

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHCM BVIHCOM2024/0619, 0620, 0621 & 0622

BETWEEN:

OASIS CORE INVESTMENTS FUND LTD. & OTHERS

Applicant

and

HOLLYSYS AUTOMATION TECHNOLOGIES LTD.

Respondents

Appearances:

Mr Richard Millett KC (instructed by Ogier, Campbells, Collas Crill, and Carey Olsen) and, with him, Ms. Holly Challenger of Ogier, Mr Alex Hall Taylor KC (25 February) and Mr Dean Robson of Carey Olsen, Mr Jomokie Phillips of CAMPBELLS and Mr Michael Adkins of COLLAS CRILL, for the Claimants in each action

Mr Andrew Willins and Miss Laure-Astrid Wigglesworth (both of APPLEBY) for the Defendant in each action

2025: February 10 and 11
March 4

JUDGMENT

Introduction, Background and Issues

- [1] **MITHANI J [AG]:** These proceedings relate to four separate claims (“the Claims” or “these Claims”) issued against Hollysys Automation Technologies Ltd (“The Defendant”). The Claimants are Oasis Core Investment Fund Ltd and various other companies (“the Claimants”) referred to in Schedule A to the Claimants’ skeleton argument dated 21 February 2025.

- [2] The Claimants have brought claims against the Defendant following their dissent from a merger undertaken by the Defendant, which the members of the Defendant approved on 8 February 2024. The merger became effective on 25 July 2024.
- [3] The background to the dispute need only be stated briefly.
- [4] The Defendant is a leading automation control system solutions provider in China, with overseas operations in eight other countries and regions throughout Asia. It is incorporated in the British Virgin Islands and, by the merger price, is valued at \$1.66 billion.
- [5] The Defendant was “acquired” by Ascendent Capital Partners (“ACP”) through a merger of the Defendant and a special purpose vehicle owned by ACP. ACP is a well-known international private equity management firm. It manages capital for renowned global institutional investors, including sovereign wealth funds, endowments, pensions, and foundations.
- [6] As a result of the Claimants’ dissent from the merger, they were entitled to require the shares they held in the Defendant to be redeemed under s. 176 of the Business Companies Act 2004 (“the BCA 2004”) and have sought to do so. Section 179 of the BCA 2004 states that, in the absence of agreement between the Claimants and the Defendant about the price to be paid for redeeming their shares, the Claimants are entitled to be paid a fair value of the shares, fixed pursuant to a fair value appraisal made by three appraisers in accordance with s. 179(9) of the BCA 2004.
- [7] There is no issue that the requirements of s. 176 of the BCA 2004, which govern the circumstances in which the shares of a company may be redeemed on a merger, have been complied with by the Claimants. The parties have not been able to come to an agreement for the price to be paid by the Defendant for the Claimants’ shares (individually or collectively referred to as “the Shares” or “the Claimants’ Shares”). Accordingly, the price of the Shares falls to be determined in accordance with the machinery for assessing their value under s. 179(9) of the BCA 2004.
- [8] Section 179(1) states that “a member of a company [i.e., the Claimants] are entitled to payment of the fair value of his or her shares upon dissenting from ... (d) a merger¹, if the company is a

¹ Section 169 of the BCA 2004 defines a “merger” as “the merging of 2 or more constituent companies into one of the constituent companies.”

constituent company², unless the company is the surviving company and the member continues to hold the same or similar shares.” (Emphasis supplied).

- [9] Section 179 of the BCA 2004 sets out the process that governs the valuation of a dissenting member’s shares which is redeemable under s. 176 of the BCA 2004. The material provisions of s. 179(9) of the BCA 2004 state:

“If the company and a dissenting member fail, within the period of 30 days referred to in subsection (8), to agree on the price to be paid for the shares owned by the member, within 20 days immediately following the date on which the period of 30 days expires, the following shall apply—

- (a) the company and the dissenting member shall each designate an appraiser;
- (b) the 2 designated appraisers together shall designate an appraiser;
- (c) the 3 appraisers shall fix the fair value of the shares owned by the dissenting member as of the close of business on the day prior to the date on which the vote of members authorising the action was taken or the date on which written consent of members without a meeting was obtained, excluding any appreciation or depreciation directly or indirectly induced by the action or its proposal, and that value is binding on the company and the dissenting member for all purposes; and
- (d) the company shall pay to the member the amount in money upon the surrender by him or her of the certificates representing his or her shares.”

- [10] The three appraisers that need to be appointed under s. 179(9)(c) have now been appointed, but after what the Claimants say was a period of inordinate delay on the part of the Defendant. The appraisers have not been able to make much progress in determining the fair value of the Shares. The Claimants say that too is down to the Defendant. Whatever the reason for the delay and whoever caused it, the Claimants say that the valuation that had to be undertaken, and the payment for the Shares that had to be made, some months ago has not happened. Nor is it likely that it will happen any time soon.

- [11] The Claimants seek the following substantive relief from this court (“this Court” or “the Court”), summarised in para. 1 of the draft order lodged with the Claimants’ Reply Note dated 17 March 2025, i.e., a declaration that:

² Section 169 of the BCA 2004 defines a “constituent company” as meaning “an existing company that is participating in a merger or consolidation with one or more other existing companies.”

- “(a) on its true construction, the period of 20 days provided for in section 179(9) of the Business Companies Act 2004 (the "**Act**") applies such that each of the steps provided in subsections (a), (b), (c) and (d) must all have been completed within the said 20 days;
- (b) the Claimants are entitled to have the appraisal of fair value in accordance with the terms of section 179(9)(c) of the Act completed in time to allow the Defendant to make payment by [+20 calendar days of the date of this order] (the "**Payment Date**"), pursuant to section 179(9)(d) of the Act; and
- (c) the Defendant is liable to make payment of such amount to each Claimant as the Appraisers shall have appraised to be due to each Claimant by the Payment Date.”

[12] In broad terms, this Court is being invited to rule on three issues:

- (a) The proper construction of s. 179(9). Specifically, the Court needs to determine whether the 20-day period specified in s. 179(9) applies to para. (a) of that subsection only or whether it applies to all of the steps specified in paras. (a)-(d).
- (b) If the Court rules against the Defendant on (a) above, whether this Court can assist with the timetabling of the appraisal process which, wherever the blame for the alleged delay arises, the Claimants say needs to be firmly put back on track.
- (c) Whether this Court should give directions for the bringing of a claim against the Defendant which the Claimants wish to pursue against the Defendant on account of its alleged delay in the appraisal process.

The Dispute between the Parties, Summary of the Law, and Analysis and Discussion Construction of s. 179(9)

[13] The issue between the parties here is whether – as the Claimants contend – the entire process specified in s. 179(9) has to be completed within the period of 20 days referred to in that provision or – as the Defendant contends – only the procedure specified in subsection (a)³ has to be completed within that period.

