

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

3 **CAUSE NO: FSD 54 OF 2021 (CRJ)**

4 **IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)**
5 **AND IN THE MATTER OF MADERA TECHNOLOGY FUND (CI), LTD**

6
7 **BETWEEN: FIDEICOMISO F/000118**

8 **PETITIONER**

9 **AND**

10 **MADERA TECHNOLOGY FUND (CI), LTD**

11
12 **RESPONDENT**

13
14 **Appearances: Mr. James Eldridge and Mr. Lukas Schroeter of Maples and Calder (Cayman**
15 **LLP) for the Respondent**

16
17 **Mr. Peter Hayden and Mr. Laurence Aiolfi of Mourant for the Petitioner**

18
19 **Before: The Hon. Justice Cheryll Richards Q.C.**

20
21 **Heard: 4th June 2021**

22
23 **Decision: 11th October 2021**

24
25 **Draft Judgment: 3rd November 2021**
26



27 **HEADNOTE**

28 *Application to strike out, contributory winding up petition, abuse of process, allegations of collateral*
29 *purpose, whether alternative remedies, buy-out offer.*

30



JUDGMENT

- 1
- 2
- 3
- 4 1. By Summons dated 29th March 2021, Madera Technology Fund (CI), Ltd (“the Company”)
- 5 applies for the strike out of the Petition dated 5th March 2021. The application is made pursuant
- 6 to GCR O.18 r.19 and the Court’s inherent power to prevent an abuse of its process. The Order
- 7 provides *inter alia* that the Court may at any stage order a petition to be struck out on the ground
- 8 that it:
- 9 (a) “discloses no reasonable cause of action or defence, as the case may be; or
- 10 (b) is scandalous, frivolous or vexatious; or
- 11 (c) may prejudice, embarrass or delay the fair trial of the action; or
- 12 (d) is otherwise an abuse of the process of the court.”
- 13
- 14 2. The Petition which is filed by Fideicomiso F/000118, (“the Petitioner”) seeks the winding up
- 15 of the Company pursuant to s.92 (e) of the Companies Act (2021 Revision) on the basis that it
- 16 is just and equitable to do so. It is said that the appointment of independent liquidators is
- 17 necessary in order to take control of the assets of the Company and investigate its affairs.
- 18
- 19 3. The grounds for the Petition are summarised in the Petitioner’s proposed draft amended
- 20 Petition as follows, that:
- 21 i) “ The Company sought to compulsorily redeem the Petitioner’s shares in the Company
- 22 in breach of the common law obligation and/or an implied term of the Articles of
- 23 Association to exercise powers for proper purpose;
- 24 ii) The Company failed to convene an extraordinary general meeting of the members of
- 25 the Company in breach of the terms of its Articles of Association and/or contrary to
- 26 representations in the Company’s Confidential Explanatory Memorandum;
- 27 iii) The Company converted the Petitioner’s shares into non-voting shares in breach of the
- 28 common law obligation and/or implied term of the Articles of Association to exercise
- 29 powers for proper purpose;

- 1 iv) The Petitioner has suffered a justifiable loss of faith in the Company’s management;
2 and
3 v) It is necessary for there to be an independent investigation into the affairs of the
4 Company.”
5

6 4. The Company was registered in the Cayman Islands as an exempted investment Company on
7 the 6th November 2014 and commenced operations on the 1st January 2015. It operates as a
8 feeder fund, which is part of a master feeder structure through which it invests almost all of its
9 assets. The Company offers investments in a number of share classes, one of which is Class
10 A, Accolade E-1 Sub-Class which are solely invested in Accolade Inc. The Accolade shares
11 were subject to certain restrictions by which they were not freely tradeable until the 29th
12 December 2020. Mr. Kristopher Drankiewicz was the sole director of the Company at the time
13 it was established. On 1st January 2020, the Company appointed a second director, the wife of
14 Mr. Drankiewicz, Ms. Liliana Macias. In March of 2021, the Company appointed its first
15 independent director, Mr. Ronan Guilfoyle of Calderwood. It is said that this was done, in an
16 effort to bolster the Company’s corporate governance structure. The Investment Manager of
17 the Company and its General Partner are limited liability companies registered in Delaware,
18 U.S.A. The Managing Member of the General Partner is Mr. Drankiewicz.
19

20 5. The Petitioner is a Trust established under the laws of Mexico. It is owned by certain members
21 of the Bours family. The Petitioner was introduced to the Company in 2018 by a member of
22 the family, Mr. Mario Bours Laborin (“Mr. Bours”). Mr. Bours is described as then being an
23 employee of an affiliate of the Investment Manager who worked alongside Mr. Drankiewicz
24 and was on good terms with him. Mr. Bours also served as a liaison between the Petitioner and
25 the Company. In August 2018 the Petitioner, by an investment of some US\$5.5 million,
26 subscribed for an amount of Class A, Accolade E-1 shares in the Company and obtained what
27 was reported to it to be an ownership interest of approximately 29.5% together with various
28 rights including rights to information and to vote. At the time, the Petitioner was the sole
29 investor in this class of shares.
30
31
32





1 **BACKGROUND**
2

- 3 6. The Petition is supported by two other shareholders and is verified by the First Affidavit of Mr.
4 Daniel Alberto Salazer Ferrer, the Chief Financial Officer of the Petitioner. He provides some
5 of the background to the matter. In summary, the Petitioner asserts that a series of actions and
6 or omissions by the Company over time provide evidence that the Company's affairs have been
7 mismanaged and that there has been oppressive and or discriminatory conduct towards it. The
8 Petitioner also asserts that as a result of these matters, there is justifiable loss of confidence in
9 the probity with which the affairs of the Company are being conducted.
- 10
11 7. There is agreement that there was initially an amicable relationship between the parties through
12 to February 2020 and as to the broad sequence of events. There is disagreement as to the
13 intention and motive underlying various actions.
- 14
15 8. In September 2019, Mr. Bours' relationship with the affiliate of the Investment Manager began
16 to deteriorate culminating in Mr. Bours filing proceedings against it in New York in May 2020.
- 17
18 9. In August 2019 and April 2020, the Company made two capital calls of the Petitioner. These
19 were paid in September 2019 and after inquiry and with some expressed reluctance in June
20 2020. Prompted it is said by the capital request made on the 18th April 2020 with follow up
21 reminders on 13th and 18th May 2020, the Petitioner began seeking detailed explanations of the
22 expenses claimed in relation to the calls and repeated earlier requests for information as to its
23 proportionate shareholding. On the 23rd June 2020, the Petitioner was notified that its account
24 was in default due to non-payment of the second capital call. On the 26th June 2020, the
25 Petitioner provided confirmation of that payment but continued to request more detailed
26 information as to the calls. This included repeated requests for information as to the legal basis
27 on which the Company purported to make them, the timing and breakdown of the expenses
28 claimed in relation to them, an itemised breakdown of the Company's investment activity,
29 operational expenses and working capital requirements, how the Petitioner's portion of the
30 second capital call was calculated, a quarterly breakdown of the Company's management fee
31 periods and copies of the agreements relating to the Petitioner's investment in the Company.
32

1 10. The Company now accepts that it had no legal basis to make those calls and that the Petitioner
2 had no obligation to pay them. The two calls totaled US\$311,112.78. The Company issued
3 additional shares to the Petitioner in return. The Petitioner points to this as being one example
4 in which its inquiries were necessary and justified and persists in a further inquiry as to how
5 the funds were expended and decisions made. It asserts that the responses received are limited
6 and lack detail. The Company says that this is no more than a past error which has been rectified
7 by the issue of the additional shares and that the Petitioner has been provided with the
8 information to which it is entitled.

9
10 11. In response to the request for a breakdown of share percentage information, the Company
11 refused to provide this information and indicated that the Petitioner was provided with the same
12 information as other investors. The further response was that details such as a breakdown of
13 operational expenses of the Company, how the Petitioner's pro-rata shares had been allocated
14 and quarterly breakdowns of the Investment Manager's fees are not provided in the usual
15 course.

16
17 12. On the 25th June 2020 an email from Mr. Bours to one of the attorneys of the Petitioner was
18 inadvertently copied to Mr. Drankiewicz. This email appears to be at the center of the
19 deteriorating relationship between the parties. It states in part as follows:
20

21 *“Moreover, the overall goal of the Trust is to gain more control and oversight over its*
22 *investment primarily (in our own view) through three sequential lines of action: i)*
23 *exercising our rights to receive information on the state of our investment and the*
24 *partnership, ii) determining the proportional equity stake that the Trust holds in order to*
25 *ascertain our corporate rights (pursuant the majority thresholds set in the corporate*
26 *documents), iii) If a majority stake is indeed confirmed at the fund and/or share class levels,*
27 *to explore the possibility and merits of appointing an independent inspector at the very*
28 *least and/or designating additional directors to gain more control over the investment*
29 *and/or removing the sole director all together, possibly forcing a wind down (the nuclear*
30 *option). The main purpose of pursuing these actions is to gain control over redemption*
31 *rights, so that we can exit the investment at our discretion or to at least get comfortable*
32 *with the state in the investment by having more of a say over its destiny. We believe we*
33 *can achieve this either judicially or through negotiation with the fund's principal and GP.”*
34

35 13. On the 29th June 2020, the Company sought to compulsorily redeem the Petitioner's shares in
36 exercise of a power conferred by Article 12.1 of the Company's Memorandum and Articles of



1 Association (“MAA”). The Compulsory Redemption Notice made reference to the “privileged”
2 email from Mr. Bours and described it as detailing the Petitioner’s intention to gain control
3 over the Company and force its wind down. There were various calls between representatives
4 of both entities. On the 7th July 2020 Mr. Ferrer assured Mr. Drankiewicz that the Petitioner
5 had no intention of taking over control of the Company but was simply seeking information to
6 which it was entitled as a shareholder. The Company thereafter proposed that it would
7 withdraw the Redemption Notice but in tandem it would convert the Petitioner’s shares to non-
8 voting shares. The Petitioner objected. The Company indicated that the conversion would apply
9 to all shareholders. The Petitioner says that this gave rise to further concern that this was not
10 raised in advance and was not put to shareholders for a vote to amend the MAA. Other
11 shareholders were not notified and it appeared to unfairly target and be discriminatory towards
12 the Petitioner.

