

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

FSD CAUSE NO. 122 OF 2019 (RMJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF GLOBAL CORD BLOOD CORPORATION

BETWEEN:

- (1) JAYHAWK CAPITAL MANAGEMENT, LLC**
- (2) JHMS FUND, LLC**
- (3) KENT C. MCCARTHY**



PLAINTIFFS

AND:

- (1) GLOBAL CORD BLOOD CORPORATION**
- (2) MARK D CHEN**
- (3) JENNIFER J WENG**
- (4) KEN LU**

DEFENDANTS

Appearances: Mr. Mark Goodman and Mr. Guy Cowan of Campbells for the Plaintiffs

**Mr. Stephen Atherton Q.C instructed by Mr. Tim Baidam of Carey Olsen
for the First Defendant**

**Mr. Lukas Schroeter of Maples and Calder for the Second, Third and
Fourth Defendants**

Before: The Honourable Mr. Justice Robin McMillan

Heard: 9 and 19 April 2021

Draft Judgement Circulated: 6 May 2021

Judgment Delivered: 21 May 2021

HEADNOTE

*The general principle that costs shall follow the event – the circumstances in which there may
be a departure from that principle – the distinction between misjudgment and misconduct.*



JUDGMENT

1. This matter which concerns the award of costs arises in relation to proceedings begun by the three Plaintiffs by an Originating Summons issued by Loeb Smith and dated 26 June 2019. The Originating Summons was directed to the four Defendants.

The Background

2. The Originating Summons sets out at paragraphs 1-8 a number of questions for the determination of the Court as follows:

"1. The Court's determination of the following questions:

1. *Whether it would be contrary to the public interest under Section 237(7) (e) of the Companies Law (2018 Revision) (the "Companies Law") to permit a statutory merger which constitutes or is likely to constitute a fraud on the minority members of the First Defendant, Global Cord Blood Corporation ("The Company").*
2. *Whether Section 239(1) (b) and Section 239 (2) (b) of the Companies Law may be relied on to deprive members of the Company who dissent from a merger from receiving payment of the fair value of their shares in accordance with Section 238 of the Companies Law, in circumstances where the shares proposed to be offered in exchange for such statutory merger are substantively illiquid, low volume trading shares of low value, despite being listed on a national securities exchange.*



3. *Specifically, whether apparent compliance with Section 239(1) (b) and Section 239 (2) (b) of the Companies Law may be relied on by a majority in control of a company to deprive dissenting minority members of the Company of their rights under Section 238 of the Companies Law to a determination of the fair value of their shares in the Company, a Cayman Islands company, listed on the New York Stock Exchange ("NYSE") with daily trading and liquidity, subject to National Association of Securities Dealers ("NASD"), NYSE and Securities Exchange Commission ("SEC") regulation, with some US\$745 million in cash and no debt (as at 31 March 2019); upon a proposed statutory merger with a Singapore company affiliated with and part owned by the majority shareholders, having cash of just SGD\$43.3 / US\$31.9Million (as at 31 December 2018), listed on the Singapore Stock Exchange ("SGX") but with a small market capitalization and minimal trading activity, and whose low value shares are illiquid; and in circumstances where such merger is not bona fide in the interests of the Company or all its shareholders.*

4. *Whether on a true construction of the Amended and Restated Articles of Association (the "Articles") of the Company, or as a matter of law, any non-executive director who holds a material shareholding in the Company can be deemed to be sufficiently independent and impartial to be able to act in the capacity of an independent non-executive director for the purposes of good corporate governance of an NYSE listed company and in compliance with the NASDRules.*



5. *Whether on a true construction of the Company's Articles or as a matter of law, any non-executive director who is incentivised by or in receipt of substantial remuneration can be deemed independent and impartial and able to act in the capacity of an independent non-executive director for the purposes of good corporate governance of an NYSE listed company and in compliance with the NASDRules.*
6. *Whether on a true construction of the Company's Articles or as a matter of law, the appointment of any independent non-executive director to both to the audit committee of the Company as well as the compensation committee of the Company precludes any truly independent oversight and control over such director himself or herself or the Board of Directors of the Company (the "Board") as a whole, and whether such identical director committee membership represents inadequate internal corporate governance in a NYSE listed company and is unlawful in all the circumstances.*
7. *Whether on a true construction of the Company's Articles or as a matter of law, any non-executive director who is not independent (whether by reason of holding a material shareholding in the Company or by being in receipt of valuable incentives to approve the majority decisions of the Board or for any other reason) is eligible to be appointed to a special committee to determine fairly and impartially whether a statutory merger with Cordlife Group Limited ("Cordlife") a Singapore entity affiliated and part owned by the majority shareholders of the Company on a share for share basis pursuant to Section 239 of the Companies Law is in the best interests of the Company and all its shareholders including minority shareholders thereof.*