³ I.e., for the Defendant and the Claimant each to designate an appraiser.

- [14] The Claimants contend that it is clear from the literal meaning of s. 179(9) that the whole process of valuing the Claimants' Shares, including payment under s. 179(9)(d), has to be completed within the 20-day period.
- [15] In support of their contention, the Claimants rely upon several matters.
- [16] First, the plain terms of s. 179(9). Mr Millett KC, who appears on behalf of the Claimants, says that the words "within 20 days immediately following the date on which the period of 30 days – i.e., the period for the agreement of the value of the dissenter's shares by the parties – expires, the following shall apply" in the main part of the subsection before the colon are incapable of applying only to para. (a) alone. They must also apply to paras. (b), (c) and (d). He states that the Defendant's suggestion that it can all be made sense of by simply putting a full stop after s. 179(9)(a) is wrong. The Defendant's construction involves not merely repunctuation, but wholesale further redrafting and restructuring of the subsection, including the removal of the cumulative "and" after paragraph (c).
- [17] Mr Millett is correct. If the construction contended on behalf of the Defendant were adopted by the Court, it would require the deletion of the words "the following shall apply" and all the words of para. (a) being moved to be part of the opening words of s. 179(9). New homes would then have to be found for paras. (b), (c), and (d), by their inclusion in a new subsection or subsections. I agree with Mr Millett that wholesale changes of this nature cannot be justified on the basis that the appraisal machinery in s. 179(9) is alleged to be impossible to achieve and is "more honoured in the breach than the observance".
- [18] Second, the Claimants say that, in at least one case, decided in this jurisdiction, it was held that the whole process, i.e., (a)-(d), had to be completed within 20 days. In **Brantley Inc v Antarctic Asset Management Ltd (BVIHCV2007/0227)**, at [46], **Hariprashad-Charles J** said:

It appears that section 179 was crafted in such a manner to ensure that, once a member dissents, the process which eventually follows in arriving at a fair value is swift. Not only will the dissenting member be promptly paid for its shares but on the other hand, the company could continue its operation with minimal disruption. The drafters, quite knowledgeable of the fact that the parties may wish to attempt to agree on a fair value for the shares and in an effort to reduce costs, (e.g. costs of appraisers) allotted 30 days to embark on the conciliatory process. Section 179(8) limits the time for negotiation to 30 days and not to 50 days. During the additional 20 days provided for by section 179 (9) (which begins immediately following the 30 days), the appraisal process should begin and be completed as Mr Husbands correctly postulated. The additional 20 days is not for further negotiations, the time for that ended after 30 days."

[19] **Hariprashad-Charles J** concluded, at [47]:

“Therefore, immediately after 30 days, it is imperative that both parties commence the appraisal process by appointing an appraiser and informing the other side that it has done so. The procedure outlined in section 179 (9) should follow with the appraisal process to be completed within the 20 days to allow for prompt payment as well as for the surrendering of the share certificate.”

[20] Third, the Claimants say that if the words of s. 179(9) are not given their literal construction, there would be no incentive for a company, whose shares are being redeemed by a dissenting shareholder, to proceed to a swift conclusion for the determination of the fair value of those shares. Indeed, there would be every reason for it to delay the process and – as the Claimants contend has happened here – keep the dissenting shareholder out of his money for the payment of the shares for a significant period of time. The Claimants maintain that, unlike other jurisdictions where a similar type of machinery exists for valuing a dissenting holder’s shares, the dissenting shareholder is neither entitled to obtain an interim payment on account of the likely value of his shares nor interest on the value determined by the appraisers from the date of the appraisal until the amount is paid. This is so despite the fact that while the dissenting shareholder waits to be paid, he ceases to have any of the rights of a member except the right to be paid the fair value of his or her shares under s. 179: s. 179(7).

[21] Finally, the Claimants say that there is no reason for the Court not to apply the literal words of s. 179(9). Specifically, they contend that there is no basis for the Court to apply a “purposive” construction of s. 179 because the purpose of the legislation is clear from the literal words of that provision and is consistent with the principle that BVI legislation must be read consistently with the BVI constitution: see, for example, **The Bank of Nova Scotia Bahamas Ltd v The Registrar of Companies (BVIHCVAP2016/0009 and 00109)**, in which the **Eastern Caribbean Court of Appeal** said, at [40]:

“Section 115(1) of the Virgin Islands Constitution Order 2007 (“the Constitution Order”) which came into force on 15th June 2007 provides that existing law “shall be construed with such adaptations and modifications as may be necessary to bring them into conformity with this Constitution.”

[22] The Claimants assert that the BCA 2004 is an existing law and accordingly must be construed in such a way as to make it conform, *inter alia*, with **s. 25 of the Constitution Order** which prohibits the taking possession or compulsory acquisition of property except where, *inter alia*, provision is made for the prompt payment of compensation.

- [23] The substance of this point was acknowledged by **Wallbank J** in **Nettar Group Inc v Hannover Holdings SA (BVIHCM 2021/0177)**, at [139] and [140], in which he said:

“Indeed, the legislative intent appears to be to allow a member to give up his membership and receive full fair value for his shareholding without any detrimental effect which a decision to merge may have upon the value of his shareholding. In other words, the legislative intent is to permit a member then to have a no-loss exit, if that is what he wants...The words of section 179 stand to be construed against this intention.”

- [24] The Defendant does not dispute that the literal meaning of section 179(9) is, as contended for by the Claimants, but asserts that the construction contended for by the Claimants is incorrect and that the Court should adopt a purposive interpretation to ensure that the statutory machinery can operate – as it contends – effectively. Among the arguments that it relies upon in support of the Court adopting a purposive approach are these.

- [25] First, while there is no dispute by the Defendant that the process specified in s. 179(9) was intended to be swift and efficient, the obligation to produce a fair value within the timescale contended for by the Claimants is fanciful. If the Courts construed s. 179(9) as requiring the whole process to be completed within 20 days, the quality of the work done by the appraisers could suffer significantly. That is because the work would have to be done at such speed that the appraisers would likely cut corners and take unnecessary shortcuts, such that the fair value for the shares fixed by them might, in fact, not be fair. If the valuation is prepared hurriedly, it may not be prepared with the professionalism, care, and skill expected of appraisers who are charged with the task of preparing it and would be more susceptible to challenge than if the appraisers were given a reasonable amount of time to undertake the valuation.