13
14 14. On the 9th July 2020 the Petitioner filed Writ proceedings against the Company, and obtained
15 an injunction which restrained the Company from proceeding with the Compulsory
16 Redemption. Thereafter the Company confirmed that it would not proceed with the
17 Redemption and the parties attempted but failed to reach a settlement agreement.

18
19 15. The Petitioner alleges that the Compulsory Redemption Notice was issued for an unlawful and
20 improper purpose and was therefore in breach of the common law and/or an implied term of
21 the MAA. Mr. Ferrer asserts his belief that the Compulsory Redemption Notice was invalid
22 and or unlawful and as evidencing that the Company’s directors acted in breach of their duties.

23
24 16. On the 28th January 2021, the Petitioner and two other shareholders, JI Family Holding Limited
25 and Juan Gonzales Diaz Brown sought to convene an Extraordinary General Meeting (“EGM”)
26 of the Company. They believed that in accordance with the Confidential Explanatory
27 Memorandum’ (“CEM”) provided to them on investment, that together they held not less than
28 one half of the votes entitled to be cast at the meeting. The purpose of the meeting was to debate
29 a proposed resolution to appoint four (4) new directors nominated by the Petitioner. On the
30 16th February 2021 the Company responded advising that the Petitioner and the other two
31 shareholders did not hold a sufficient number of shares to be able to call such a meeting and
32 held less than 35% of the number of voting shares.



- 1
2 17. Thereafter on 19th February 2021, the Petitioner sought the intervention of the Court by way of
3 an Originating Summons seeking an Order to require that the Company convene an EGM or
4 alternatively to provide such information as would allow contact to be made with other
5 shareholders. The Summons was served on the Company.
6
7 18. The assertion of the Petitioner is that in refusing to convene an EGM, the Company has “resiled
8 from the representation made in the CEM” which was provided to it in July 2018 and in the
9 more recent Memorandum of March 2020.
10
11 19. On 12th January 2021, the Petitioner responded affirmatively to the Company’s proposal to
12 redeem its shares in Accolade on the basis that this was to be a full redemption. This was later
13 clarified by the Company to be only a partial redemption. The Petitioner says that
14 “notwithstanding this difference in understanding, and without further correspondence the
15 Company proceeded with the partial redemption on 15th January 2021.”
16
17 20. On the 23rd February 2021, the Company issued notice that it would redeem 50% of the
18 Petitioner’s shares. The Petitioner sought an undertaking from the Company to maintain the
19 status quo until the Originating Summons could be resolved in Court. The Company refused.
20
21 21. Mr. Ferrer also alleges that commencing in February 2020 and continuing, the Company failed
22 to respond to various requests for information as to:
23
24 i) The Petitioner’s percentage shareholding in the Company in circumstances where this
25 would impact its voting rights.
26 ii) Annual reports and financial statements.
27
28 22. The Summons of 29th March 2021 is supported by the First Affidavit of Mr. Drankiewicz dated
29 1st April 2021. He provides some unchallenged details as to changes in the directorship
30 arrangements of the Company and its general operations. The Company has an independent
31 administrator. It provides regular monthly reports to shareholders and annual audited financial



1 statements. The monthly reports are in a standard format which is similar to that used by other
2 funds.

3
4 23. Mr. Drankiewicz states and it is not disputed that the Petitioner's investment has been
5 successful and that there was an amicable relationship between the Company and the Petitioner
6 through to February 2020. He characterizes the information requests of the Petitioner as either
7 seeking information to which it was not entitled, had already received or was information which
8 could not be provided to it because of United States security laws. The unavailability of some
9 of the information sought by the Petitioner is explained as being due to the timing of the audited
10 financial statements which are completed within six months of year end. Those statements
11 provide detailed calculations of the Company's expenses, management fees, organisation costs,
12 as well as details as to the number of shares in the Company by share class.

13
14 24. In March 2020 in response to further requests, the Company declined to provide copies of
15 formal share certificates stating that such are not issued by a private fund. A request by the
16 Petitioner to exercise a right with respect to the register of members was met with the response
17 that s.44 of the Companies Act does not apply to the Company.

18
19 25. According to Mr. Drankiewicz, the inadvertently disclosed email chain included statements
20 made by Mr. Bours which acknowledged that there was a limited right to information. The
21 information requests therefore appear to be an attempt to exert pressure on the Company. The
22 email expressed an intention to "potentially hi-jack the fund" and gave rise to concerns which
23 led to the giving of the Notice of Redemption on 9th July 2020. Prior to the Court injunction
24 some two days before, following discussions the Company had indicated that it would
25 discontinue the redemption process.

26
27 26. On 27th August 2020, the Company wrote to the Petitioner and indicated formal withdrawal of
28 the redemption notice as well as the potential for the execution of existing long term plans to
29 redeem the shares after the lock-up period ended. This advance notification of possible
30 redemption is said to be of some significance. The Company says that the partial redemption
31 in January 2021 was done in order to secure to shareholders the advantage of the then high



1 trading prices. The Petitioner’s response to that proposal was to indicate its willingness to
2 liquidate its investment as soon as possible.

3
4 27. According to Mr. Drankiewicz the Petitioner then attempted to take over the Company by
5 calling an EGM. The Petitioner’s claim to holding a simple majority of the shares, failed to
6 take into account the partial redemption which had taken place in January 2021 and the fact
7 that there had been additional investors since August 2018. He further states that in the face of
8 the continued aggression towards the Company, it resolved to convert the Petitioner’s
9 remaining shares to non-voting shares in accordance with Article 29.3 of the Memorandum and
10 Articles which provides as follows:-

11
12 “In addition, existing Members who have been issued Voting Shares may have such Shares
13 converted to Non-Voting Shares if the Directors determine, at their discretion, that such
14 conversion is necessary or advisable to avoid possible adverse consequences with respect
15 to the Company or a particular Member; provided that the Member will be granted the right
16 to redeem such Shares prior to conversion.”

17
18 28. The reasons for the conversion are said to include that a number of affiliates of the Petitioner
19 are politically exposed persons which was not disclosed to the Company in breach of the terms
20 of the relevant subscription agreement and that the nominees for directorship are all closely
21 tied to the Bours family. The Resolution of the Board of Directors of the Company listed seven
22 reasons for its statement that:

23
24 *“The Board considers that it would not be in the best interest of the Company, and its*
25 *investors as a whole, for the Company to fall under the effective control of the Bours family*
26 *and politically exposed persons, through its Nominees.” Para 1.12*

27
28 29. The Notice of Conversion provided to the Petitioner included an offer to redeem its shares.
29
30
31
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1 **NATURE OF THE ALLEGATIONS**
2

3 30. One of the main planks of the Company’s argument is that there are no matters requiring any
4 investigation by a liquidator and in effect that as the Court can see this at this stage, the Petition
5 ought to be dismissed. Counsel for the Company asked rhetorically at various points, what
6 would be the purpose for any investigation in this case.
7

8 31. The two supporting shareholders have provided Affidavits as has Mr. Bours. I have reviewed
9 them for the purpose of identifying the issues raised rather than a detailed analysis of the
10 evidence which would be inappropriate on an application of this nature. The First Affidavit
11 of Roberto Diaz Brown dated 23rd April 2021 attests to him being a shareholder in the Company
12 and as sharing the concerns regarding the mismanagement of the Company. He alleges that
13 there was insufficient transparency in the management of the Company and its investments and
14 that there was action in breach of its constitution in issuing the Compulsory Redemption Notice
15 against the Petitioner, which caused him to question the motives of management towards its
16 investors. This caused him to seek further oversight into his investment and the management
17 of the Company by way of the appointment of further directors. He further states:
18

19 “14. The Company’s response to the Requisitionists’ attempt to convene an EGM and
20 to the Petitioner’s Originating Summons Proceedings, as set out in Laborin 1 (paragraphs
21 92-112), has only served to heighten my concerns regarding the Company’s
22 mismanagement. The Company has deliberately sought to frustrate the attempts of the
23 Requisitionists to exercise their corporate rights in a manner that would lead to oversight
24 into the affairs of the Company’s management.
25

26 15. I share the Petitioner’s concerns with regards to the corporate governance of the
27 Company set out at Laborin 1 (paragraphs 94-95 and 113-114). Whilst I note that the
28 Company has recently appointed Mr. Ronan Guilfoyle as an independent director of the
29 Company, this appointment postdates all the complaints in the Company. Mr. Guilfoyle is
30 not the most appropriate person to investigate the complaints raised in the Petition, which
31 should be carried out by a professional liquidator.”

1
2 32. Mr. Bours has provided an Affidavit dated 22nd April 2021. I will set out in some detail the
3 allegations made by him in the context of the nature of the allegations against the Company
4 given the submission that there is no need for an investigation in the circumstances of this case.
5 Mr. Bours states that the Petitioner has come to understand that the capital calls were not levied
6 on all investors and that the Company has not provided details as to the reason the capital calls
7 were requested and how they were approved. He states further that Mr. Drankiewicz had prior
8 knowledge of the politically exposed status of representatives of the Petitioner. He states also
9 that the information sought by the Petitioner as to the financial position of the Company and
10 the various expenses was not readily available from the monthly investment statements and
11 that in any event those statements were misleading. This he says is because historical rather
12 than current rates were used in the statements. He states:

13
14 “35. ...This gives rise to concerns that the valuations were being manipulated by the
15 Investment Manager, with the result that the value of the Accolade Investment was being
16 misrepresented. For example, in the September 2020 monthly statement (KD-1, page 39),
17 the Company valued the Petitioner’s interest at US\$13,829,200.29. However, the publicly
18 available information at the time from the end of that month shows that the shares were
19 valued at US\$33.61 per share, which would mean that the Petitioner’s investment should
20 have been valued in the region of US\$18 million, not in the region of the US\$13 million
21 recorded in the monthly statement. This was a very substantial undervaluation of some
22 US\$5 million.”