8. *Whether on a true construction of the Company's Articles or as a matter of law the identical director membership of the audit committee, compensation committee and the Special Committee of the Company represents inadequate internal corporate governance in a NYSE listed company and is unlawful in all the circumstances."*

3. Then at paragraphs 9, 10 and 11 and in light of what had immediately preceded those paragraphs application was made for the following declarations:

"II. The Following Declarations:

9. *That the Second, Third and Fourth Defendants (the "Defendant Directors") are disqualified from sitting on the Company's audit committee by reason of a history of bias in approving self-dealing transactions by the majority/ controlling shareholders and a conflict of interest in being unable to exercise any independent oversight over themselves as directors.*
10. *That the Defendant Directors are disqualified from sitting on the Special Committee to determine fairly and impartially whether a merger with Cordlife, an entity affiliated and part owned by the majority shareholders of the Company, on a share for share basis pursuant to Section 239 of the Companies Law is in the best interests of the Company and all its shareholders including minority shareholders thereof, by reason of their history of bias in approving self-dealing transactions by the majority shareholders to the prejudice of minority shareholders, and a lack of impartiality and independence being under a conflict of interest.*



11. *That the Plaintiffs are entitled as dissenting members to object to the proposed statutory merger and to file a petition with the Court under Section 238 of the Companies Law for a determination of the fair value of the shares of all dissenting members.”*

4. An interlocutory injunction was sought at paragraphs 12 - 13:

“III. Interlocutory Injunction

12. *An order restraining the Defendant Directors from acting as members of the Special Committee or taking any action as members for or on behalf of the Special Committee in connection with the proposed merger of the Company and Cordlife until the Court's determination of the matters set out in this Originating Summons herein.*

13. *Further or alternatively, an order directing the Company to revoke the appointment of the Defendant Directors as members of the Special Committee immediately in accordance with Article 120 (1) of the Company's Articles and to refrain from appointing any new members to the Special Committee pending the Court's determination of the matters set out in this Originating Summons herein.”*

5. The complaints relied upon were bias on the part of the Defendants as Directors and inadequate corporate governance.



6. In addition the Plaintiffs made a Summons Application dated 4 July 2019 for orders in these terms:

- “1. *An order restraining The Second, Third and Fourth Defendants ("The Defendant Directors") from acting as members of a Special Committee or taking any action as members for or on behalf of the Special Committee appointed in connection with the proposed merger of the First Defendant Company and Cordlife Group Limited registered in Singapore ("Cordlife") until the Court's determination of the matters set out in the Originating Summons filed herein on 25 June 2019 or further order.*
2. *Further or alternatively, an order directing the First Defendant Company to revoke the appointment of the Defendant Directors as members of the Special Committee immediately in accordance with Article 120 (1) of the Amended and Restated Articles of Association and to refrain from appointing any new members to the Special Committee pending the Court's determination of the matters set out in the Originating Summons dated 25 June 2019 herein or further order.*
3. *Directions for the service of any evidence on behalf of the Defendants in response to the Plaintiffs' evidence filed in support of the Originating Summons and this application; and directions for service of evidence in reply by the Plaintiffs.*
4. *Such further or other case management directions as the Court sees fit.*
5. *That the costs of an incidental to this summons be paid by the First Defendant Company.”*

7. In support of these collective applications was an Affidavit of Mr. Michael D. Schmitz apparently dated 5 July 2019. Mr. Schmitz is the Chief Financial Officer of the First Plaintiff company, Jayhawk Capital Management, LLC (“Jayhawk”).



8. Mr. Schmitz summarised Jayhawk's concerns at paragraphs 5- 7:

"SUMMARY

5. *The Plaintiffs are concerned that the statutory framework which permits a merger to take place between two companies whose securities are both listed on national exchanges on a share for share swap basis, is being deliberately abused by the majority shareholders in control of the Company to avoid paying dissenting minority shareholders fair value for their shares. As set out in the Originating Summons, the Plaintiffs seek the Court's determination of legal questions relating to whether technical but not substantial compliance with Section 239 of the Companies Law (2018 Revision) (the "Companies Law") in respect of a statutory merger is sufficient to deprive the Plaintiffs as dissenting shareholders of their right to a determination of the fair value of their shares under Section 238 of the Companies Law.*
6. *The proposed merger is not an arm's length transaction with an unconnected entity. Sanpower, the group controlling the Company through its majority shareholder, Nanjing, already controls over 30% of Cordlife, so it is a proposal which requires close scrutiny and unbiased assessment by a genuinely independent Special Committee. We therefore seek the Court's determination of questions arising in respect of the internal corporate governance of GCBC as a NYSE listed company. Specifically whether the Defendant Directors can be deemed to be acting impartially and independently as non-executive directors on the board of directors of GCBC ("The Board") when there appears to be a history of bias and rubber-stamping all decisions of the majority shareholders. Also whether under the Articles or as a matter of law, the Defendant Directors are eligible to sit simultaneously on the Board, the Audit Committee, the Compensation Committee and*



most importantly, on a Special Committee formed to consider the merits of the proposed merger of GCBC with a connected entity, Cordlife.

