard to the relationship of trust and confidence which formerly existed between them, they must buy the whole, part from themselves and part from the minority, thereby achieving the same freedom to manage the business as an outside purchaser would enjoy.

43. The practice of striking out a petition or restraining the presentation of a threatened petition after the petitioner has unreasonably refused a fair offer for his shares is a relatively recent development in England and post-dates the introduction of section 210 of the Companies Act 1948. The cases in which the English courts have been called upon to decide what constitutes such an offer have therefore been decided in the context of a claim that the respondents should be ordered to purchase the petitioner's shares (or occasionally vice versa), or at least in a situation where the court has power to grant such relief. Opportunity submits that the position is very different where, as in the Cayman Islands, the only relief available to the petitioner is to have the company wound up. In such a case, it argues, the petitioner's shares have no value beyond the amount which could be obtained in respect of them on a winding up, and an offer to

buy at a price which reflects that value cannot be stigmatised as unfair.

44. The proposition that the value of the petitioner's shares should reflect the remedy available to him if no offer is made has a superficial attraction, but their Lordships regard it as unsound. Its attraction lies in the popular notion that the value of an asset depends on what a willing purchaser would be prepared to pay for it, and that it has no value if no one is willing to buy it. In cases such as the present the respondents are normally unwilling purchasers. They do not want to buy the petitioner's shares and would not make him an offer at all were it not for their concern to have the proceedings aborted.

45. Where the court has power to order the respondents to purchase the petitioner's shares, the flaw in the proposition that the value of his shares is measured by the remedy is readily apparent. The price at which the respondents ought to offer to buy the petitioner's shares in order to have the proceedings struck out if he refuses to accept it and the price which the court will order them to pay if the petition is successful cannot be measured in terms of each other without producing a circularity. The concept of a fair price assumes that the shares have an objective value by which the fairness of the offer can be assessed.

46. Their Lordships consider that the proposition is equally unsound where the only remedy available to the petitioner is to have the company wound up. In the first place, it assumes that the fair value of the shares is to be measured by their value to the petitioner and that their value to the respondents is to be ignored. The amount which the petitioner would obtain in respect of his shares on a winding up represents the least that they can be worth to him, but it does not represent their fair value as between the parties. In the second place, the fairness of the offer should be judged by reference to what will happen if it is accepted, not if it is refused.

47. Opportunity sought to draw comfort from a passage in the judgment of Millett J. in *Re a company (No 003843 of 1986)* [1987] BCLC 562 where he said at p 571:

“It is now manifestly unreasonable for the petitioners to continue to press for a winding up order. That would give them a financial remedy only, but it would be a financial remedy which would inevitably result in a later payment of

a lesser sum than could be obtained from the offer that has been made.”

But the passage must be read in context. As it makes clear, the respondents had offered to buy the petitioners' shares at more than their break up or liquidation value. In fact they had offered to pay a price equal to a rateable proportion of the company's assets at the market value of the company as a going concern, the valuation to be made by an independent chartered accountant selected by agreement or in default nominated by the President of the Institute of Chartered Accountants. The petitioners rejected the offer because they were not interested in selling their shares at any price. They wanted to be reinstated as directors, failing which they insisted that the company should be wound up. The passage lends no support to Opportunity's submission that a fair price can be based on the company's break up or liquidation value..

48. The proposition is inconsistent with the rationale which excludes a discount to reflect the fact that the petitioner's interest represents a minority holding. In the case of a quasi-partnership company the corporate structure represents the legal medium by which a business is carried on as a joint venture. The petitioner's interest in the joint venture cannot be determined by a sale of his shareholding to his co-venturers unless the price reflects his share in the underlying business. The subject-matter of the notional sale which forms the basis of valuation is, therefore, not the petitioner's minority holding but the entire share capital of the company.

49. Their Lordships are satisfied that Opportunity's offer to purchase Mr Demarco's interest at a valuation based on the Company's break up or liquidation value falls far short of a fair offer and fails to remedy his complaint. It is not entitled on this ground to restrain the presentation of a winding up petition.