23
24 33. He gives further examples for November and December 2020 and describes the valuation as
25 important for reasons including that the Petitioner’s voting rights were calculated by way of
26 the Net Asset Value (NAV) per share. He also refers to a management decision made to
27 reimburse investors that joined the Company before December 2017, at a higher level of
28 expenses. The Petitioner did not benefit from this given the date of its investment. He alleges
29 also that there may have been payment by the Petitioner of excessive management fees. He
30 states:
31



1 “84. ... It therefore appears that the Petitioner may have been paying excessive
2 management fees, to allow other earlier investors to be reimbursed. As such, the Petitioner
3 would have been subsidising the other investors. The Petitioner understands that the family
4 of Mr. Drankiewicz (and Mrs. Macias) was an early investor in the Company and would
5 have been a beneficiary of such a scheme. The Petitioner is concerned that Mr.
6 Drankiewicz and Mrs. Macias’s decisions favoured related parties at the expense of the
7 Petitioner.”
8

9 34. Mr. Bours asserts that Mr. Drankiewicz is determined to obscure the financial position of the
10 Company and that the actions taken by the Company were designed to prevent inquiry and
11 oversight.
12

13 35. With respect to the share percentages, he states that the share percentage of the Petitioner had
14 been provided at the time of the investment in 2018 and that the effect of the partial redemption
15 made was adverse to the Petitioner’s voting rights and the balance of power in the course of
16 then ongoing without prejudice negotiations.
17

18 36. With respect to the convening of the EGM, he states that “the Requisitionists were unable to
19 exercise their right to convene an EGM because they did not know all the shareholders or have
20 contact details for them”. They provided the proper notification to the Company pursuant to
21 Article 26.6 of the MAA. This included notice and proxy forms to be sent to all shareholders.
22 There was no explanation by the Company for the assertion in reply as to insufficiency of
23 shares and no evidence was produced in support of it.
24

25 37. As to the removal of voting rights he states:
26



27 “105. Such a substantial partial redemption was likely to reduce the Petitioner’s voting
28 rights to the extent that the Requisitionists would not be entitled to convene an EGM, or in
29 the event that an EGM was convened, to pass the resolutions sought. This would therefore
30 render nugatory the orders sought by the Petitioner in the Originating Summons
31 Proceedings.
32

1 109. By letter dated 4 March 2021, the Company communicated to the Petitioner its
2 intention to exercise a power to remove the Petitioner’s voting rights altogether (KD-1,
3 page 446) pursuant to article 29.3 of the MAA (DASF-1, page 216) (the Conversion
4 Decision).

5
6 110. This decision is consistent with other acts taken by the Company, exercising a power
7 to deliberately and improperly deprive the Petitioner from exercising its voting rights.

8
9 111. The purported justifications for the Conversion Decision (summarised at
10 Drankiewicz-1, paragraph 102) are not valid reasons and do not justify the exercise of the
11 power:

12
13 a) *“the Petitioner’s interests were not generally aligned with Fund’s interest more*
14 *broadly”*. The Petitioner alone held more than 72% of the value in the Company in
15 2019, even before the IPO and exercise of warrants which increased its interest. As the
16 holder of by far the largest economic interest in the Company, the Petitioner’s interests
17 were very closely aligned with the Company. The Petitioner’s concern relates to Mr.
18 Drankiewicz’s mismanagement of the Company. Further, the Petitioner’s was entitled
19 to exercise its rights to convene and EGM. The other Requisitionists, who held
20 different shares classes, also considered that their interests were aligned with the
21 Petitioner and supported its approach. Together, the Requisitionists held nearly 80%
22 of the economic interest at the close of 2019, according to the annual financial
23 statements.

24 ...

25
26 d) *“the attempted requisition”*. The Petitioner was exercising its corporate rights to seek
27 to appoint directors that could have oversight of the management of the Company. The
28 Company’s management have repeatedly acted contrary to the Company’s constitution
29 and obstructed the Petitioner from exercising its rights under the MAA. Further, the
30 proposed directors all had significant and appropriate experience that they could bring
31 to the Company in that role. ... The timing of the Conversion Decision, after the



1 Originating Summons Proceedings had effectively been rendered nugatory by the
2 partial redemptions, would indicate that this was a further attempt to prevent the
3 Petitioner exercising corporate rights which could lead to an investigation of the
4 Company’s affairs and the actions of its directors.
5

6 113. The Petitioner notes that Ronan Guilfoyle has very recently been appointed as a
7 director on 30 March 2021. This belated appointment, which has obviously been made in
8 response to the Petition, does not assuage the lack of proper corporate governance prior to
9 that date. It postdates all the complaints with respect to the mismanagement of the
10 Company. Importantly, the appointment was made after the Company had succeeded,
11 through the improper exercise of its management powers, in defeating the Petitioner’s
12 attempts to exercise its voting rights, firstly by the partial redemptions of 20% and 50%
13 respectively of the Petitioner’s shares on 11 January 2021 and 18 February 2021 and
14 finally, by the removal of all voting powers attaching to the Petitioner’s shares on 4 March
15 2021.
16

17 114. The fact remains that for a very lengthy period of time in which the Petitioner had
18 concerns about the management of the Company and was seeking to get clarity on its
19 investment, there was no oversight in the Company from an independent director. Further,
20 as a professional director, Mr. Guilfoyle is not the most appropriate person to investigate
21 the Petitioner’s complaints. That investigation should be carried out by a professional
22 liquidator, with the benefit of legal advice and forensic accountancy skills.”
23

24 **APPLICABLE PRINCIPLES** 25

26 38. The applicable principles on a strike out application of this nature have been clearly stated by
27 the Grand Court in a number of cases. Counsel for the Company has drawn the Court’s attention
28 to the recent case of *Re Circumference Holdings Ltd.*¹. In that case a petition was struck out
29 as an abuse of process on the basis that it had been brought for tactical reasons in respect of
30 litigation outside of those proceedings and that there was an adequate alternative remedy. This

¹ Grand Court FSD 56 of 2021(RPJ), Unreported judgment dated 3rd May 2021



1 was against the background of ongoing litigation in the English High Court and inquiries in
2 Luxembourg in which the petitioner’s allegations of mismanagement made in the petition
3 would be raised. In that case Parker J. provides a helpful exposition of the principles on a strike
4 out application which may be summarised in the following way.

5
6 39. The Court’s jurisdiction on a strike out application is derived not only from the Grand Court
7 Rules but also the Court’s inherent power to prevent an abuse of its process.² A petition which
8 is brought for some collateral or improper purpose may be struck out as an abuse of process as
9 it would not be just and equitable to grant such relief. Given the possible serious impact on a
10 company when a petition is brought, the remedy of winding up should only be used in
11 circumstances in which there is no adequate alternative. Thus on a strike out application such
12 as the present case, the Court should consider two questions, whether there is an alternative
13 remedy which is available to the petitioner and whether the petitioner is acting unreasonably in
14 not pursuing it. The Court should be alive to the possibility that there may be an attempt to use
15 the winding up procedure in order to exert commercial pressure or for tactical benefit. The
16 procedure should not be used to resolve *inter partes* commercial disputes. The Court should
17 consider the appropriate balance between the danger in pre-judging the matter and the care
18 needed to ensure that there is not improper use of the winding up procedure. Parker J. stated:

19
20 *“52. It is also important to recognise that a strike out application is not suitable for the*
21 *resolution of factual issues and so for the Court to examine and finally determine whether*
22 *there was in fact a justifiable loss of trust or lack of confidence in the conduct and*
23 *management of the Company’s affairs in the circumstances of this case would require a*
24 *trial.*

25
26 *53. At this stage the Petitioner has to show an objectively sustainable case which is likely*
27 *to result in a winding up order. Lack of probity is a well-established basis for a just and*
28 *equitable winding up as long as it is supported by facts which are not properly contested*
29 *or contestable.”³*

² Judgment of Court in RCB v. Thai Asia Fund Ltd. [1996] CILR 9

³ Ibid, paragraphs 52 and 53



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40. By reference to the case of *Re Kitson & Co Ltd*⁴, it was stated that loss of confidence is not enough neither is a grievance by a shareholder or group of shareholders about a company’s internal affairs. Lord Greene MR in that case without expressing an opinion noted that there may well be cases in which:

“...directors have complete control of the company and are impossible to control, those circumstances, coupled perhaps with others, may make it just and equitable for a company to be wound up, although in these days of minority actions it would not seem that winding up proceedings in order to prevent that kind of thing are likely to be so necessary as before minority actions became common.”

41. The learned Judge expressed the view that if directors are misbehaving, the shareholders would have a remedy to stop such behaviour and that it would be wrong for there to be a dissolution merely because of misbehavior which can be stopped by way of an injunction.

42. In *RCB v. Thai Asia Fund*⁵, the Grand Court held that a court should be prepared to scrutinize the available undisputed evidence supporting the allegations and to strike out a petition if it was obviously unsustainable. The order for striking out should only be made where it is plain and obvious. For a loss of confidence ground to succeed, it had to be loss of confidence in the conduct of the company’s business.

43. In that case a petition was brought based on three main grounds. Central to two of those grounds was an allegation of preference of a majority shareholder as against the minority shareholders. The Court noted that the decision made to suspend a programme of buy back of the company’s shares had been made some ten months before the majority shareholder had reached the percentage threshold. The conclusion was that there was a failure to show that the directors had acted in bad faith. Additionally, the conduct alleged had been ratified by shareholders in the general meeting. A petition based on what is merely a valid exercise of a powers conferred by

⁴ [1946] 1 ALL ER 441
⁵ Judgment of Court in *RCB v. Thai Asia Fund Ltd.* [1996] CILR 9



1 articles will not succeed unless it is outside what was contemplated by the members on
2 subscription.

3
4 44. Both parties in the instant case referred extensively to the cases of *Re Camulos Partners*
5 *Offshore Limited v. Katherin*⁶ and *Tianrui v. China Shanshui Cement Group Limited*.⁷
6 Counsel for the Company submitted that there is much similarity between the instant case and
7 the earlier case of *Re Camulos Partners*.

8
9 45. In that case the appellant company, an investment fund, sought to restrain the respondent from
10 presenting two petitions for its winding up. The factual dispute involved the proposed
11 redemption of the respondent's shares in the company and the company's failure to pay out
12 any redemption proceeds in cash or kind. Investors other than the respondent had been offered
13 cash payments. The respondent had commenced proceedings by way of originating summons
14 before seeking to file petitions. The Grand Court refused to restrain the filing of the petitions.
15 The company appealed. The Appellate Court allowed the appeal of the company and held that
16 the petitions which had been filed by the time of the appeal, would be struck out as an abuse of
17 process. The petitions were brought on the just and equitable ground with alternative claims
18 for the payment of the redemption price for the shares and restraint of payments to other
19 investors. The Appellate Court said that it had no doubt that the objective of the investor in
20 that case was to put pressure on the fund to accede to its demands with respect to redemption
21 payments. This was in circumstances where the respondent itself had identified alternative
22 remedies which could be obtained by way of writ action or the originating summons proceeding
23 which was then existing.