- [26] Second – and this follows from the first argument – the parties might be setting up the appraisers to fail if they are not given adequate time to prepare their valuation because (contends the Defendant) if the 20 day period forms part of the contractual mandate, then it may be arguable that once the statutory period has been exceeded, the resulting award will not be binding. The Defendant relies upon the following passage in **Kendall on Expert Determination, 5th Edn, 2014, Freedman, C and Farrell, J, Sweet and Maxwell**, at para. 7-17-7:

“Some expert determination clauses say that the expert is to make a decision by a particular date. These provisions are inserted to encourage speed in the reference, which is generally desirable. The agreement containing the time limit should make clear whether a decision made after the time limit has expired will be binding on the parties notwithstanding the failure to issue the decision by the time specified. Unless this is

clearly stated there could be a dispute about whether a decision which is issued out of time is a decision which has been made in accordance with the contract and is binding on the parties.”

- [27] The substance of the above point was acknowledged in **Lee v Chartered Properties (Building) Ltd** [2010] EWHC 1540 (TCC), in which a decision of an adjudicator that was not communicated to the parties in the manner or time stipulated by the applicable adjudication terms, was held to be invalid.
- [28] While accepting the force of this point, in my judgment, it should not be necessary for the valuation to be determined outside the period of 20 days referred to in s. 179(9).
- [29] Third, the Defendant argues that the statutory regime applies a “one size fits all” approach to s. 179. The Defendant states that it would be inconceivable for the time limit specified in s. 179(9) to be complied with in a company, such as the Defendant, a \$1.66 billion company, based in China, where the machinery for complying with s. 179(9) will be complicated by several factors, such as documents needing to be translated into the English language and where compliance with regulatory provisions to allow that machinery would not be altogether straightforward. While accepting the force of this point, I do not consider that it supports the premise that a construction of s. 179(9) should be given that is not based on its literal words. The legislature chose to apply s. 179 to all the companies incorporated or registered in the BVI. If it thought that there might be difficulty in certain companies complying with the machinery set out in s. 179, it would have made different rules for different types of companies. It did not.
- [30] Nor can the fourth point, relied upon by the Defendant in support of the construction contended for by it, be correct. The Defendant is right to say that once appraisers are appointed, the valuation exercise is largely in their hands. But it seems to me to be wrong in principle for the appraisers to take their own time to decide how the dissenting shareholder’s shares should be valued. It is a fallacy to think that the appraisers – if they know of the deadline of 20 days for completing their appraisal – will not be aware that they are working against a tight deadline. It follows that if they disregard that deadline, they will do so at their own peril. But there is another important point to make here: there is no reason why the terms upon which the appraisers are retained to conduct the valuation should not make it clear that the appraisers must determine the fair value of the dissenting member’s shares within the 20-day period referred to in s. 179(9). If an appraiser, having accepted the retainer, is unable to achieve that deadline – or at least, be in

a position himself to do so – he would be in breach of the terms of that retainer and be liable to a claim for such breach accordingly.

[31] The fifth and sixth points relied upon by the Defendant have little or no substance. If the parties and the appraisers are not tied down to a particular timetable for the valuation of a dissenting shareholder's shares in a company, the whole process becomes open-ended. The one serious flaw in the Defendant's argument is that if paras. (b)-(d) are not subject to the overall time limit of 20 days, then it must beg the question of what the time limits are for the compliance of those provisions. The legislature chose not to include the word "reasonable" in any of the provisions, so the dissenting shareholder does not even have the benefit of knowing that the company will act with proper or reasonable dispatch, even though if the construction of s. 179(9) contended for by the Defendant is correct, the court will likely imply a requirement that the steps in paras. (b)-(d) should be carried out within a reasonable time.

[32] Likewise, the seventh point is without substance. I would not expect the responsibilities and the duty of care and skill that professionals owe to the parties in any way to be compromised just because they are under a tight timetable to carry out their valuation. The terms of their retainer will say how they must carry out their duties and functions and that they must exercise reasonable care and skill. But even if they do not, such a term will be implied in the retainer unless it is excluded, which would be extraordinary and might be in breach of s. 179(9) anyway. If they feel that the timetable will not make it possible for them to do so, they can always decline to accept the instructions they receive. But if they do accept the instructions, they would be expected, and would have, to carry out their duties professionally and with reasonable skill and care. Nothing short of that would comply with s. 179(9). Of course, it should be pointed out that while each appraiser will have his own terms and conditions of retainer from the party appointing him, and the terms of the third appraiser will have to be agreed upon separately, it is a fallacy to think that the appraisers will be acting for the party that appointed them. As in any expert valuation, arbitration, or other – for want of a better expression – "quasi-judicial" determination of the value of an asset, those appointed to undertake the exercise will need to act independently. They would be in breach of their duty if they did not do so and risk their determination being set aside.

[33] Perhaps, the least attractive reason for the construction contended for by the Defendant is its assertion that adopting the Claimants' construction would "damage the Territory's financial service infrastructure" because of the impossibility of conducting a process that is ever likely to be completed within the 20-day period referred to in s. 179(9). Even if the Defendant is right about the assertion that the 20-day period is ambitious, the function of this Court is to interpret

the legislation on the material before it. It is not able to strain the construction of a provision simply because it believes that it might damage the financial interests of these Islands, of which it has every reason to be very proud. The fact is that when construing a piece of legislation, decisions about what is and is not in the best interests of the citizens of these Islands are not for Judges to make. They are primarily a matter for the legislature. If this Court – or any other court in these Islands or outside (such as the Privy Council) – makes any decision of a binding nature that is liable to harm the financial infrastructure of these Islands, it is for the legislature to put it right by providing for legislation to reverse it. Indeed, it is equally arguable that the reason for the strict timetable in s. 179(9) is to demonstrate that the companies' legislation of these Islands provides effective protection for minority shareholders who have made investments in BVI companies to redeem their shares if they are not content with major decisions made by those companies about the direction that those companies are taking. In other words, it is just as appropriate for the companies' legislation of the BVI to ensure that a minority shareholder is not left with a sense of grievance that, despite having agreed to surrender his shares, he has had to wait for months to receive payment of the fair value for it, with no ability to be compensated for the delay either by the payment of any interest or seeking a payment on account for the likely fair value of the shares.

The literal construction of the words of section 179(9)

- [34] I do not understand the position of Mr Willins, who acts on behalf of the Defendant, to be that the literal construction of s. 179(9) does not produce the result contended for by the Claimants. So far as he does, I do not agree with him.

- [35] The governing provisions of s. 179(9) are the words: "If the company and a dissenting member fail, within the period of 30 days referred to in subsection (8), to agree on the price to be paid for the shares owned by the member, within 20 days immediately following the date on which the period of 30 days expires, the following shall apply ..."

- [36] Those provisions govern the various paragraphs of s. 179(9), i.e., paras. (a)-(d).