Abuse of process.

50. Opportunity also submits that, by presenting a winding up petition after he has been offered the full value of the amount which he would obtain in respect of his interest if the Company were wound up, Mr Demarco would be abusing the process of the court by using it for an ulterior purpose.

51. This contention, too, has a superficial attraction, for it is easy to doubt the bona fides of a plaintiff who commences or

continues proceedings after he has been offered everything which he could hope to achieve in the proceedings even if wholly successful. In the case of an ordinary action, however, the defendant is not entitled to have the proceedings struck out on the ground that the plaintiff has been offered the full amount of his claim. The defendant's remedy is either to submit to judgment or to pay money into court, await judgment, and ask for his costs.

52. The special nature of winding up proceedings and the loss which they may cause the company and its shareholders, however, makes it incumbent on the court to ensure that they are not brought for an improper purpose. In particular, they must not be brought simply to bring pressure on the respondents to yield to the petitioner's demands, however unreasonable, rather than suffer the losses consequent upon the presentation of a petition or the making of a winding up order.

53. Where the petitioner can achieve his object by other means, therefore, he may be restrained from bringing winding up proceedings. In *Charles Forte Investments Ltd. v Amanda* [1964] 1 Ch 240, a minority shareholder complained of the board's refusal to register transfers of his shares to a third party. He threatened to present a winding up petition unless the board registered the transfers. He was restrained from presenting a petition. The shareholder had other and more suitable remedies available to him, namely an action for rectification of the register or proceeding by way of motion under section 116 of the Companies Act 1948, and his threat to employ the machinery of winding up was an attempt to bring pressure on the board to reverse its decision and an abuse of the process of the court.

54. There is this similarity between that case and the present: in neither case would the winding up of the company achieve what the minority shareholder wanted. But there the similarity ends. In that case the shareholder had other and more suitable remedies available to him: his choice to initiate winding up proceedings was not made in good faith. In the present case Mr Demarco has no other remedy available to him. He does not want the company wound up: but he has no choice but to initiate winding up proceedings if he is to have any hope of receiving a reasonable offer for his shares, an offer to which, if his claim is well founded, he is entitled.

55. The fact that the court lacks the necessary power to make a more suitable order does not mean that a winding up order would

be unjust if Opportunity declines to make a fair offer for Mr Demarco's shares. By presenting a winding up petition on the just and equitable ground Mr Demarco is invoking the traditional jurisdiction of equity to subject the exercise of legal rights to equitable considerations. If he can make good his contention that the business venture which the parties carried on through the medium of the Company possessed the necessary characteristics, then equity will not allow Opportunity to exploit its position to make a profit at his expense. If it wants to carry on the Company's business as a going concern without him, it must offer to pay him the going concern value of his interest. If it is unwilling to pay him more than the break up or liquidation value of his interest, then the court may order that the Company be wound up. This will not obtain more for Mr Demarco than he has already been offered, but it will achieve a fair and just result between the parties by ensuring that they are treated equally.

56. Their Lordships would wish to emphasise that this does not mean that a minority shareholder can use the threat of winding up proceedings in order to bring pressure on the majority to yield to his demands however unreasonable. As *Re a Company (No 003843) of 1986* demonstrates, the court will be astute to prevent such conduct. In a case such as the present, it would be an abuse of the process of the court for a petitioner to commence or continue proceedings after he has plainly received a fair offer for his shares. If he holds out for more, the respondent can apply for the proceedings to be restrained or struck out. The court is fully in control and will not allow its process to be abused.

57. Their Lordships are satisfied that Mr Demarco has not acted unreasonably in rejecting Opportunity's offer to buy his interest, and that by continuing to hold out for a fair offer he is not threatening to abuse the process of the court.

Conclusion.

58. Their Lordships will humbly advise Her Majesty that the appeal should be dismissed with costs.