24
25 46. The Court said that the approach which was to be adopted, applied irrespective of whether the
26 petition was brought by a creditor or a contributory. The inevitability of failure is not the only
27 basis for concluding that a petition is an abuse of process. There is also the basis whether the
28 winding up jurisdiction is being used improperly, for example to resolve an inter partes dispute
29 or as a substitute for litigation of commercial disputes. It was held that:

⁶ [2010] 1 CILR 303

⁷ [2019] 1 CILR 481



1 “ The court would strike out a winding-up petition whenever it was being used improperly
2 to resolve an inter partes dispute (for example, those involving disputed debts, and when
3 the petition had been brought to exert pressure on the respondent): the jurisdiction to do
4 so was not confined to claims which were bound to fail. In determining whether to restrain
5 the presentation of or strike out a winding-up petition, the court had to consider whether
6 (i) there was an alternative remedy available to the petitioner; and (ii) the petitioner was
7 acting unreasonably in not pursuing that alternative remedy. If it were satisfied that a
8 petitioner was acting unreasonably, then it was likely that it would hold that the petition
9 was an abuse of process.”

10
11 47. The Court expressed the view that it cannot be just and equitable to make a winding up order
12 where it is not needed in order for the petitioner to have a sufficient remedy. Thus an affirmative
13 answer to the two questions stated above would lead the Court to conclude either that the
14 presentation of the petition is an abuse of its process or that it is bound to fail because it would
15 not be just and equitable that the company should be wound up. In the case of a contributory’s
16 petition, the fact that the petitioner was acting unreasonably in failing to pursue an alternative
17 remedy is sufficient ground to hold that the petition was bound to fail.

18
19 48. The Court considered that the effect of s.95(3) of the Companies Act is to provide new remedies
20 on a contributory’s petition as an alternative in cases where a court is of the opinion that it is
21 just and equitable that a company should be wound up. The Court said that those remedies are
22 not free standing ones.

23
24 49. Counsel for the Petitioner sought to distinguish the case of *Re Camulous Partners* by stating
25 that it was a case where the petitioner therein wanted to be bought out and the petition had been
26 brought in order to secure payments. Counsel for the Company points out that in the instant
27 case, the Petitioner had responded positively to a redemption offer made in January 2021 when
28 it thought that this was to be a full rather than partial redemption. The Company asks and it is
29 a live question on this application, whether the present stance of the Petitioner is no more than
30 a change in strategy to achieve some objective of its own. As it stands however, I do note that



1 the Petitioner’s case appears to be distinguishable in that it also seeks to raise allegations of
2 interference with its rights as a shareholder.

3
4 50. Counsel for the Petitioner placed significant reliance on the case of *Tianrui v. China Shanshui
5 Cement Group Limited* and described it as bearing a strong similarity to the instant case. It is
6 accepted that as Counsel for the Company submitted and as was stated by the Appellate Court
7 in response to a subsequent leave to appeal application, that the case evidences an application
8 of the existing law to particular facts rather than a change to it.

9
10 51. In that case the Appellate Court considered the appellant company’s appeal against the strike
11 out of its petition by the Grand Court. The appellant was a shareholder of the respondent
12 company. It alleged that other shareholders in the company had conspired to damage it by
13 various actions including actions allegedly taken to dilute its shareholdings.

14
15 52. The Court held that it was well settled that the existence of an adequate alternative remedy
16 which the petitioner had unreasonably failed to pursue was a basis for the strike out of a petition
17 as an abuse of process and that:

18
19 *“If it was clear at an early stage that the petition would fail on this ground, it could be
20 struck out as an abuse of process. The rationale for the principle that a petition could be
21 struck out if an adequate alternative remedy existed that it was unreasonable for the
22 petitioner not to pursue was that the mere presentation of a winding-up petition was
23 capable of causing great damage to a company.”*

24
25 53. The Court held that in all but a plain and obvious case, it will be necessary for the facts
26 underlying a petition to be established at trial. It is only after the establishment of such facts
27 that a decision as to a suitable alternative remedy can be made or reached.

28
29 54. In the circumstances of that case, the Court concluded that the remedies considered as
30 appropriate alternatives by the Grand Court addressed the single issue of convertible bonds and
31 did not address the full range of the appellant’s concerns. Those concerns included allegations
32 as to a course of conduct by the company at the instance of majority shareholders. The Court



1 said that if the appellant could establish a justifiable loss of confidence then it had a statutory
2 right to have its petition heard notwithstanding that there were other remedies available to it.

3
4 55. The Court held that:

5
6 *“If the company’s actions, prompted by directors appointed at the instance of a majority*
7 *of its shareholders, had resulted in a justifiable loss of confidence in the management of*
8 *the company, the appellant had a statutory right to petition for the winding up of the*
9 *company on the just and equitable ground. It could not be deprived of that right merely*
10 *because the company could point to other remedies which, alone or in combination, might*
11 *arguably go all or some of the way to compensating the appellant for what had occurred.*
12 *The appellant could legitimately take the view that it preferred the company to be wound*
13 *up to having to pursue piecemeal a series of actions, by litigation or otherwise, that might*
14 *be capable of addressing some or even all of its concerns. It was entitled to have the*
15 *circumstances investigated in the context of a winding-up petition that it was entitled to*
16 *bring, and if it established its complaints it was entitled to have the court consider whether*
17 *the appropriate remedy was winding up or another remedy set out in s.95(3). It would be*
18 *illogical to say that because the procedure adopted would be similar to that adopted in a*
19 *writ action, the matter should be determined by way of writ instead of by way of petition.”*

20
21 56. On the issue of possible reputational damage to a company, the Court held that this was inherent
22 in the statutory right to petition and is but one element for consideration which by itself does
23 not necessarily mean that a petition is an abuse of process. The right is not qualified by the
24 need to prevent damage to the reputation of the company. The Court stated:

25
26 *“The likelihood of reputational damage provided part of the rationale for the court’s*
27 *ability to strike out an abusive winding-up petition but it does not itself mean that the*
28 *petition is an abuse. The statutory purpose in conferring a right to present a petition on*
29 *the just and equitable ground includes the provision of protection to members against*
30 *improper conduct by the company. The possibility of damage to the reputation of the*
31 *company is inherent in the statutory right. This is particularly so, because the fact that in*
32 *the Cayman Islands the sole gateway to obtaining alternative relief is by bringing a just*



1 *and equitable petition meant that it cannot be an abuse to petition where the primary*
2 *purpose was to obtain s.95(3) relief rather than the winding up of the company... Since the*
3 *exercise by the member of the legal right is subject to the court's inherent jurisdiction to*
4 *prevent an abuse, there is no basis for qualifying the right by introducing a concept of*
5 *preventing or deterring damage to the reputation of the company... The court's ability*
6 *under s.95(3) to grant alternative relief instead of a winding-up order does not have the*
7 *consequence of removing the court's ability to strike out a petition where an adequate*
8 *alternative remedy exists. It would only be appropriate to strike out a petition where it*
9 *could clearly be seen at the outset that the just and equitable ground for winding up could*
10 *not be established. In all but a plain and obvious case, it was likely to be necessary for the*
11 *facts underlying a petition to be established at trial before the adequacy of a suggested*
12 *alternative remedy, and the reasonableness or otherwise of the petitioner in failing to*
13 *pursue it, could be established. Indeed, the structure of the legislation indicated that in*
14 *ordinary circumstances the decision as to the suitability of an alternative remedy, at least*
15 *a remedy specified in s.95(3), was to be made after the allegations in the petition had been*
16 *determined by the court and a prima facie case for a just and equitable winding up made*
17 *out. Therefore, unless an available alternative remedy could be seen, without full*
18 *examination of the facts, to be capable of satisfying the petitioner's concerns to an extent*
19 *that would make it clearly impossible for him to persuade the court that it would be just*
20 *and equitable to wind up the company, the petition should proceed."*

21
22 57. The Court cautioned against prejudging the outcome of the hearing of the Petition on a strike
23 out application and noted that the issue of a sufficient alternative remedy should ordinarily be
24 determined after a determination as to whether there is a case for winding up on the just and
25 equitable ground. The Court expressed doubt as to whether in the context of a contributory's
26 petition brought on the just and equitable ground, a class action was required.

27
28 **THE SUBMISSIONS**

29
30 58. Counsel for the Company submitted that this application to strike out is not a merit or fact
31 based one, in that it is not based on the argument that the Petition is so poor on its face factually



1 that it ought to be struck out. Instead the argument is that the Courts have taken a different
2 approach in these matters because of the possible negative impact on a company from the
3 presentation of a petition. The possible loss of confidence in a company and a run on
4 redemptions is something that one would wish to guard against. It is said that the Courts have
5 therefore not been hesitant to strike out petitions where it is appropriate to do so. Against this
6 background the application for strike out of the Petition is posited on three broad grounds:

- 7
- 8 i) The Petitioner has been made an offer of redemption at effectively full value.
 - 9 ii) The Petitioner has alternative remedies which would adequately address all the issues
10 raised.
 - 11 iii) The Petition is being brought for an improper collateral purpose.
- 12

13 59. In broad response the Petitioner submits that the presentation of the Petition is not an abuse of
14 process, that on a proper application of the legal principles this is not an appropriate case for a
15 strike out and that the application should be dismissed. In support of this position, it is
16 submitted in summary that the Petition involves real and serious allegations of impropriety and
17 misconduct and that facts are in dispute. It is said that given these allegations, the question
18 whether the evidence is adequate and justifies winding up is a matter for the hearing of the
19 Petition.

20

21 **THE OFFER OF REDEMPTION**

22

23 60. Counsel on behalf of the Company submitted that the nature of the Company, being a mutual
24 fund, is of significance and is an important feature of this case. Counsel submitted that this case
25 is or ought to be about money. The Company is a fund which has only one purpose as distinct
26 from a joint venture or public company, thus the present case is “really just a dispute about
27 money”, a “real world concern”. Thus it is argued that the offer of redemption which has been
28 made, if accepted, would be a means by which the Petitioner would receive substantial justice.