7. *The Plaintiffs seek declaratory relief and an interlocutory injunction to restrain the Defendant Directors from serving on the Special Committee or taking any further action as the Special Committee prior to the Court's decision in this matter.”*

9. Mr. Schmitz explained that the First Defendant, Global Cord Blood Corporation (“GCBC”) is a New York Stock exchange (“NYSE”) listed company and is China's leading provider of cord blood collection, laboratory testing, hematopoietic stem cell processing and stem cell storage services. It is the first and largest umbilical cord blood banking operator in China in terms of geographical coverage and the only cord blood banking operator with multiple licences from the Chinese Government to operate in various licensed regions. The Company transferred by continuation to the Cayman Islands on 30 June 2009 and is registered under # 227732. It has been listed on the NYSE since November 2009 (NYSE: CO).

10. He continued at paragraphs 10- 12:

“THE PLAINTIFFS/ MINORITY SHAREHOLDERS

10. *Jayhawk first became a shareholder of the Company on April 2, 2007, even before it was listed on the NYSE, recognising the economic potential of this innovative bio-technology business in the Chinese market.*

11. *Jayhawk is an investment manager, founded in 1995 and based in Shawnee, Kansas, that manages alternative investment vehicles, primarily focused on investments in Chinese companies. The Second Plaintiff is an investment vehicle formed and managed by Jayhawk. The Third Plaintiff is the Founder and President of Jayhawk and is deemed to be the beneficial owner of each Plaintiff's shares.*



12. *The Plaintiffs are minority shareholders, currently holding or controlling an aggregate 11.0% equity interest in the share capital of the Company. The Plaintiffs' shareholdings have been substantially diluted by the issuance of new shares in the Company in 2014 and 2017, and as I shall describe below, we were denied any right to participate in specific convertible notes issued by the Company in 2012 on favourable terms offered to a third party and the majority shareholding group itself at the relevant time."*
11. It was explained at paragraph 15 that the Plaintiffs (and the Plaintiffs believed other minority shareholders), had lost trust and confidence in the Board of the Company and in the Defendant Directors as supposedly independent directors, because during the past seven years they had approved what are described as a number of highly questionable self-dealing transactions at the behest of the majority shareholders. The only rational explanation for the Board's management of the Company in a manner which continued to depress its share price and ensure it remains artificially low was said to be to facilitate a privatisation offer or a merger offer by the majority shareholders (or parties connected with the majority shareholders) at a low price, acting in bad faith to deprive minority shareholders of fair value for their investment and to maximise profits for themselves. This is what the Plaintiffs say they believe has been going on.
12. Reference to a Merger Offer was made at paragraphs 41 – 42:

"THE MERGER OFFER

41. *On 4 June 2019 the Board received an "indicative non-binding proposal" letter from Cordlife, pursuant to which Cordlife proposes to combine the businesses of Cordlife and the Company by way of a statutory merger (the "Merger Offer"). The proposal letter appears at MSI Tab F /24.*



42. *On 6 June 2019, the Company announced that in response to the Merger Offer that the Board had formed a special committee of independent directors (the "Special Committee") made up of the Defendant Directors: the Second Defendant, Mark D Chen; his spouse, the Third Defendant, Jennifer J Wen; and Fourth Defendant, Dr. Ken Lu with The Second Defendant serving as the chair of the Special Committee (See MS1, Tab F /25)."*

13. There was further reference at paragraph 49 to the necessity of having a genuinely independent assessment and scrutiny of the Merger Offer and the fairness of the value being attributed to the shares of the Company in a proposed merger with a connected entity. It was claimed that the role of the Special Committee and the fiduciary duties owed by the Board to the Company and all its shareholders to act fairly in the interests of all shareholders were therefore the only protection available to the minority shareholders of the Company.

14. Finally in this regard Mr. Schmitz states at paragraph 81:

"81. Unless an urgent injunction is granted by the Court either to restrain the Defendant Directors from sitting as the Special Committee to consider the statutory merger between the Company and Cordlife or in the form of an order to the Company to revoke the appointment of the Defendant Directors to the Special Committee, (with such injunction to continue until the Court has determined the questions and issues raised in the Originating Summons), the Special Committee is likely to rubber stamp the merger being in the interests of Nanjing the majority shareholder. The Plaintiffs' entire application will then be rendered nugatory."