- [37] The literal words of s. 179(9) can only lead to one conclusion. That conclusion is that the 20-day period governs all the paragraphs of that subsection. If the 20-day period had been intended to apply to para. (a) only, s. 179(9) would have said so. In addition, s. 179(9) would have gone on to specify the periods that apply to the rest of the paragraphs. It does not do so. This can only

mean that the words of s. 179(9) applies to all the paragraphs of s. 179(9). It does not matter how quickly or slowly one complies with each individual paragraph of s. 179(9). The only requirement is that the overall period taken to comply with all of them must not exceed 20 days.

Is there a basis for applying a different rule of construction on s. 179(9)

[38] The presumption in favour of the literal meaning of a statutory provision is very strong. As Lord **Selborne LC**, said in **Caledonian Rly Co v North British Rly Co (1881) 6 App Cas 114 at 121**, “there is always some presumption in favour of the more simple and literal interpretation of the words of the statute.”

[39] In **Maunsell v Olins [1975] A.C. 373, at 390-1**, Lord **Simon** said:

“What **Maxwell on Interpretation of Statutes, 12th ed. (1969), p. 28**, calls ‘the first and most elementary rule of construction’ is that ‘it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and otherwise in their ordinary meaning.’ This ‘golden’ canon of construction has been so frequently and authoritatively stated that further citation would be otiose. It is sometimes put that, in statutes dealing with ordinary people in their everyday lives, the language is presumed to be used in its primary ordinary sense, unless this stultifies the purpose of the statute, or otherwise produces some injustice, absurdity, anomaly or contradiction, in which case some secondary ordinary sense may be preferred, so as to obviate the injustice, absurdity, anomaly or contradiction, or fulfil the purpose of the statute: while, in statutes dealing with technical matters, words which are capable of both bearing an ordinary meaning and being terms of art in the technical matter of the legislation will presumptively bear their primary meaning as such terms of art (or, if they must necessarily be modified, some secondary meaning as terms of art).”

[40] Lord **Simon** went on to say, at 391:

“It is essential that this ‘golden’ rule is adhered to. An English court of construction must put itself in the place of the draftsman, and ascertain the meaning of the words used in the light of all the circumstances known by the draftsman – especially the ‘mischief’ which is the subject matter of the statutory remedy. But an English court of construction cannot look at the parliamentary proceedings in order to ascertain whether the meaning thus identified of the statutory language is what the legislature meant to say. The canons of construction - including, first and foremost, the ‘golden’ rule – constitute a code of communication between the draftsman and the court of construction. Observing the code on his side, the draftsman will use language in such a way that its meaning represents what Parliament means to say; and it is only by observance of the code by the court on its own side that a divergence can be avoided between its interpretation of what the words mean from what Parliament meant to say.”

[41] However, as Lord **Simon** himself observed, there are several instances where a court will not apply the literal words of a statutory provision, such as where the literal words “stultify the purpose of the statute, or otherwise produce some injustice, absurdity, anomaly or contradiction, in which

case some secondary ordinary sense may be preferred, so as to obviate the injustice, absurdity, anomaly or contradiction, or fulfil the purpose of the statute.”

Is there any basis upon which the Court can depart from the literal words of s. 179(9)?

[42] Examples of instances where the Court will depart from the literal words of a statutory provision include the following:

(a) Where, as **Lord Simon** observed, the literal words produce a result that: (i) is absurd; (ii) is unintended; (iii) does not address the “mischief” sought to be addressed by the legislation; (iv) does not promote the purpose for which it was passed; and (v) allows a person subject to it to avoid or evade that provision with ease⁴.

(b) Where there is an obvious error or errors in the words, such as where certain text has been inadvertently left out of the words. In such a case, the Court will apply a rectifying construction and include words that should have been included in the text or delete words that have erroneously been included in the text. However, the test for applying such a construction is strict not just because there is a presumption that legislation will be drafted by a competent draftsman but also because there is a risk of identifying words that have erroneously been included or excluded which the Court cannot be sure about. This happened in **Lyde v Barnard (1836) 5 LJ Ex 117**, where three different judges took different views about what the words that were obviously missing from s. 6 of the Statute of Frauds Amendment Act 1828 were. In **Inco Europe Ltd v First Choice Distribution [2000] 1 W.L.R. 586 at 592**, Lord Nicholls said that the power to correct the words of a statutory provision by applying a rectifying construction was⁵:

“confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of

⁴ A helpful summary of when the court may depart from the literal meaning of the words of a statutory provision are set out in Part 6 of **Bennion, Bailey, and Norbury on Statutory Interpretation, 8th Edn, 2020, Bailey and Norbury (“Bennion”)**.

⁵ Indeed, as the learned editors of **Bennion** say in section [15.1]: “Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In **Western Bank Ltd v Schindler [1977] Ch. 1, 18, Scarman L.J.** (as he then was) observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation. None of these considerations apply in the present case. Here, the court is able to give effect to a construction of the statute which accords with the intention of the legislature.”

judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation...”

- (c) Where the court is having to construe two directly conflicting statutory provisions. Where two enactments within an Act or other instrument appear to conflict, it may be necessary to treat one as modifying the other. As Lord Herschell LC said in *Institute of Patent Agents v Lockwood* [1894] AC 347 at 360, where there is a conflict between two sections in the same Act:

“You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other.”

A good example of this, though not referred to in any well-known book on statutory construction⁶, was how s. 1(1) of the Company Directors Disqualification Act 1986 (“the CDDA 1986”), as it applies to England, Wales, and Scotland, was formulated before its amendment by the Insolvency Act 2000, as it applies to England and Wales. The then version of s. 1(1) only appeared to impose a qualified prohibition (i.e., a prohibition from acting in a particular capacity without permission of the court) on a person who was subject to a disqualification order from acting as an insolvency practitioner on a person who was subject to a disqualification order from acting as an insolvency practitioner. However, that version of s. 1(1) was inconsistent with s. 390(4)(b) of the Insolvency Act 1986 (“the IA 1986”), which provided that a person who was subject to a disqualification order was prohibited absolutely from acting as an insolvency practitioner, i.e., without the right of the person to obtain of the court to act in that capacity. The legislative intention – as confirmed by the Parliamentary debates on the CDDA bill before it became the

⁶ However, see the commentary in **Mithani: Directors’ Disqualification**, Tiran Nersessian (Ed), loose-leaf and online versions, LexisNexis, at para. VI[6] *et seq* and VI[204] *et seq.*, where the subject is considered in detail.

CDDA 1986 – was that the prohibition was intended to be absolute. However, it could not be construed in that way, not just because the CDDA 1986 was a quasi-penal provision but also because the CDDA 1986 was enacted after the IA 1986, albeit that both provisions came into force on the same day⁷. It thus became necessary for Parliament to legislate on the subject to make the position clear. The Insolvency Act 2000 amended s. 1(1) to make it clear – in line with Parliamentary intention – that the prohibition was absolute.

[43] As noted above, the above circumstances are not exhaustive.