29

30 61. Counsel submits that the long established principle is that where a petition is brought by a
31 contributor, an offer at full value of the shares is a complete answer to the petition. Counsel



1 highlighted the fact which is not disputed that on 4th March 2021, one day before the Petition
2 was filed, an offer of redemption was made to the Petitioner. The offer which is at NAV and in
3 accordance with the calculation method identified in the Articles and CEM, remains open. An
4 undertaking has been given that it would remain open for seven days should the Petition be
5 struck out. Counsel said that it is of note that the Petitioner had previously indicated in January
6 2021 that it would be happy to redeem its shares and that the financial position would be worse
7 for the Petitioner should the Company be wound up as liquidation expenses would have to be
8 deducted before there is any pay out.

9
10 62. Reliance is placed on two cases. Firstly on the judgment of Millet J. in the case of *Re A*
11 *Company (No 003843 of 1986)*⁸ and secondly the judgment of the Privy Council in the case
12 of *CVC/Opportunity Equity Partners Ltd & Anor. v. Demarco Almeida*.⁹

13
14 63. In *Re A Company (No 003843 of 1986)*, the English High Court stayed a petition for winding
15 up on the basis that it was an abuse of process. It had been unreasonably brought. The Court
16 held that the real wish of the petitioner was to seek financial compensation which could be
17 obtained by other means. A fair offer to buy out the petitioner's shares had been made and there
18 was nothing in the allegation of suspicion of misfeasance and misappropriation. The offer also
19 included the opportunity to access all the company's records and to make representations to
20 independent accountants.

21
22 64. In *CVC/Opportunity Equity Partners Ltd & Anor.*, the appellant sought to have an injunction
23 restored which had prevented the respondent minority shareholder of a single share in the
24 company, from presenting a winding up petition. The respondent had repeatedly sought to be
25 bought out of the company at a fair offer for his shares.

26
27 65. The Privy Council noted that Cayman Islands law did not contain the equivalent provision to
28 s.210 of the English *Companies Act 1948* or its successor, s.459 of the *Companies Act 1985*.
29 These permit a shareholder to bring a petition on the ground that the affairs of the company are

⁸ [1987] BCLC 562

⁹ [2002] UKPC 16



1 being conducted oppressively, or in a manner which is unfairly prejudicial to the interests of a
2 member.

3
4 66. The Court referred with approval to the case of *O’Neill v. Phillips*¹⁰ and to the statement therein
5 that unfairness in the context of a petition brought under s.459 of the *Companies Act 1985*
6 would lie not in the exclusion of the petitioner from the management of the company but in the
7 case where that exclusion was made without a reasonable offer for the petitioner’s shares.¹¹

8
9 67. The Court stated:

10
11 *“The special nature of winding up proceedings and the loss which they may cause the*
12 *company and its shareholders, however, makes it incumbent on the court to ensure that*
13 *they are not brought for an improper purpose. In particular, they must not be brought*
14 *simply to bring pressure on the respondents to yield to the petitioner's demands, however*
15 *unreasonable, rather than suffer the losses consequent upon the presentation of a petition*
16 *for the making of a winding up order.*

17
18 *Where the petitioner can achieve his object by other means, therefore, he may be restrained*
19 *from bringing winding up proceedings. In Charles Forte Investments Ltd. v Amanda*
20 *[1964] 1 Ch 240, a minority shareholder complained of the board's refusal to register*
21 *transfers of his shares to a third party. He threatened to present a winding up petition*
22 *unless the board registered the transfers. He was restrained from presenting a petition.*
23 *The shareholder had other and more suitable remedies available to him, namely an action*
24 *for rectification of the register or proceeding by way of motion under section 116 of the*
25 *Companies Act 1948, and his threat to employ the machinery of winding up was an attempt*
26 *to bring pressure on the board to reverse its decision and an abuse of the process of the*
27 *court.”*

28
29 68. The Court emphasized that a court should be astute to prevent a minority shareholder from
30 using the fact of winding up proceedings to bring pressure on a company to yield to its

¹⁰ [1999] 1 WLR 1092, page 1107

¹¹ Ibid paragraph 34



1 unreasonable demands. The conclusion in the circumstances of that case was that the petition
2 was the only route to the respondent, Mr. Demarco receiving a fair offer for his shares in
3 circumstances where no fair offer had been made.
4

5 69. Counsel for the Company argues that in contrast in the instant case a fair offer has been made
6 to the Petitioner and thus this ought to be a complete answer to the Petition brought.
7

8 70. In response, Counsel for the Petitioner submits that the suggestion that the company is offering
9 full payment for the Petitioner's shares and that this is an alternative remedy is wrong. It is
10 said that there are serious issues which are not addressed by the redemption offer. These issues
11 include the correct value of the shares because of the inadequacy of the information provided,
12 the unlawful capital calls, the manipulation of valuations and the discriminatory approach to
13 the levying of management fees. In short it is said that acceptance of the redemption offer
14 would not address the allegation of breaches of fiduciary duties and improper conduct. Counsel
15 submitted:
16

17 *“This case is unusual in that the Petitioner has already sought to pursue other proceedings,*
18 *not once but twice, before turning to the Petition. It is bringing the Petition as a last resort*
19 *and because the directors of the Company have deliberately prevented it from exercising*
20 *its rights under the constitution.”*
21

22 71. Counsel also sought to distinguish the two cases relied on by the Company by stating that in
23 the first, ***Re A Company***, this was an unfair prejudice petition but one in which the petitioner
24 wanted to be bought out. In ***CVC v. Demarco***, not only was the petitioner seeking to be bought
25 out but he held less than 1% in shares. This is said to be in contrast to the instant case, where
26 the Petitioner is a more significant shareholder and claims to have owned more than 50% of
27 the shares at one stage.
28





1 **ADEQUATE ALTERNATIVE REMEDIES**
2

3 72. Counsel on behalf of the Company submits that the presentation of a winding up petition is a
4 remedy of last resort and that the Petitioner has alternative remedies and is acting unreasonably
5 in not pursuing them. Counsel submits that as in the case of *Re Camulos Partners* where the
6 essential complaint was the amount entitled to be received on redemption and the appropriate
7 remedy was the commencement of a writ action, in the instant case, the Petitioner has the option
8 of accepting the redemption offer made and the remedy of filing suit for any difference, if there
9 is an issue with the amount of money received.

10
11 73. In respect of the refusal to convene a general meeting, the submission is that the appropriate
12 remedy is the originating summons which was previously filed. The additional submission is
13 that now that the position is different and the issue is in respect of voting rights, that also can
14 be pursued by way of originating summons. Any challenge to the capital calls may also be done
15 by writ action.

16
17 74. Counsel argues that there is a distinct contrast to the circumstances in the case of *Tianrui*. In
18 that case the petitioners were locked in with the existing board, there was no offer to buy out
19 and the Appellate Court could not be sure that there were alternative remedies. In the instant
20 case there is an offer and this Court will be able to conclude that there are adequate alternative
21 remedies. Counsel also points to the change in the Petitioner's approach from the originating
22 summons process and submits that a similar change also featured in the case of *Re Camulos*
23 *Partners*. The submission is that this change in approach on the part of the Petitioner supports
24 the Company's arguments as to the existence of alternative remedies.

25
26 75. The Company's arguments as to possible alternative remedies appear to be of some strength.
27 Given the remedies which are accepted to be available, I think that the issue really turns on
28 whether it can be said at this stage that it is plain and obvious that the Petitioner will not be
29 able to establish its case on the just and equitable ground and will not be able to establish that
30 there is a need for an investigation.
31
32



1
2 **NEED FOR AN INVESTIGATION**
3

4 76. It is accepted that the need for an investigation can be a free-standing basis for the making of a
5 winding up order on the just and equitable ground.¹²
6

7 77. Counsel for the Company submits that there is no proper or serious basis for an investigation
8 and that the assertion that there is a need for this is not plain and obvious and is a ‘red herring’.
9 This is against the factual background that there were no difficulties until February 2020, when
10 there was ‘sudden concern’ which Counsel submitted can only be related to the fact of the
11 departure of Mr. Bours who was the Petitioner’s “man on the inside”.
12

13 78. It is also said that some of the concerns are historical in nature, such as for example the issue
14 of the capital calls. Reliance is placed on the judgment of the Court in the case of *Re*
15 *Washington Special Opportunity Fund, Inc.*¹³ which did not approve of what was said to be
16 an “ex post facto trawl” going back many years where every possible grievance was sought to
17 be relied on by the petitioner.
18

19 79. The Petitioner’s claims as to the non- provision of information are addressed by the Company
20 in the following way. Firstly, that the Petitioner bargained for a particular set of information
21 rights and was fully aware what those are as is evidenced by various emails of 24th and 25th
22 June 2020. The information to which it was entitled has been provided, for example audited
23 financial statements. Secondly, that it is seeking items of information to which it is not entitled.
24 For example a count as to its shareholdings which in any event is now a moot issue as it no
25 longer has voting shares. Thirdly, that any other information requested is not held by the
26 Company.
27

28 80. The issue of disparity in expenses (1.8% and 2.16%) being charged to the Petitioner is said to
29 be explained by the audited accounts which show that the difference between the two is as a

¹² See In Re Paradigm Holdings [2004- 05] CILR 542, In the matter of GFN Corporation Ltd. [2009] CILR 135 at para 42

¹³ Unreported. Grand Court 1st March 2016

1 result of fees other than management fees with the higher amount being the global figure. The
2 issue of expensive management fees over time is said to be in part explained by Mr.
3 Drankiewicz. The proffered explanation is that some fees were initially reimbursed by the
4 Investment Manager by way of a reduction of the management fees that would otherwise have
5 been payable. This occurred in the early years of the Company through to December 2017.

6
7 81. The difference in the value of the shares is said to be explained by the fact of the lock-up of
8 trading of those shares until December 2020. Additionally, it is said that there can be no real
9 issues with values as the investment is in a company which is listed on the Nasdaq Exchange
10 where there is significant transparency and the shares are valued according to the published
11 trading price using the methodology set out in the CEM.