15. Mr. Chen Bing Chuen Albert in his Affidavit dated 16 July 2019 states that he is the Chief Financial Officer of the First Defendant GCBC. In reply to Mr. Schmitz he stated at paragraphs 16-17:

“The Company's undertaking and potential prejudice to the Company

16. *In support of the Company's present application for an adjournment of the 4 July Summons, the Company is prepared to provide the following undertaking:*

"AND UPON the First Defendant undertaking that the First Defendant's board of directors will not authorise the proposed statutory merger between the First Defendant and Cordlife Group Limited without either (a) providing the Plaintiffs 14 days notice or (b) obtaining a further order of this Court permitting it to do so."

17. *I verily believe that with the above undertaking, the Plaintiffs' position will not be prejudiced if the adjournment is allowed since the proposed statutory merger between the Company and Cordlife Group Limited (Cordlife), which is one of the Plaintiffs' primary concerns, will not and cannot proceed unless the condition in the proposed undertaking is satisfied."*

The Order for Adjournment

16. On 17 July 2019 an initial hearing took place attended by the then counsel for the Plaintiff, Ms Sarah Dobbyn of Sinclairs, and also by counsel for the Defendants.



17. As a result of the hearing the Court made certain directions for advancing the matter following an adjournment, and these will be set out. However, of particular note in this regard are the various recitals which have undertakings setting the stage for all that has followed.
18. The Order states:

“UPON the Plaintiffs' Summons dated 4 July 2019 (4 July Summons)

AND UPON The First Defendant's Summons for an Adjournment dated 16 July 2019

AND UPON hearing counsel for the Plaintiffs, counsel for the First Defendant and counsel for the Second, Third and Fourth Defendants

AND UPON reading the Affidavit of Tetrina Rivers, the Affidavit of Michael D Schmitz and corresponding exhibit MS-1 [The Schmitz Affidavit"], the Affidavit of Service dated 5 July 2019 and the Affidavit of Bing Chen Albert and corresponding exhibit AC-1 dated 16 July 2019.

AND UPON the First Defendant undertaking that the First Defendant's board of directors (the Board) will not authorise the proposed statutory merger between the First Defendant and Cordlife Group Limited without (a) providing the Plaintiffs 28 days' notice or (b) obtaining a further order of this Court permitting it to do so.

AND UPON the Second, Third and Fourth Defendants each undertaking that the special committee appointed by the Board on 6 June 2019, comprising the Second, Third and Fourth Defendants, will not recommend the proposed statutory merger between the First Defendant and Cordlife Group Limited to the Board or the First Defendant's shareholders without either (a) providing the Plaintiffs 28 days' notice or (b) obtaining a further order of this Court permitting it to do so

IT IS HEREBY ORDERED THAT:



1. *The service of the Originating Summons, the Summons dated 4 July 2019 and the Affidavit of Tetrina Rivers Defendants on 5 July 2019 and the service of the Schmitz affidavit on 11 July 2019 on the Second to Fourth Defendants at the First Defendant's registered office is deemed good service.*
2. *The 4 July Summons be adjourned.*
3. *On or before 19 July 2019, each of the Defendants shall file their respective Acknowledgements of Service in respect of the Plaintiffs' Originating Summons dated 26 June 2019.*
4. *The parties shall endeavour to agree directions for the hearing of the Originating Summons dated 26 June 2019.*
5. *Save as might be agreed by the parties or directed by the Court, any other directions or procedural time limits provided for in the GCR, including without limitation the directions set out in GCR Order 28 Rule 1 A, shall not apply.*
6. *There be liberty to apply.*
7. *Costs reserved."*

The Hearing on 13 September 2019

19. A further Chambers hearing took place on 13 September 2019, the object of which was to settle Directions for the hearing of the Originating Summons itself. Notwithstanding lengthy submissions from counsel and a shared understanding of the practical steps that would be required, no actual Order for Directions was ever finalized, nor in the absence of agreement between counsel as to the exact terms was any effort subsequently made by the Plaintiffs to bring that issue before the Court for a final adjudication.



20. Instead, an Amended Originating Summons was filed and served by Sinclairs despite no leave to do so having been sought or granted and despite the procedural impossibility of doing so unilaterally and without leave.
21. On this occasion paragraph 11 was purportedly amended to seek a determination by the Court of the fair value of the Plaintiff's shares in GCBC "*pursuant to the Court's equitable or inherent jurisdiction*". Paragraph 17 was also purportedly amended to include a determination of the Plaintiff's shares in GCBC pursuant to the same equitable and/or inherent jurisdiction.
22. By Notices of Acting filed in August and October 2020, Campbells was appointed to act as attorneys for the Plaintiffs, replacing Sinclairs.