[44] In addition, there are many other principles of construction that the court will apply. An example is that, as a general rule, a court will strive to avoid adopting a construction that penalises a person where the legislator's intention to do so is doubtful, or penalises him in a way that is not made clear⁸.

Does s. 179(9) fall within the scope of any of the exceptions to the general principle that the court must apply a literal construction of s. 179(9)?

[45] In my judgment, the answer to this question is an emphatic “NO”.

[46] First, there is nothing inherently illogical about the 20-day period in s. 179(9) to complete the steps referred to in paras. (a)-(d). The timetable is short and may be thought to require somewhat of a counsel of perfection to achieve. But the objection of the Defendant is primarily about how long s. 179(9) provides for the steps in paras. (a)-(d) to be complied with. If the period had been two years, instead of 20 days, the Defendant would likely not be complaining about it.

[47] Second, rather than there being an obvious error in s. 179(9) (such as might be thought to be the case if the period was two days rather than 20 days), the tight timetable is entirely consistent with the intention of the legislature – viz, a swift payment to the dissenting shareholder for

⁷ See s. 443 of the Insolvency 1986 and art. 3 of the Insolvency Act 1985 (Commencement No. 5) Order 1986, 1986/1924.

⁸ This is a long-standing principle of the construction of a statutory provision: **Dickenson v Fletcher (1873) LR 9 CP 1 at 7**. It is particularly relevant in construing fiscal legislation. For an example of its application to the penal provision specified in s. 216 of the IA 1986 (which prohibits the re-use of company names), see **Ricketts v Ad Valorem Factors Ltd [2003] EWCA 1706**.

surrendering his shares in circumstances where he neither has the right to seek the payment of interest nor seek a payment on account of the likely fair value of his shares.

[48] Third, the 20-day time limit is not impossible to achieve. Mr Willins may well be correct that it is seldom, if at all, achieved. There may be several factors that contribute to this, including the widely held belief in this jurisdiction that the timetable is not set in stone and may be allowed to slip. But if that is what practitioners believe, then, in my judgment, it is wrong. The timetable has been set by the legislature and is no empty formality. It must be complied with in every case. I would expect a dissenting shareholder to readily agree to relax the 20-day time limit if the company agrees to make a payment on account to him or agrees to the payment of the amount⁹. Unless all the parties – and by that, I mean the company and the dissenting shareholders – agree to relax the 20-day time limit, the Court, is powerless to do so, even in “force majeure” circumstances, such as the death of an appraiser.

[49] Fourth, in most, if not all, cases, it will be the company or one or more appraisers that delays the completion of the valuation process. They must realise that the process is, and is intended to be, speedy and the failure to adhere to it is likely ever to be prejudicial to the dissenting shareholder. But, whoever is responsible for the delay, it is a fallacy to think that the timetable is not achievable in practice.

[50] In the first place, before a merger or any transaction that falls within Part IX of the BCA 2004 takes place, there will be time for the company to consider the position of a shareholder who may dissent to the proposed transaction. I would find it extraordinary that the company (and the dissenting shareholder) would not have contemplated the steps that they would have to take if the transaction proceeds further and the company has to deal with a dissenting shareholder.

[51] But next, and importantly, there are the various steps set out in s. 179(2)-(7), which the parties will need to take before they get to the 30-day period for agreeing a fair value for the dissenting member's shares. I would expect much of the groundwork to take place before one gets to that stage. However, even if that is not possible, the 30-day period for agreement will undoubtedly “flush out” each party's position for determining the fair value for the shares. Of course, I would not expect appraisers to be formally instructed at that stage (other than perhaps where it becomes obvious during the 30-day period that no agreement is likely to be achieved between

⁹ This was offered by the Claimants but rejected by the Company. In the context of my determination of the Claims, it is not for me to say whether the rejection was reasonable or not, but if the offer had been accepted, it is unlikely that the Claims would have proceeded to a final determination.

the company and the dissenting shareholder), but I would expect discussions to take place about that and all other matters leading to the appraisers being instructed as soon as the 20-day clock starts running for making their determination under s. 179(9).

[52] There is no reason why immediately the 20-day period starts running, the parties should not be in a position to instruct and retain their choice of appraisers. Nor is there any reason why a third appraiser cannot be appointed soon after the two appraisers appointed by the parties are in place. Of course, there is frequently disagreement about who the third appraiser should be, but it must be remembered that the appraisers are not meant to take a partisan view, based on who instructs them, about the fair value of the shares. They are – and must be seen to be – independent and have to provide a fair value for the shares, based on their professional evaluation and judgment on the material submitted to them. So far as the appointment of the third appraiser is concerned, the appointing appraisers must bear in mind that seeking to appoint a person who is not suitable because of their connection with him or who is conflicted may amount to a breach of s. 179(9) if another appraiser has to be appointed and the appraisal machinery is at risk of not being completed within the 20-day period.

[53] Of course, there will need to be an agreement between them about how the shares are to be valued to come to a fair price for them. However, I believe that this is all achievable within the 20-day period.

[54] Mr Willins is correct – there is no direct civil claim under s. 179 against an appraiser or a party for delaying the process specified in s. 179(9). Nor does the failure to comply with the requirements of that section amount to a criminal offence. But – and I say this with great diffidence given the professional standing of the firms that appear in the Claims – if the terms of the retainer of the appraisers (including the third appraiser) make it clear that they must produce the valuation within the 20-day period, they would have to do so and would be in breach of those terms if they failed to do so. This must mean that the appraisers have to be chosen with care and only those professionals who can comply with the terms of the retainer, which include a provision that the whole process must be completed within 20 days, should be appointed. The terms will also tightly govern the criteria for the appointment of the third appraiser, so that, for example, if one appraiser insists on appointing a third appraiser who is conflicted, the consequent delay in the appointment of the third appraiser will be laid at his door. In such a case, a breach of the terms of the retainer will enable a direct claim to be maintained against all three appraisers for any delay. As I have said above, how the parties achieve this is not a matter for me just as it is not necessary “to teach one’s grandmother how to suck eggs”. The firms that appear in the

Claims are far better suited, equipped, and knowledgeable to deal with these matters than I am. But what I suggest above is no different from how a legal practitioner would instruct an expert and, in my judgment, is achievable, together with all the other steps specified in s. 179(a)-(d), within the 20-day time limit without any professional standards on the part of the appraisers being compromised. The simple and final diktat to a proposed appraiser would be “only accept the proposed retainer if you can comply”. I reject the suggestion implicit in Mr Willins’ contention that no firm will be able to accept instructions on that basis.

[55] It will often be the parties that delay the machinery for the valuation to be taken within the period specified in s. 179(9). Whether or not there might be a civil claim against the delaying party for that delay is not for this Court to decide at this stage in these proceedings. There may well be. But whether or not there is, this Court will always be prepared to come to the assistance of a party prejudiced or likely to be prejudiced by that delay – given the clear and mandatory words of s. 179(9) – if necessary, by the grant of an injunction.