12
13 82. The timing of the two partial redemptions is said to be explained by the fact that this was shortly
14 after the lock-up ended. These partial redemptions were said to have been done for commercial
15 reasons.

16
17 83. Finally on this aspect it was submitted that the Company had a sound basis for utilising Article
18 29.3 of the MAA in respect of the resolution re voting rights of the Petitioner's shares. It is said
19 that this is clear from the matters set out in the Board resolution and that this was not done for
20 an improper purpose.

21
22 84. Counsel also submitted that there are a number of checks and balances which militate against
23 the need for any kind of investigation. The Company is audited by an auditor who is approved
24 by the regulator and who is independent. It has an independent administrator and, now an
25 independent director.

26
27 85. Counsel on behalf of the Petitioner submits in reply that there is conduct that requires an
28 investigation in the face of serious allegations against the Company. The assertion of justifiable
29 loss of confidence rests on lack of probity in the conduct of the Company's affairs. It is argued
30 that there is a long history of the Company attempting to deprive it of rights, of being oppressive
31 and of a course of conduct involving multiple issues of breach of fiduciary duty on the part of



1 management. The filing of the Petition is said to be a last resort following various efforts to
2 address the main concern which is the management of the entity.

3
4 86. Counsel summarised the concerns as including in addition to the refusal to provide information
5 and the absence of a proper explanation of the capital calls, a breach of the legal bargain made
6 by which investors were induced to invest and offered and accepted voting shares. The
7 Petitioner is said to have been improperly deprived of the power to appoint directors by the
8 actions of the Company which served to destroy and create a new majority.

9
10 87. Counsel said that the Company unilaterally proceeded with a partial redemption of the
11 Petitioner's shares in January 2021 the effect of which was to significantly reduce the
12 Petitioner's voting rights. The Petitioner and two other shareholders sought to exercise their
13 rights to requisition a meeting. This was obstructed by the Company with the claim that they
14 had insufficient shareholding to ground the jurisdiction to be able to call such a meeting.
15 Thereafter there was a further partial redemption of 50% on 28th February 2021, the effect of
16 which served to reduce the Petitioner's voting rights by a significant amount. The redemption
17 proceeded despite the Petitioner filing an originating summons thereby rendering that
18 procedure nugatory. It is said by the Petitioner that the conduct has effectively forced the
19 Petitioner out of the Company to a significant degree and that it appears to be designed to avoid
20 any proper scrutiny into the Company's affairs.

21
22 88. The argument is that the actions of the Company go beyond the inability of the Petitioner to
23 call an EGM and can properly be described as interfering with shareholder rights which raise
24 the concern as to lack of probity. The Petitioner states its understanding that the Company has
25 not canceled voting rights for other shares. The submission is that it is unconstitutional for the
26 directors to use their fiduciary powers over the shares of the Petitioner, and that the conduct
27 may also impact other shareholders as it affects their rights. It is said that even if the articles
28 permit the Company to do this, the power has been exercised for an oppressive discriminatory
29 purpose.



1 89. Reliance is placed on the case of *Loch v. John Blackwood*¹⁴, and what is said to be
2 circumstances of some similarity, for the submission that the failures of the directors or those
3 managing a company to conduct the affairs of a company in accordance with statute or the
4 company's own procedures as set out in its company documents may give rise to a justifiable
5 loss of confidence and a lack of probity.

6
7 90. In respect of what is said to be oppressive conduct, Counsel highlighted the following statement
8 by the Court in the case of *In re Jermyn Street Turkish Baths Limited*¹⁵:

9
10 *“Oppression must, we think, import that the oppressed are being constrained to submit to*
11 *something which is unfair to them as the result of some overbearing act or attitude on the*
12 *part of the oppressor.”*



13
14 **IMPROPER COLLATERAL PURPOSE**

15
16
17 91. The submission of Counsel for the Company is that the Petition brought is being used as a
18 weapon for self-serving reasons and that improper motive can be readily inferred from the
19 evidence. The purpose for the bringing of the Petition is as stated in the disclosed e-mails. It is
20 being brought to exert pressure so that the Petitioner can dictate terms. Additionally it is
21 submitted that it is open to the Court to infer that it is being brought to gain some sort of tactical
22 advantage in the forthcoming employment dispute in New York. This in light of the fact that
23 Mr. Bours who is one of the witnesses is intimately connected to the Petitioner. It is further
24 argued that there is no improper purpose to the actions of the Company with respect to the
25 voting rights to the shares of the Petitioner. This given the nature of the proposed nominees. It
26 was thought to be undesirable for a single investor to have so much control. It is also argued
27 that the Petitioner is required to and has failed to demonstrate that the Petition is being brought
28 in the interest of a class of shareholders. The submission is that:

29
30 *“It is clear that a contributories’ winding up petition should only be used “to advance a*
31 *class remedy on behalf of other shareholders” and it is not permissible for a petitioner to*

¹⁴ [1924] AC 788

¹⁵ [1971] 1 W.L.R. 1042

1 use a petition “to advance its own individual commercial interests”: see *Ctrip Investment*
2 *Holding v eHi Car Services* (Unreported, Grand Court, 29 June 2018) at [3] per Kawaley
3 J. As McMillan J further noted in *Re Torchlight Fund L.P.* (Unreported, Grand Court, 25
4 September 2018), where the Court dismissed a just and equitable winding up petition for
5 similar reasons, “[T]he Petitioners must demonstrate that the Petition has been pursued
6 in the interest of [the shareholders] as a class and not merely for their own individual
7 interests whatever they may be” (at [1134]).”
8

9 92. The Petitioner in response submits that at least three shareholders support the Petition which is
10 a sufficient class and that it should be noted that the Appellate Court in the case of *Tianrui* was
11 doubtful whether a class action is necessary in these circumstances.
12

13 93. The primary responsive submission is that at this stage there is no evidence of improper or
14 collateral purpose. The e-mails referenced were sent by Mr. Bours and not by the Petitioner.
15 Further and in any event, they do not support the proposed conclusion. They do no more than
16 list a series of options with no express intention to pursue any particular one. In the second
17 paragraph of the e-mail chain the clear indication from Mr. Bours is that requests should only
18 be made in respect of information to which the Petitioner is entitled. The further submission
19 is that there is nothing improper in seeking more control over investments. Finally on this
20 aspect it is said that credible concerns are raised by the material presented, and that it would be
21 wrong for the Court to seek to determine collateral purpose which requires conclusions to be
22 reached on intention and or motive on affidavit evidence alone and without a trial.
23
24

25 INDEPENDENT DIRECTOR/ THE APPOINTMENT OF INSPECTORS

26

27 94. The applicable principle is that the winding up jurisdiction is not a punitive one and the Court
28 is to consider the position as at the date of the hearing rather than as it was in the past, (see *Re*
29 *Fildes Bros. Ltd.*¹⁶).

30
31 95. Counsel for the Company in reliance on this argues that even if there is some need for an
32 investigation which is not accepted, there is now an independent director, Mr. Guilfoyle.

¹⁶ [1970] 1 WLR 592



1 Additionally that the Court has the power to appoint inspectors to the Company pursuant to
2 s.64 to s.68 of the Companies Act. It is said that both of these options would be less heavy
3 handed. Counsel urged the Court to consider what needs to be investigated that could not be
4 investigated by Mr. Guilfoyle or by an inspector.

5
6 96. In respect of Mr. Guilfoyle, it is said that he is a well-known, qualified, experienced and
7 respected professional who would be ideally placed to carry out an investigation. Counsel for
8 the Company submitted that it is not too late for Mr. Guilfoyle’s appointment and that this is
9 an option open to the Petitioner which it has not sought to pursue. This is evidenced by the fact
10 that since his appointment, Mr. Guilfoyle has not been contacted by the Petitioner.¹⁷

11
12 97. In response, the Petitioner submitted that the appropriate time to consider alternative remedies
13 is after the Petition is heard and all the evidence has been considered. With respect to Mr.
14 Guilfoyle, it is said that “the Petitioner is entitled to an independent investigation by an official
15 liquidator with the appropriate wide ranging powers and forensic skills and not by a recently
16 appointed director who is a part of the management of the Company.”

17
18 **DISCUSSION**

19
20 98. It is not inappropriate to describe this matter as a series of actions and counter actions which
21 escalated following the inadvertent disclosure of the internal emails. Each side describes their
22 own actions as either seeking to enforce rights or to defend itself from hostility and aggression.
23 While the issue of the capital calls which the Company has accepted it had no right to make is
24 said to be historical in nature, there is no dispute as to the timing of them and that the inquiries
25 of the Petitioner initially related to these calls. Those inquiries arose prior to the internal emails
26 being sent. Viewed in context the calls appear to be part of a chain of events rather than to be
27 historical conduct in the sense described in the case of *Re Washington Special Opportunity*
28 *Fund, Inc.*



¹⁷ First Affidavit of Mr. Ronan Guilfoyle, dated 3rd June 2021 paragraph 4

1 99. In the chain of events, the tipping point for the Petitioner which sought to take other remedies
2 appears to have been the loss of its voting rights. The Company responds that this is permissible
3 by Article 29.4 of the MAA and is a defensive measure as explained in the Board Resolution
4 to prevent itself from being ‘flooded’ with four directors of the Petitioner’s choice. Whether or
5 not the nominees are or were suitably qualified is not for determination and cannot be
6 determined at this point.

7
8 100. It is fair to say that the factual questions surrounding the attempt by the Petitioner and others
9 to call an EGM and the question of the loss of voting rights of the Petitioner are of significance
10 for this Court on considering this application. This is because it is accepted that the alleged and
11 or accepted conduct may open the factual door for the argument which the Petitioner seeks to
12 raise as to the purpose for the conduct and whether or not there was oppressive conduct. This
13 also possibly brings into sharp focus the earlier partial redemptions. The Company says that
14 these were for commercially sound reasons after the lock-up period had ended and the shares
15 could be traded. The Petitioner alleges that this was for an improper purpose to reduce its
16 shareholding so that it could be stripped of its voting rights which it had been assigned as part
17 of the shareholder agreement.