The Summons to Strike out

23. The next significant procedural event was the filing of a Summons for Strike Out by the First Defendant dated 20 January 2021.
24. The Summons sought the following Orders:

- "1. That the Plaintiffs' claim by way of Originating Summons in these proceedings, including for these purposes a purported amended version of the Originating Summons filed in Court without leave on 20 September 2019 (the "Originating Summons"), be struck out and dismissed in its entirety;*
- 2. That the undertakings that have been provided to the Court by the Defendants, and other relevant individuals (as directors of the First Defendant) in the course of and for the purposes of these proceedings be discharged forthwith;*



3. *That the Plaintiffs pay the costs of the Defendants of and occasioned by the Originating Summons, to be taxed on the indemnity basis if not agreed; and*
4. *Such further or other orders as the Court sees fit.”*

25. This Summons Application was supported by the Third Affidavit of Mr. Chen Bing Chuen Albert dated 20 January 2021.

26. He provided this explanatory summary of GCBC’s position at paragraph 7:

“Executive Summary

7 *The grounds for the Company's present strike out Application will be elaborated upon in this Affidavit and may be summarised as follows:*

- (a) *The originating summons process commenced by the Plaintiffs is not a suitable originating process, as it is a summary procedure which should not be used for claims such as those contained in the Originating Summons;*
- (b) *The Plaintiffs' Originating Summons, in its initial and purportedly amended iterations, is incoherent in terms of the relief sought;*
- (c) *The Plaintiffs have failed to take any steps to obtain the Court's leave to amend and file their proposed amended Originating Summons;*
- (d) *The Plaintiffs have failed to take any steps to progress the Originating Summons for over a year and settlement negotiations have stalled;*



- (e) *It is evident from the Plaintiffs' inordinate and continuing delay in progressing the proceedings that they are pursuing these proceedings for an improper and/or collateral purpose;*
- (f) *The failure of the Plaintiffs to progress these proceedings is causing the Company prejudice as a publicly listed company, including reputational damage, and is hindering its day-to-day operations;*
- (g) *The Company should be allowed to proceed with its affairs without being adversely affected by the presence of the proceedings; and*
- (h) *In light of the above, the Originating Summons is an abuse of process of the Court."*

27. Equally importantly, an account of more recent events was then set out at paragraphs 11-14:

"11 Under the terms of the Proposed Merger, the Company's shareholders would receive shares in Cordlife as compensation for their shares in the Company. The Company's current shareholders would cease to be shareholders of the Company and become shareholders of Cordlife, which would be the parent company of the surviving Cayman subsidiary.

12 Upon receipt of the proposal for the Proposed Merger, on 4 June 2019, the Board formed a special committee of independent directors on 6 June 2019, comprising the Second, Third and Fourth Defendants (the "Special Committee"). This Special Committee is tasked with evaluating the Proposed Merger and undertaking any negotiations with Cordlife on behalf



of the Company. Upon completion of the negotiations and the evaluation by the Special Committee, the Special Committee will make a recommendation to the Board to either reject the Proposed Merger, or to endorse it and recommend acceptance to the Company's Board and its shareholders. If the Special Committee recommends the Proposed Merger, the Board would then need to consider whether to accept the Special Committee's suggestion and whether to call an extraordinary general meeting of the Company's shareholders for the purpose of putting to a vote whether to approve or reject the Proposed Merger.

13 *In November 2019, Mr. Jack Chow ("Mr. Chow") joined the Board as an independent director. Mr. Chow is a partner of VMS Private Equity. Prior to joining the VMS Group, Mr. Chow was an audit partner at KPMG. Mr. Chow is a former member of the Listing Committee of the HKEX. He was also the Chairman of Mainland Development Strategies Advisory Panel of the Hong Kong Institute of Certified Public Accountants and Council Member of Hong Kong Institute of Chartered Secretaries. Mr. Chow replaced the Third Defendant as a member of the Special Committee.*

14 *In February 2020, Mr. Siu Chuen Cheng ("Mr. Cheng") joined the Board as an independent director and member of the Special Committee. Mr. Cheng currently serves as a partner at the law firm of C&T Legal LLP. He served as a consultant to China Minsheng Financial Holding Corporation Ltd during March 1, 2019 to July 21, 2020. Mr. Cheng has over 10 years' experience in legal and compliance for corporations and banks, and has been providing*



year-round legal consultancy for various banks and solicitors. As a result, the Special Committee now consists of 4 independent directors, 2 of whom are new members to the Board, and a majority the Board are experienced independent directors, with experience from areas such as accounting, business and law.”

28. In other words it appears at least that the allegation that the Special Committee lacked a component of true independence had now effectively fallen away.
29. Shortly after this it became clear that the Proposed Merger would not in fact proceed. It is uncontested that the Proposed Merger has been abandoned. However, the Court is unable to deduce from or even to infer from that abandonment that the current proceedings were causative of that outcome or influenced the recommendation of the Special Committee in any way.