[56] It follows that, subject to what I say below, I am prepared to grant a declaration about the construction and effect of the words of s. 179(9) in substantially the form sought by the Claimants in para. 1(a) of the draft order.

Matters arising from the above analysis and discussion

[57] So far as the declaratory relief sought by the Claimants in para. 1(a) of the draft order is concerned, it is immaterial who was responsible for the delay, whether part of it was attributable to one party or another or the effect of such delay. The fact is whoever was responsible for it, the statutory time limit of 20 days needed to be complied with. Matters such as delay, the reasons for it, and the effect that it has had on the parties may be relevant in a claim for an injunction or a claim for damages brought by one party against the other or others. However, for the purpose of the declaratory relief that is sought in the Claims, it has no, or no significant, bearing.

[58] This type of declaratory relief is perfectly within the jurisdiction of this Court to grant. Indeed, CPR 40.20 of England and Wales, which (so far as I am aware) is not replicated in the ECSC CPR makes it clear that declaratory relief may be granted even if a claimant does not apply for it. In the words of Lord Lane in **Imperial Tobacco Ltd v Attorney-General [1981] AC 718 at 742 and 750**, citing **Pyx Granite Co Ltd v Ministry of Housing and Local Government [1960] AC 260** and **Ealing London Borough Council v Race Relations Board [1972] AC 342** in support: “Anyone is in principle entitled to apply to the court for a declaration as to their rights unless

statutorily prohibited expressly or by necessary implication.” However, this principle is subject to the well-known exception that the court will not exercise its discretion to grant declaratory relief where it is not needed, i.e., the court will not act “in vain”: see, for example, **Cruz City 1 Mauritius Holdings v Unitech Ltd [2014] EWHC 3131 (Comm)**; **JSC VTB Bank v Skurikhin [2015] EWHC 2131 (Comm)**; and **Pitt and another v Holt v Futter and others [2013] UKSC 26, [2013] 2 AC 108**.

[59] I am, therefore, prepared to make a declaration in the terms specified in para. 1(a) of the draft order submitted on behalf of each of the Claimants.

[60] I am also prepared to make a declaration in the terms specified in para. 1(b) of the draft order. However, the date to be inserted in that subparagraph should be the date when the valuation should originally have been completed and payment made. I do not consider that it is open for this Court to declare any other date. If 17 (or 18) March 2025 reflects a date that is calculated from the first hearing date on 25 February 2025 or when Mr Van Zandt signed his letter of engagement, that date cannot be right. The declaration would not reflect the terms of s. 179(9) if the 20-day period expired, as it did, substantially earlier than 17 or 18 March 2025. I understand it to be common ground that the expiry of the original period was 23 September 2024. That is the date that should be inserted in para. 1(b).

Should This Court Assist In Getting The Valuation Process Back On Track And, If So, How May It Assist?

[61] Mr Willins states that now that appraisers have been appointed to undertake the valuation, this Court should not concern itself with the valuation process. Section 179(9) provides a self-contained code for the valuation to be made by the appraisers. Once that process is commenced the court should keep out of the process unless it is to exercise its residual discretion to bring the appraisal back on track, which both **Olive Group Capital Ltd v Mayhew BVIHCMAP 2016/0002** and **Rhino Resources Ltd v Sanlam Trustees International Ltd BVIHCM 2022/0202** confirmed it had.

[62] But here one or more of the appraisers – and certainly the Defendant – have proceeded and continue to proceed on the misconceived basis that they have an endless amount of time to

undertake their valuation. If the appraisers had accepted that they had a maximum period of 20 days to come to a fair value for the Claimants' Shares, and were able to undertake the valuation before the end of that period, it would not have been necessary for this Court to interfere with the process or exercise its residual discretion to get the valuation process back on track.

[63] In the present case, the process has not been conducted with the alacrity that it should have done. This judgment puts paid to any belief on the part of a party or any other person involved in the appraisal process that the time limit of 20 days can be disregarded. In my judgment, s. 179(9) is only susceptible to one meaning – the meaning I have ascribed to it above. Of course, I accept that more learned and much wiser minds in the Court of Appeal, and beyond, may disagree. If they do, I will happily stand corrected.

[64] It is possible that this finding puts the parties or appraisers in breach of their retainer or lays them open to a claim in damages, but, at this stage, that is not a matter for this Court. It is for the parties, the appraisers and their legal advisers to determine what the effect of this judgment is. The Defendant and the appraisers may genuinely have believed that s. 179(9)(b)-(d) was not subject to the 20-day time limit. The fact is that it is.

What assistance can the Court provide to get this matter back on track?

[65] Is there power to vary the time limit for compliance with s. 179(9) whether under any statutory or other provision or under what has been described as its residual jurisdiction to put the appraisal process back on track or to dismantle the appraisal machinery and implement a new one?

[66] I am not sure that either party has suggested this, but it is right that I deal with it briefly.

[67] In my judgment, there is no power to do so, whether under **s. 179** or (so far as I am aware) any other provision of primary legislation.

[68] There is, of course, power in the **ECSC CPR** to vary a time limit: see **ECSC CPR 26.1(2)(k)**. However, this provision does not allow a time limit set out in primary legislation to be varied. The best illustration of this principle may be given by comparing the provisions of s. 6 of the IA 1986 of England and Wales (which stipulates the time limit for the bringing of challenges where a company voluntary arrangement has been approved by the creditors of the company) with the provisions of s. 262 of the IA 1986 and, where appropriate, r. 15.35 of the Insolvency (England and Wales) Rules 2016, SI 2016/1024 ("the IR 2016"), which likewise stipulates a time limit for

the bringing of challenges where an IVA, i.e., an individual voluntary arrangement has been approved by the creditors of an individual under Pt VIII of the IA 1986. The court has no discretion to extend the period under s. 6 of the IA 1986 because it is properly characterised as a limitation period as it does not contain a provision allowing the court to extend time: see **Re Bournemouth and Boscombe Athletic Football Club Co Ltd [1998] BPIR 183**. The rules are different for an IVA because both s. 376 of the IA 1986 and, where applicable, r. 1.2 of, and para 3 of Sch 5 to, the IR 2016, allow the court to extend time for the bringing of such a challenge: see **Tager v Westpac Banking Corpn [1997] 1 BCLC 313, [1998] BCC 73**.

[69] Of course, the 20-day time limit is not a limitation provision. However, absent agreement between the parties, it is difficult to see how the Court has any jurisdiction to extend that time. If it did, and the Defendant applied to extend it so as not to be held in breach of s. 179(9), the Court might be prepared to exercise its discretion to extend it in a way that allowed the Claimants to be compensated in at least some measure for the Defendant's delay in progressing the appraisal process.