18
19 101. Mangatal J. in the cited case of *Re Washington Special Opportunity Fund, Inc.* provides a
20 helpful summary of the law and issues to be considered. Even where the conduct is technically
21 legal it may still be oppressive in that it constitutes a visible departure from the standards of
22 fair dealing on which a shareholder is entitled to rely. The learned Judge stated:

23
24 *“In the Law, there is no statutory reference to “oppression” except as one of the conditions*
25 *for appointment of provisional liquidators – see section 104(2)(b)(ii). However, cases of*
26 *oppression are simply an example, or sub-set of cases in which it may be just and equitable*
27 *to wind up a company. In one of the oft-cited and leading Scottish cases on this area, **Elder***
28 *v **Elder and Watson Ltd** [1952] SC 49, Lord President Cooper stated as follows, in related*
29 *to the relevant pre -1947 practice under the “just and equitable” clause:*

30
31 *“Under the former practice, winding up has been ordered in many types of case*
32 *which involved no true element of oppression to shareholders, eg. where the*



1 *substratum of the company had vanished, and such cases will doubtless continue*
2 *to arise. On the other hand the justice and equity which led to the grant of a*
3 *winding up order have often been found in conduct reasonably capable of being*
4 *described as “oppressive” to some part of the company’s members, the*
5 *oppressions being usually exerted by a person with predominating voting power*
6 *which was employed for his own advantage to the detriment of a helpless minority.*
7 *The decisions indicate that conduct which is technically legal and correct may*
8 *nevertheless be such as to justify the application of the “just and equitable”*
9 *jurisdiction, and, conversely, that conduct involving illegality and contravention*
10 *of the Act may not suffice to warrant the remedy of winding up, especially where*
11 *alternative remedies are available. Where the “just and equitable” jurisdiction*
12 *has been applied in cases of this type, the circumstances have always, I think, been*
13 *such as to warrant the inference that there has been at least an unfair abuse of*
14 *powers and an impairment of confidence in the probity with which the company’s*
15 *affairs are being conducted, as distinguished from mere resentment on the part of*
16 *a minority at being outvoted on some issue of domestic policy. The phrase*
17 *“oppressive to some part of the members” acquires a certain colour from its*
18 *collocation in section 165 with such stronger expressions as “intent to defraud”,*
19 *“fraud” “misfeasance”, or “other misconduct”, and the essence of the matter*
20 *seems to be that the conduct complained of should at the lowest involve a visible*
21 *departure from the standards of fair dealing, and a violation of the conditions of*
22 *fair play on which every shareholder who entrusts his money to a company is*
23 *entitled to rely.”*

24
25 102. In the cited case of **Loch v. John Blackwood**, the Privy Council expressed the view that failings
26 to adhere to statute and articles taken together with the fact that the calling of a meeting of
27 shareholders would inevitably fail and be unavailable as a remedy could not be excluded from
28 a consideration as to whether it is just and equitable to wind up a company. The Court stated:

29
30 *“Such a consideration, in their Lordships’ view, ought to proceed upon a sound induction*
31 *of all the facts of the case, and should not exclude, but should include circumstances which*



1 *bear upon the problem of continuing or stopping courses of conduct which substantially*
2 *impair those rights and protections to which shareholders, both under statute and contract,*
3 *are entitled. It is undoubtedly true that at the foundation of applications for winding up, on*
4 *the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct*
5 *and management of the company's affairs. But this lack of confidence must be grounded*
6 *on conduct of the directors, not in regard to their private life or affairs, but in regard to*
7 *the company's business. Furthermore the lack of confidence must spring not from*
8 *dissatisfaction at being outvoted on the business affairs or on what is called the domestic*
9 *policy of the company. On the other hand, wherever the lack of confidence is rested on a*
10 *lack of probity in the conduct of the company's affairs, then the former is justified by the*
11 *latter, and it is under the statute just and equitable that the company be wound up."*

12
13
14 103. It was further stated:

15
16 *"The present Lord President of the Court of Session (Lord Clyde) in Baird v. Lees (1)*
17 *discusses the section and the ejusdem generis doctrine in exactly the same spirit. His words*
18 *are as follows: "I have no intention of attempting a definition of the circumstances which*
19 *amount to a 'just and equitable' cause. But I think I may say this. A shareholder puts his*
20 *money into a company on certain conditions. The first of them is that the business in which*
21 *he invests shall be limited to certain definite objects. The second is that it shall be carried*
22 *on by certain persons elected in a specified way. And the third is that the business shall be*
23 *conducted in accordance with certain principles of commercial administration defined in*
24 *the statute, which provide some guarantee of commercial probity and efficiency. If*
25 *shareholders find that these conditions or some of them are deliberately and consistently*
26 *violated and set aside by the action of a member and official of the company who wields*
27 *an overwhelming voting power, and if the result of that is that, for the extrication of their*
28 *rights as shareholders, they are deprived of the ordinary facilities which compliance with*
29 *the Companies Acts would provide them with, then there does arise, in my opinion, a*
30 *situation in which it may be just and equitable for the Court to wind up the company."*
31



1 104. In *Elder v. Elder & Watson*¹⁸ the Court summarised the case of *Loch v. Blackwood* as being
2 “a case where directors with a controlling power in a company were held to have acted in the
3 affairs of the company in such a way as to give rise to the suspicion that they were managing
4 the company in their own interest and with a view to acquiring the shares of the minority
5 shareholders at an under value”. This was said to be illustrative of the kind of case which
6 may fall under s.210 of the Companies Act in the United Kingdom.

7
8 105. In applying the principles to the instant case I have considered whether in bringing this Petition
9 the Petitioner is doing so as part of some earlier identified strategy as set out in the disclosed
10 e-mails albeit that the email emanated from Mr. Bours and not from the Petitioner. It appears
11 that there is some significant connection among them. This being the “nuclear option” in order
12 to have greater control over its investments. The difficulty is that there are agreed or alleged
13 actions by the Company which occurred after the disclosed e-mails which actions are said to
14 require scrutiny. Arriving at a conclusion at this stage on the suggested motive of the Petitioner
15 would also require reaching conclusions on the Company’s own actions.

16
17 106. I have also considered whether the actions of the Company particularly with respect to the
18 conversion of the shares to non-voting shares was not only legitimate but also no more than
19 protective in nature against what was seen as the aggressive actions of a member. There are
20 also factual questions which are raised as to the reasons for the two partial redemptions at the
21 particular times. There are two issues, one is determining whether or not there is an improper
22 collateral purpose in the absence of a trial. Secondly it is that even if those actions were
23 legitimate, they may still amount to an unfair abuse of power and may thus be sufficient to
24 ground an application under the just and equitable ground.

25
26 107. As to the second issue, actions may well be oppressive even if done for the purpose of seeking
27 power and control. (See *Re Harmer Ltd*¹⁹). Additionally in the case of *Howard Smith Ltd. v.*
28 *Ampol Petroleum*²⁰ in respect of an intra vires allotment of shares, the Privy Council stated:
29



¹⁸ 1952 SC 49 (1),

¹⁹ [1959] 1 W.L.R 62

²⁰ [1974] A.C. 821

1 *“But, intra vires though the issue may have been, the directors’ power under this article is*
2 *a fiduciary power: and it remains the case that an exercise of such a power though formally*
3 *valid, may be attacked on the ground that it was not exercised for the purpose for which it*
4 *was granted.”*

5
6 108. The Court said in that case that if the primary object for the allotment of shares was to alter the
7 majority shareholding, the directors had acted improperly:
8

9 *“ Although the directors had acted honestly and had power to make the allotment, to alter*
10 *a majority shareholding was to interfere with that element of the company's constitution*
11 *which was separate from and set against the directors' powers and, accordingly, it was*
12 *unconstitutional for the directors to use their fiduciary powers over the shares in the*
13 *company for the purpose of destroying an existing majority or creating a new majority;*
14 *and that, since the directors' primary object for the allotment of shares was to alter the*
15 *majority shareholding, the directors had improperly exercised their powers and the*
16 *allotment was invalid.”*

17
18 109. In the context of this case, I note also what is said by the Court in the case of ***Eclairs Group***
19 ***Ltd v. JKX Oil & Gas plc***²¹, the answer to action which is said to be abusive cannot be that the
20 person to whom the act is directed, brought it upon himself. Lord Sumption stated:
21

22 *“The limitation of the power to its proper purpose derives from its fiduciary character. If*
23 *its exercise would otherwise be an abuse, it cannot be an answer to say that the person*
24 *against whom it is directed had only himself to blame. Moreover, the majority's proposition*
25 *assumes that that person is the only one whose interests are adversely affected. But that is*
26 *not right. Other shareholders who agreed with them would be deprived of their support.”*
27

28 110. In summary, against this background, the issue of abuse of power is raised in the instant
29 circumstances. Where this is raised, the state of mind and intention of those who acted is an

²¹ [2015] UKSC 71



1 important consideration. In the case of *Howard Smith Ltd. v. Ampol Petroleum*, the Court
2 stated:

3 “...before one can say that a fiduciary power has been exercised for the purpose for which
4 it was conferred, a wider investigation may have to be made. This is recognised in several
5 well-known statements of the law. Their Lordships quote the clearest which has so often
6 been cited. 'Where the question is one of abuse of powers, the state of mind of those who
7 acted, and the motive on which they acted, are all important, and you may go into the
8 question of what their intention was, collecting from the surrounding circumstances all the
9 materials which genuinely throw light upon that question of the state of mind of the
10 directors so as to show whether they were honestly acting in discharge of their powers in
11 the interests of the company or were acting from some bye-motive, possibly of personal
12 advantage, or for any other reason.' (Hindle v. John Cotton Ltd. (1919) 56 Sc.L.R. 625,
13 630-631, per Viscount Finlay.)”