The Application to Strike Out

30. The First Defendant’s application to strike out the Originating Summons came on for hearing on 9 April 2021. By that stage it was common ground among the parties that there was no longer any practical purpose to the Originating Summons proceedings themselves, as the Proposed Merger had ceased to be the subject of judicial consideration.
31. The Court on that occasion decided to dismiss the Originating Summons in the exercise of its inherent jurisdiction. Continuing such proceedings would have been an abuse of the process of the Court and entirely pointless. In addition, the Court in exercising its inherent jurisdiction took into account both the delay which had occurred and the conduct of the proceedings, taking those proceedings into account broadly and as a whole.



32. However, in reaching that decision the Court declined to do so in specific furtherance of the Summons Application, and it was stated clearly that the Court would proceed to consider the separate matter of costs without preconception and as the circumstances warranted.

The Law Applicable to Costs

33. The general principles governing entitlement to costs are contained in GCR O.62, r.4 (2):

“4. (2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.”

34. GCR O. 62, r. 4 (5) further states:

“(5) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.”

35. The circumstances of the instant case are complicated and indeed it has been necessary to set out at some length what the Court considers to be the most salient features. Accordingly, two questions arise: what is the event and are there circumstances whereby some other form of order than one for costs following the event should be made on this occasion as to the whole or any part of the costs?



36. Both the Plaintiffs and the Defendants have drawn to the attention of the Court additional sources of authority to assist in these determinations.
37. Mr. Goodman on behalf of the Plaintiffs refers to certain *dicta* of Nourse LJ in *In re Elgindate Ltd* (No. 2) [1992] 1 WLR 1207 at page 1214:

“The principles are these. (i) Costs are in the discretion of the court. (ii) They should follow the event, except when it appears to the court that in the circumstances of the case some other order should be made. (iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or cost of the proceedings he may be deprived of the whole or a part of his costs. (iv) Where the successful party raises issues or makes allegations improperly or unreasonably, the court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs. Of these principles the first, second and fourth are expressly recognised or provided for by rules 2(4), 3(3) and 10 respectively. The third depends on well established practice.”

38. Mr. Goodman points out that this authority was applied by the Grand Court in *Farrell v. Bodden* [2013 (2) CILR 411].
39. In addition Mr. Goodman places particular emphasis on the *dicta* of Henry J in *Barretts & Baird (Wholesale) Ltd & Others v Institution of Professional Civil Servants & Others* [1988] Lexus Citation 1753.

40. Henry J states at page 5:

“Now in most cases of discontinuance, that may well be just, because in most cases of discontinuance, discontinuance equals defeat, effectively, or the acknowledgement of a defeat or a likely defeat. But it is equally possible, and the plaintiffs assert it to be the situation in this case, that discontinuance reflects not defeat so much as that the matter has now become academic save for the question of costs.

In those circumstances, where the matter is effectively academic, the court should then look at the matter to see whether the general rule applies because I am satisfied that the general rule should only apply where the discontinuance can safely be equated with defeat or the acknowledgement of likely defeat....”

41. The learned Judge adds at page 7:

“If the general rule as to discontinuance relied on by the defendants applied in all cases, even where the discontinuance was because where the matter was largely academic, then inevitably it would lead to more academic or half academic cases being contested simply to avoid the incident of costs. There is a public interest in the fact that such matters should not be litigated.”

42. The Plaintiffs in seeking to recover costs also rely upon the observation of Henry J at page 8 that he was satisfied that the Plaintiffs obtained a tangible benefit from the proceedings that they would not otherwise have obtained. The Court will return to this aspect later in the Judgment.



43. The Defendants on the other hand seek indemnity costs against the Plaintiffs as summarised at paragraphs 50 - 52 of the First Defendant's Skeleton Argument dated 1 April 2021:

*"F. THE COMPANY AND THE OTHER DEFENDANTS OUGHT TO BE AWARDED COSTS
ON AN INDEMNITY BASIS*

50. *The court's power to make an inter partes order for costs to be paid on the indemnity basis is contained in GCR, O.62, rr. 4(11) and 11(2): Al Sadik v Investcorp Bank BSC and five others [2012 (2) CILR 33] ("Al Sadik"). GCR, O.62, rr. 4(11) and 11(2) 46 provide as follows:*

"4.(11) The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently.

11.(2) Where it appears to the Court in any proceedings that anything has been done or that any omission has been made improperly, unreasonably or negligently by or on behalf of any party, the Court may order that the costs of that party in respect of the act or omission, as the case may be, shall not be allowed and that any costs occasioned by it to any other party shall be paid by him to that other party."