[70] In **Brantley, Hariprashad-Charles J** said, at [48] that:

“An interesting point has now arisen. What is the position in cases, such as the present one, where the time for the appraisal process had long expired before an appraiser was designated due to, for example, intentional or unintentional delays by one party or the other? It appears that the Legislature did not contemplate such cases. Contrary to Mr Husbands' forceful submission, I agree with Mr Young that the jurisdiction of the Court to deal with such situations is not ousted. The Court always has an inherent jurisdiction to deal justly and fairly with matters of such nature. If that were not the case, then a member or shareholder may suffer irreparable loss, through no fault of its own but with the fervent desire that it could have resolved the dispute through negotiation.”

[71] I entirely understand the wisdom of those remarks and endorse them fully, other than in two respects.

[72] First, I disagree with her Ladyship's observation that in fixing the period of compliance under s. 179(9) at 20 days, the legislature did not contemplate that there might be unavoidable slippages in the machinery for the valuation of a dissenter's shares in s. 179(9).

[73] I also disagree that there is a broad jurisdiction vested in the Court to depart from the machinery set out in s. 179(9) to “deal justly and fairly with matters”.

- [74] So far as the first of **Hariprashad-Charles J's** above remarks are concerned, there is no evidence that the legislature did not contemplate that the 20-day period could not be achieved in the type of cases that her Ladyship was referring to. Indeed, it is an important principle of the construction of a statutory provision that the draftsman of the provision would have thought about matters such as those that the Judge was referring to. Before a rectifying type of construction as I have suggested above could be applied – and the defect to which the Judge refers can only be cured by such a construction being applied – there has to be convincing evidence that the draftsman erred in not taking into account any slippages in the timetable arising from involuntary acts, such as the death of an appraiser. There is none here.
- [75] In my judgment, therefore, the 20-day period is applicable, *simpliciter*.
- [76] So far as the alleged inherent jurisdiction identified by her Ladyship is concerned, the BCA 2004 is a creature of statute. It is difficult to see how the Court can have any inherent jurisdiction to correct injustices suffered by a party in the absence of a specific statutory provision enabling it to do so. Section 179(9) does not confer a direct cause of action against a party that is in breach of that provision. Nor – as I have already said – can a breach be enforced by criminal proceedings. However, a well-drafted contractual term in the conditions of retainer agreed by a party with the appraisers may prevent such an injustice from arising, and – so far as any claim exists against a party or appraiser in tort (or otherwise) – such an injustice may be taken into account in deciding whether liability against such a person can be established. But it does not seem to me that there is an inherent jurisdiction to do justice between the parties where the process has gone off track (such as by compensating a party who has suffered prejudice), other than to put the process back on track.
- [77] There is also an important point to be made in implying the existence of an alleged inherent jurisdiction to do justice between the parties. It will almost certainly result in the parties or the appraisers or both coming to court to argue that their case falls within that jurisdiction. This must be discouraged for practical reasons. It has now been firmly established that, absent trying to get a process back on track, the court should not interfere with it. The existence of this type of inherent jurisdiction will provide a fertile avenue of satellite litigation for the parties, with endless applications for stays and the like causing even more detriment (almost always) to the dissenting shareholders.
- [78] In my judgment, short of an agreement being reached between the parties either about the 20-day period being extended, or another process being implemented to do justice between them,

there is no jurisdiction on the part of the Court to do so, regardless of the circumstances and that would include the sort of “force majeure” situation, such as the death of an appraiser.

[79] Perhaps, a better way of describing the jurisdiction that **Hariprashad-Charles J** was referring to was the type of jurisdiction that both **Oliver Group** and **Rhino** confirmed this Court undoubtedly had – i.e., a jurisdiction to put an appraisal back on track; in other words, not a broad jurisdiction to do justice but a much narrower jurisdiction to get an appraisal back on track.

[80] The exercise of the “**Olive Group**” jurisdiction to put a matter back on track has to be determined by reference to the specific provisions of s. 179(9). So, while this Court is powerless to extend time or to make an award of interest (or order a payment on account for the value of the Shares)¹⁰, it can – in my judgment – make coercive orders against the parties (or the appraisers who, as s. 179(9)(c) confirms¹¹, are just as much required to comply with the provisions of s. 179(9) as the parties), including granting an injunction if it appears to it to be just and convenient to do so.

Is there a sufficient basis shown for the Court to exercise its discretion under its residual power in favour of the Claimants?

[81] Mr Willins submits, without prejudice to his primary contention that the appraisal process does not have to be completed within 20 days, this Court should not exercise its jurisdiction in favour of the Claimants. Put simply, what he says is that to do so would be to interfere with the appraisal process which – given that the appraisers have now been appointed – the Court should leave the appraisers to finalise. In addition, he says that the making of a declaration that the Defendant is in breach (or even simply that there has been a breach) would – even if it were true – achieve precisely nothing.

[82] I respectfully disagree with Mr Willins, as regards his first point. This is precisely the sort of case where this Court should exercise its residual jurisdiction to put the appraisal process back on track. Whoever is at fault, there has been a woeful failure to comply with the 20-day period and there does not appear to be any light at the end of the tunnel for the Claimants. How long the Claimants will still have to wait to get paid is an unknown quantity.

¹⁰ Essentially because s 179 does not specify the consequences of the failure to comply with its provisions.

¹¹ Sections 179(9)(c) says in terms that “the three appraisers shall fix the fair value of the shares owned by the dissenting member.”

[83] This position could not have been made clearer by **Webster JA** in **Olive Group**, at [37] and [38]:

“ ... Thomas LJ outlined the procedure that the court should adopt at paragraph 42 of his judgment in **Barclays Bank plc v Nylon Capital LLP** [2012] 1 All ER (Comm) 912:

[42] In my view it is not necessary to go further than the statement of principle by Hoffman LJ in **Mercury Communications**; it does not assist to describe the circumstances in which a court will intervene as “exceptional”. The court has to determine first whether it is faced with a dispute which is real and not hypothetical and then if it is real, whether it is in the interests of justice and convenience to determine the matter in issue itself rather than allowing the expert to determine it first. The matter in issue in this appeal is the issue of jurisdiction. In my view, very different considerations apply to those which apply where the issue is one relating to interpretation of the mandate given to the expert in relation to a dispute where it is accepted the dispute is within his jurisdiction.’

To sum up, where a dispute arises during the valuation process, the court must decide firstly if the dispute falls within the expert’s mandate. If it does, the court should not intervene. If the dispute is jurisdictional, such as the interpretation of the expert’s mandate, the court must determine that issue, and it is a matter of procedural convenience whether it does so before or after the expert completes his work.”