14
15 111. In the case of *Re Smith and Fawcett Ltd.*²² the appellant challenged the refusal of the directors
16 of a private company to register a transfer of shares to him. He had obtained rights to the shares
17 on the death of his father. Counsel on his behalf argued that the refusal to register the shares
18 was wrong in principle as it had not been made for the benefit of the company but for other
19 motives. The Court noted that Article 10 of the Articles of Association of the company gave
20 the directors a wide discretion to register any transfer of shares. The language was not such as
21 to limit the powers to particular circumstances. The Court noted that the exercise of powers
22 under articles while fiduciary in nature, must be exercised in the interest of the company and
23 not for a collateral purpose. There was nothing to show that this was the case. Lord Greene MR
24 expressed reservations about determining mala fides on affidavit evidence alone. The learned
25 Judge stated:

26
27 “Speaking for myself, I strongly dislike being asked on affidavit evidence alone to draw
28 inferences as to the bona fides or mala fides of the actors. If it is desired to charge a
29 deponent with having given an account of his motives and his reasons which is not the true
30 account, then the person on whom the burden of proof lies should take the ordinary and

²² [1942] 1 Ch 304, 308



1 *obvious course of requiring the deponent to submit himself to cross-examination. That does*
2 *not means that it is illegitimate in a proper case to draw inferences as to bona fides or*
3 *mala fides in cases where there is on the face of the affidavit sufficient justification for*
4 *doing so, but where the oath of the deponent is before the court, as it is here, and the only*
5 *grounds on which the court is asked to disbelieve it are matters of inference, many of them*
6 *of a doubtful character, I decline to give to those suggestions the weight which is*
7 *desired.”²³*

8
9 112. I am also mindful that while the general principles applicable to strike out applications are
10 considered in the context of company matters which involve additional considerations as
11 outlined in the cases above, the essential feature remains, that this is not the place for the court
12 to conduct a mini trial or to attempt to resolve factual issues. In the context of a petition brought
13 on the just and equitable ground Gibson J. in the case of ***Re a Company No. 003096 of 1987***²⁴

14
15 *“It is trite law that an application to strike out will fail unless it is plain and obvious that*
16 *the petition will not succeed. If the court, on a review of the material that has properly*
17 *been put before it, finds that there are facts in dispute which are or may be material to a*
18 *determination in the petitioners' favour of the petition, then it must let the petition go to*
19 *trial. On the other hand, if the facts which must be taken to be true or (where evidence is*
20 *admissible) are established by evidence which is not disputed, lead the court to the clear*
21 *view that the petition is bound to fail, then it would be pointless to allow the petition to go*
22 *to a hearing and thereby to protract the uncertainty that hangs over the company.”*

23
24 113. I have set out above in some detail the allegations made by Mr. Bours in his Affidavit. In my
25 view this Affidavit perhaps more so than others details the issues on the Petition.

26
27 114. I bear in mind that Mr. Bours is said not to be a neutral party and may well have motives in
28 supporting the Petitioner which are linked to his employment dispute with the affiliate. Counsel
29 for the Applicant urged that given his close connection to the Petitioner and the statements

²³ Ibid, Page 308

²⁴ [1988] 4 B.C. C. 80



1 made by him including in the disclosed e-mail correspondence, the Court can conclude that the
2 Petition is no more than a ‘side fight’ to that dispute and is being brought to exert some sort of
3 pressure on the Company. Put simply, I have reviewed this submission with some care but do
4 not consider that it would be appropriate at this stage to dismiss all that is said by Mr. Bours
5 with such a broad brush, without an examination and ultimately a determination of its veracity
6 as to part or whole. I note also that there is no suggestion that the issues raised herein, will or
7 would be determined as part of that employment dispute.

8
9 115. I have also considered the answers put forward by the Company and the documents referenced
10 such as the audited accounts. It appears to me that some of the answers would require summary
11 conclusions of fact without affording an opportunity for challenge.

12
13 116. Given the conduct alleged and questions raised, I do not consider that this is a plain and obvious
14 case in respect of which the facts underlying the Petition do not require to be established.
15 Neither can it be said at this stage that it is obvious that the Petitioner will not be able to
16 establish that there is a need for an investigation.

17
18 117. The Applicant made arguments that this is a case which ought to be about money, that the
19 nature of the company is particularly significant. It is a fund, its sole purpose is to make
20 investments and generate profits, that in effect the buyout offer together with the ability to
21 challenge any amounts of received by way of writ action is likely to be a complete and effective
22 answer. I accept the submission of the Petitioner that this cannot be a complete answer in light
23 of the nature of the allegations.

24
25 118. I also accept the submissions of Counsel for the Petitioner that the concerns raised in the
26 Petition are wider than financial and that allegations of improper collateral purpose and
27 oppressive conduct do require examination at trial. The broad question is whether or not there
28 has been unfairness or oppression in the sense detailed above. Factual questions which arise
29 for resolution and inquiry include but are not limited to the following:-

- 30
31 i) Whether or not there was an entitlement to management or other participation
32 which the Petitioner was denied?
33 ii) In respect of both parties, the motives and intentions behind various actions.



- 1 iii) Whether or not the allegations raised as to mismanagement of the Company are
2 correct.
3 iv) Whether or not there is obscuring of the financial position of the Company.
4 v) Whether or not decisions were made which favored related parties at the expense
5 of the Petitioner.
6 vi) What was the shareholding of the Petitioner in January 2021, did that change, if
7 so, how, by what means and with what motives?

8
9 119. The Applicant submits that the Petition is being brought for a selfish collateral purpose as is
10 said to have been admitted in internal correspondence as the nuclear option and that there is no
11 economic rational reason. However this is a case in which the Petitioner has sought to pursue
12 other remedies, firstly by writ and then by way of originating summons. Counsel for the
13 Petitioner submitted and I accept that in this case the change of direction from the originating
14 summons procedure followed on from the occurrence of that which the procedure had been
15 seeking to prevent.

16
17 120. Implicit in the submission of Counsel on behalf of the Company that its strike out application
18 is not based on merit is perhaps the recognition of the sufficiency of the issues raised. In large
19 measure the focus was on the possible harm to the Company should the Petition proceed and
20 the existence of alternative remedies.

21
22 121. Counsel’s argument on behalf of the Company is that the bringing of a petition is likely to
23 cause reputational damage. Counsel described it as seeking to “blow up the fund”. I have
24 considered this aspect in the light of the guidance from the Court of Appeal in the cited case of
25 *Tianrui* in three respects. Firstly that the likelihood of reputational damage is but one factor to
26 be considered in determining whether or not a petition should be struck out. That factor by
27 itself does not mean that a petition is an abuse of process. In the Cayman Islands the only route
28 for a member of a company to obtain alternative relief to winding up is by bringing a petition
29 on the just and equitable ground. Secondly, that a strike out application is not the place for
30 assessing which procedure whether writ action or petition would produce less damage. Thirdly,
31 as this matter involves a member’s petition it is not clear that it requires to be brought for the
32 purpose of advancing a class remedy.



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122. Are there alternative remedies available to the Petitioner? The answer is that there appear to be alternative remedies for some but not necessarily for all of the concerns raised. Is the Petitioner acting unreasonably in not pursuing alternative remedies, ie by writ or other process? The answer is in the negative. Where possibly the only aspect which could not be remedied by alternate means is an investigation, is the Petitioner being unreasonable in not asking Mr. Guilfoyle to undertake an inquiry or pursuing the route of inspectorship? The Petitioner relies on the case of *In re Gordon and Breach Science Publishers*²⁵ for its argument that it is entitled to insist on independent investigators should its case be established at trial.

123. Additionally there are two difficulties with the suggested investigation alternatives. Firstly, this would appear to be pre-judging the matter as to whether or not at trial the Petitioner can establish its case on the just and equitable ground and secondly, if so as to which of the investigation remedies would be appropriate. In effect, in order to conclude that the Petitioner is being unreasonable in not pursuing one of these remedies, one would first have to conclude that an investigation is required and more particularly the extent to which same is required. All that can be said at this stage is that on the material presented it is not plain and obvious that the Petition is bound to fail.

124. I am also mindful of the judgment of the Court of Appeal in the case *Tianrui* in which it was stated that a petitioner should not be deprived of a statutory right simply because there are other remedies and that the appropriate time to consider the adequacy of a remedy is if and after facts have been established at a trial. The Court stated:-

29 As Asia Pacific (2) shows, however, even a buy-out offer will not in every case amount to a sufficient alternative remedy to make it an abuse to present a winding-up petition instead of accepting the offer. In all but a plain and obvious case, it is likely to be necessary for the facts underlying a petition to be established at trial before the adequacy of a suggested alternative remedy, and the reasonableness or otherwise of the petitioner in failing to pursue it, can be established. Indeed, the structure of the Cayman legislation

²⁵ [1995] 2 BCLC 189



1 *indicates that in ordinary circumstances the decision on the suitability of an alternative*
2 *remedy, at least a remedy specified in s.95(3) of the Law, is to be made after the allegations*
3 *in the petition have been determined by the court and a prima facie case for a just and*
4 *equitable winding up made out. Unless, therefore, an available alternative remedy can be*
5 *seen, without full examination of the facts, to be capable of satisfying the petitioner's*
6 *concerns to an extent that would make it clearly impossible for him to persuade the court*
7 *that it would be just and equitable to wind up the company, the petition should proceed."*
8

9 125. The Appellate Court cited the case of *Tianrui* with approval in the case of *FamilyMart China*
10 *Holding co. Ltd, v. Ting Chuan (Cayman Islands) Holding Corporation*²⁶ :

11
12 *"As Tianrui teaches, the threshold question for the court is whether the company should*
13 *be wound up on the just and equitable grounds. This question must be determined before*
14 *the question of the appropriate relief arises. It is a determination that, under the statutory*
15 *scheme the court must answer, before it can decide whether an alternative remedy should*
16 *be ordered."*

17
18 126. Against the background of these guiding principles I found the arguments of the Petitioner in
19 the instant case to be persuasive. It is not evident at this stage that this is a straight forward buy
20 out case, or that it is being brought for a collateral and improper purpose. Neither is it evident
21 that the alternative remedies identified including the assistance of Mr. Guilfoyle or the
22 appointment of inspectors will resolve all the concerns which are raised. I am not satisfied and
23 do not conclude that the Petitioner is acting unreasonably in not pursuing these remedies. I
24 conclude that this is not a case in which a strike out of the Petition is appropriate. The
25 application to strike out the Petition is therefore refused.
26



²⁶ CICA Civil appeal Nos. 7 & 8 of 2019 , 23rd April 2020

1 127. Counsel may make submissions on costs in 14 days, failing which the usual rules will apply.

2

3 **Dated this the 10th day of November 2021**

A handwritten signature in blue ink, consisting of a series of fluid, connected strokes that form a stylized, cursive representation of the name Cheryll Richards.

4

5 _____
6 **Honourable Justice Cheryll Richards Q.C.**

6 **Judge of the Grand Court**