51. *The court in Al Sadik held that the application of both rules depends upon establishing that a party has behaved improperly, unreasonably or negligently in some way, but are aimed at dealing with misconduct in two different contexts. Rule 4(11) is aimed at substantive misconduct on the part of a party personally which results in the court expressing its disapproval by making an order for indemnity costs against him. Rule 11 is aimed at procedural misconduct by a party and/or on its behalf which causes their opponent to waste money on legal fees and expenses which would not otherwise have been incurred.*
52. *In the present case, the Plaintiffs acted improperly and unreasonably by bringing premature, hypothetical and unsustainable claims in the Originating Summons, holding the proceedings in abeyance without taking any steps to progress them or withdraw them for more than a year, ignoring the Company's invitations for them to progress or discontinue the proceedings, and unreasonably rejecting the Company's proposal in February 2021 for the Plaintiffs to discontinue the proceedings and pay the Defendants' costs on a standard basis to avoid this strike out Application. For these reasons, it is submitted that the Defendants should be awarded indemnity costs in respect of the Originating Summons and the present Application."*



The Submissions of the Plaintiffs and of the Defendants

44. The Plaintiffs assert that they are in substance successful and should be awarded their costs. Their position is largely summarized at paragraph 23 C. of the Plaintiffs' Skeleton Argument dated 6 April 2021:

"C. as set out in Schmitz 3, the Plaintiffs respectfully submit that they have achieved the purpose of their Originating Summons which, as the Company has acknowledged, was to prevent the Proposed Merger from proceeding (see Schmitz 3, paragraph 7). Additionally, the Plaintiffs also received significant undertakings from the Company in lieu of an injunction, and the Special Committee has been reconstituted by the Company;"

45. The First Defendant in contrast submits that the circumstances are entirely distinguishable from success. A helpful summary of the criticisms made is found at paragraph 5 - 6 of its Skeleton Argument:

"5. The current proceedings were:

- a. Commenced using a wholly inappropriate and misconceived procedural framework;*
- b. Wholly premature in their nature;*
- c. Hypothetical in their nature;*
- d. Sought relief which was of no utility;*

- e. Sought relief which was unsustainable and incoherent in that it was not premised on any proper legal or juridical footing;*
- f. Not meaningfully or substantively progressed (by the time of the hearing) for around 19 months (i.e., since September 2019); and*
- g. Not instigated or pursued for a legitimate purpose.*

6. It follows, that in the circumstances of the case, the Originating Summons should be struck out and the Company's / the Defendants' costs of and occasioned by the Originating Summons should be paid by the Plaintiffs, to be taxed on the indemnity basis."

46. The Court will address some of those criticisms in due course in greater detail. However, for the purpose of determining whether the Plaintiffs should be awarded their costs the Court finds the criticisms to be in principle well founded.

47. Although the Plaintiffs claim to have been vindicated in terms of the ultimate outcome, nonetheless it is apparent that at different stages of the proceedings the Plaintiffs sought different objectives: to prevent the Proposed Merger, to obtain a valuation of the dissenting members shareholdings even though the Court had no jurisdiction to provide it, and to establish that the proposed merger constituted "a fraud on the minority shareholders". In other words, as the Defendants contend there was considerable confusion throughout the course of the case. Injunctive relief was sought, a determination of fair value was sought notwithstanding the legal inapplicability of section 238 of the Companies Act and there was even a suggestion in terms of allegations of fraud on the minority of shareholders. Damages in furtherance of some



kind of quasi- derivative action were being pursued as well (see paragraph (x) on page 10 of the Originating Summons).

48. The fact that ultimately the Special Committee recommended an outcome not inconsistent with the first of these objectives does not mean that any of the objectives were actually successful, except perhaps in the qualified sense that coincidence is a success.
49. The Court has formed the view that the Plaintiffs were not successful and that there is no merit in their claim that costs should follow the event and be awarded in their favour. When the situation is examined in broader terms it is entirely clear that it is the Defendants who have been successful.
50. The issue then becomes whether costs should follow the event of that success or whether the circumstances themselves justify some other form of order.
51. The Court does not intend to consider exhaustively the individual issues to which these proceedings either gave rise or may have given rise. To do so would be to encourage litigation that has no end and has no purpose. Instead, the Court will identify some of the primary reasons why in all the circumstances the Defendants justifiably claim a costs entitlement.
52. Mr. Atherton QC on behalf of the First Defendant, and with the support of the remaining Defendants contends that the proceedings were both premature and hypothetical, that the Originating Summons was conceptually flawed and the relief sought was unsustainable, and that due to the prospect if not the certainty of extensive disputes of fact and contentious issues of law these matters are unarguably unfit to be pursued by way of Originating Summons in any event.