[84] The power of the court to assist with the interpretation of a statutory provision or to make orders against defaulting parties in order to ensure compliance with a statutory provision is nothing new. Although described as a residual power, it is better described as an “enforcement” power, particularly where a statutory provision – as s. 179(9) – does not prescribe a specific method of how that power is to be enforced, and what consequences a breach gives rise to. Cases like **Olive Group**, **Brantley** and **Rhino** do little more than confirm the existence of that power. If the court did not have jurisdiction to enforce the terms of a statutory provision in such a case, the provision would be a dead letter.

[85] It is plain that the relief that the Claimants seek is neither within the scope of the appraisers’ mandate (which has still not been agreed, though it does not need to be) nor relates to any matter which is within their remit. This Court is, therefore, perfectly entitled to take appropriate steps to put the appraisal process back on track.

[86] On the basis that I am satisfied that the Court should act to put this appraisal back on track, what course of action should it adopt?

[87] Mr Millett suggests that the appropriate form of relief would be resetting the “20-day clock”. He maintains that the correct “reset date” in this case should be the date on which the Court makes the order. He says that if the Court had made an order on 13 March 2025, then the reset should have been on that date to expire on 2 April 2025. If the Court makes the order now, it should declare that it expires 20 days from when it is made.

[88] I can see the attraction in the course of action that Mr Millett suggests. Indeed, its effect would essentially be to give a period of grace to the Defendant and the appraisers to carry out the assessment and make payment to the Claimants, when, in my judgment, they are not entitled to any. However, I am not satisfied that this could take the form of a declaration or a declaration in the terms specified in para. 1(b) of the draft order.

[89] Also, in my judgment, such a declaration would not comply with the terms of s. 179(9).

[90] Mr Willins explains, in paras. 20 and 21 of his skeleton argument, why a declaration of the type sought by the Claimants should not be granted to them:

“The Court ought not to do so [i.e., grant declaratory relief] unless the declaration would serve a practical purpose, and not where no useful purpose would be served by the declaration or it can readily be treated as being academic or theoretical. If Cs construction of the legislation is correct, the 20 day period expired long ago: on 23 September 2024. Even the 18 March 2025 date which was floated in submissions by Cs will have expired by the time judgment has been given...Consequently, on Cs construction – there is (and can be) no dispute that the relevant period has been breached. Declaring that to be so achieves nothing...”

[91] This statement – which reflects the broad principle that a court will not act in vain – has to be right. It is obvious that there has been a breach of s. 179(9), so making a declaration to this effect will serve no useful purpose.

[92] In my judgment, the Court would be acting in vain if it purported to go beyond simply declaring that there had been a breach of s. 179(9) because the 20-day time limit was not complied with.

[93] It is possible that what Mr Millett suggests could take the form of an order that the Defendants and the appraisers are given until 20 days from the date of the handing down of the judgment to comply with the requirements of s. 179(9), though this may require the appraisers to be made parties to the Claims. The advantage of such a course of action would be that it would not be necessary for the Court to go into the details of who was responsible for the appraisal process

being delayed¹². I have not thought about whether this would involve the Court in making an order for specific performance and if it did, whether it would be appropriate for the Court to do so. But it does not seem to be beyond the power of this Court to make an order compelling the terms of s. 179(9) to be put into effect by a coercive order. It follows that, in principle, I endorse the course of action Mr Millett suggests, though it should not be in the form of a declaration.

- [94] Are there other courses of action open to the Court to get this matter back on track?
- [95] It has long been the law that where a contractual provision contains a process to determine the value of an asset, and that process has failed, the court will not be entitled to undertake the valuation itself if that process is mandatory. However, if the process is not mandatory, i.e., it is only permissive, the court has power to make that determination itself: **Sudbrook Trading Estate v Eggleton [1983] 1 A.C. 444**.
- [96] This option is not available here. The process for valuing the Claimants' shares – arising as it does under a statutory provision – is mandatory. The Court is, therefore, unable to undertake the valuation itself.
- [97] The Court may enforce the requirements of s. 179(9) by the grant of an injunction. This would not be the type of case where this Court would grant an interim injunction. The injunction the Court would need to grant would have to be "final". However, the Court would only be prepared to grant the injunction if it could be demonstrated that the fault for the failure to comply with s. 179(9) lay with the Defendant and that the usual factors that militated against the grant of the injunction were not present. In addition, the Court could not do so without hearing oral evidence in the matter.
- [98] In principle, I would be content to grant the Claimants the relief they seek in para 1(b) in a form that does not involve the court having to make a declaration.
- [99] So far as the relief in para. 1(c) is concerned, this can be formulated in terms of a requirement on the part of the Defendant to pay the Claimants the value of the Shares once their fair value is ascertained, rather than by way of a declaration.

¹² So far as it is necessary for me to make a finding about the cause of the delay, I can say that, on the material I have seen, the delay is entirely down to the Company and its appointed appraiser, though these cannot be a definitive finding as I have not heard any evidence in the matter. On the material I have seen, I respectfully agree with the summary of the written evidence set out in para. 38 *et seq* of Mr Millett's skeleton argument dated 21 February 2025.

- [100] In addition, I do not consider that it is appropriate for me to make a declaration in the terms set out in para. 2 of the draft orders. It is an axiomatic principle of law that, other than in exceptional circumstances, such as where a breach of a statutory provision gives rise to criminal consequences, any time limit may be extended by agreement between the parties. This is certainly the case in these Claims. This Court does not need to make a declaration of the obvious. The Court would be acting in vain if it granted that declaration.

Should the Court make directions for the bringing of a civil claim against the Defendant and others?

- [101] Mr Millett says that the Court should give directions in respect of the rest of the relief sought by the Claimants in the Claims, including any possible claim for damages.
- [102] I agree with Mr Millett that it is open for the Court to do so, and it can direct pleadings to be served (i.e., points of claim, points of defence and the like) and, subject to hearing from Mr Willins, I would be content to do so. If the Claimants wish to bring any one or more appraisers in the Claims, it would be necessary for the Claimants to make an application to join them in the Claims. I consider that it would be preferable for the Claimants to bring a fresh claim against the Defendant and any other person against whom they wish to make a claim, such as an appraiser. That seems to be a more effective way of dealing with the proposed claim, though as I have said, I will be perfectly content to consider any proposals that the parties may have to make about this. However, I have not given any thought to how the Claimants will wish to formulate the claim and if the proposal that Mr Millett makes is speedier, then I will be prepared to give further consideration to this.

Conclusion and Matters Arising

- [103] For these reasons, the Claimants are entitled to the substance of the relief they seek, though not all of that relief by way of declarations.
- [104] I am perfectly content with a time estimate of 2 hours to deal with the matters arising from this judgment.

[105] It remains for me to thank counsel and the legal representatives for all their assistance in the matter.

**Abbas Mithani KC
High Court Judge**

**By the Court
Registrar**