53. The next area of criticism concerns the terms in which the Originating Summons is drafted, with allegations that the reliefs sought are embarrassing and abusive. The Court has already set out a synopsis of this category of concerns, and the Court has much sympathy for the proposition that such an array of conflicting and even contradictory objectives could ultimately lead the Plaintiffs nowhere. Putting the matter another way, if proceedings properly analyzed constitute a waste of the Court's time then they are necessarily an abuse of the Court's process.
54. Taking into account the interrelationship of sections 238 and 239, these are matters of law where a party may well fall into error without necessarily having culpably fallen into error. In effect even where an adverse costs order may come to be made it may well not be appropriate to do so on an indemnity basis.
55. In addition to the point as to the procedural unsuitability of originating process where facts including as to conflicts of interests are inevitably contested, the Defendants also complain of what they describe as improper conduct, in the form of various delays, identified at paragraph 40- 41 of the First Defendant's skeleton argument.
56. They complain, *inter alia*, that the Plaintiffs deliberately refused to prosecute these proceedings or to take appropriate action to bring them to an end (including after the changes in the Special Committee and the conclusion of the Proposed Merger process).
57. They contend that the Plaintiffs failed to respond and caused their counsel to fail to respond to the Company's invitations, to progress or bring the proceedings to an end, only responding when forced to do so by reason of and only after the Company had no other option but to issue the present strike out application.



58. The Plaintiffs responded that the assertion as to prematurity is unmeritorious and that if the Defendants genuinely considered that the Originating Summons was an abuse of process and/or was premature then they could – and should – have applied to strike out the proceedings at their outset, thereby avoiding all of the time and costs that they have purportedly incurred since June 2019 (and which they are now seeking to recover from the Plaintiffs). Instead, they say the Defendants took no steps at all to try to strike out these proceedings until 20 January 2021, some 19 months after the Originating Summons was issued (and just 3 weeks before the abandonment of the Proposed Merger was announced).
59. As to the allegation of lack of conceptual clarity, the Plaintiffs submit at paragraph 8 (iii) of their Skeleton Argument that paragraphs 9-10 of the Originating Summons are “*wholly unambiguous and the relief sought therein is plain and clear*”. With great respect, a pleading may be plain and clear and in the overall circumstances still be not only wrong but also fundamentally misconceived.
60. Finally in terms of how the Originating Summons was drafted and purportedly amended, the Plaintiffs submit at paragraph 8 (iv) that they could, if necessary, have applied for leave to amend it, bearing in mind the Court in normal circumstances will not dismiss the proceedings but will give leave to amend, unless satisfied that no amendment will cure the defect.

The Findings of the Court

61. In summary, it is usually a relatively straightforward task to determine which party has been successful but as the Court has pointed out it is necessary first to identify what constitutes success and then whether and to what extent if any and in all the circumstances there should be a departure from the general practices and procedures.



62. As the Court has earlier indicated this is not a case where by the end of the litigation the Plaintiffs upon the evidence presented have causally established anything which is of any or any significant value to them. A decision as whether that even could be established has not been investigated by the Court, but obviously that does not prevent the Court from finally disposing of the costs.
63. Notwithstanding the fact that no decision was ultimately made on the merits the Plaintiffs claim with some justification that in the course of the proceedings they did obtain a tangible benefit in the form of the undertakings previously set out. Indeed it can be argued that GCBC took steps which it would otherwise not have taken.
64. However this must be seen in light of a much broader picture. There is of course no perfect time at which to commence litigation, but the Plaintiffs stand open to the persuasive criticism that they moved forward much too quickly, and that conceptually they failed to identify either their primary objectives or the correct procedural way in which to attain them.
65. At one point they clearly sought to prevent the Proposed Merger. At another point they pursued a strategy to obtain fair valuation of their shareholdings. At another point the elements of alleged fraud on the minority and the elements of the derivative action began to appear.
66. At yet another point consideration appears to have been given to a petition for just and equitable winding up coupled with an order providing for the purchase of the Plaintiffs' shares taken as the probable measurement of their success.
67. As the First Defendant has described the situation at paragraph 25 of its Skeleton Argument these are hypothetical, academic and irrelevant issues, and they would inevitably remain so unless and until a coherent and properly structured approach was adopted to their respective implementations.

68. In addition as we have already seen the Plaintiffs have not discharged their responsibility to proceed expeditiously and conscientiously and as thoroughly as would have been expected. It seems to this Court that the Plaintiffs' prosecution of this matter has proved inadequate, and this may well be because of the conflicting objectives with which they had chosen to grapple.
69. However, misjudgment is not misconduct. It is more of a matter of there being here a partially wrong procedure adopted than an entirely wrong procedure.

Conclusion

70. For the reasons set out above the Court concludes that the Defendants have been successful and that there are no circumstances established under which costs should not follow the event.
71. Nonetheless, the Court finds that nothing has been done by the Plaintiffs nor any omissions made by the Plaintiffs improperly, unreasonably or negligently.
72. Accordingly costs are awarded to the Defendants upon the standard basis, to commence from 17 July 2019, which is the date of this Court's first Order for Directions and the date from which the undertakings became operative.
73. There shall be no order as to costs in respect of any costs incurred before that date.
74. The Order of the Court shall include the costs of the Defendants also incurred in respect of this hearing.



MR JUSTICE ROBIN MCMILLAN

HONOURABLE JUDGE OF THE GRAND COURT