

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS
IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM NO. BVIHC (COM) 2014/0053 and 2022/0027

BETWEEN:

(1) MING SHU HUNG, RONALD

(2) SHAW SHIU KUEN, BERTHA

**(3) REGINA MING (PERSONAL REPRESENTATIVE
OF THE ESTATE OF THE LATE MING SHIU TONG)**

Claimants

AND

(1) J F MING INC

(2) MING SHUI SUM, LAWRENCE

Defendants

Appearances

Mr. Christopher Parker QC and Mr. Joshua Folkard, with them Mr. Malcolm Arthurs
of Martin Kenney & Co for the Claimants

Ms. Blair Leahy QC, with her Ms. Eleanor Morgan and Ms. Sophie Christodoulou of
Mourant Ozannes for the Second Defendant

The First Defendant did not appear and was not represented

2022 July 26 and 27
August 23

JUDGMENT

[1] **JACK, J [Ag.]**: Ming John Fook had seven children. I shall without disrespect call him and the children by their English given names. The children were Alex, Bertha, Hubert, Kenneth, Lawrence, Ronald and Tong. Kenneth and Tong are now deceased.

- [2] John came to Hong Kong in the 1950s and established a flourishing construction and property redevelopment company. Latterly the business traded through a company Ming Hsing Development Co Ltd ("MHD"). In April 1992 he had incorporated in this Territory the first defendant ("JFM") and transferred to it all his business and assets. Lawrence, his second son, worked in the business and was latterly a director of both MHD and JFM. The other children worked abroad and were not involved in the business.
- [3] There had been animosity between Lawrence and his siblings going back as long ago as 1977. In that year, the siblings used shareholdings given them by their father to oust Lawrence from the business. John was furious. He bought back the shares and reinstated Lawrence.
- [4] On 29th September 1992 John signed a memorandum in Chinese ("the Chinese memorandum") which stated that he had transferred all his assets to JFM and had decided to divide all the shares of JFM into seven equal parts to be distributed equally to his children. The Chinese memorandum was executed in the presence of a trainee solicitor and a clerk from Baker & Mackenzie, the well-known law firm.
- [5] John arranged for all of his seven children to attend a dinner on 10th October 1992, where the Chinese memorandum was read out. Each of the children was given HK\$5 million at the dinner.
- [6] John died on 21st December 1992.
- [7] What John did not say at the dinner on 10th October 1992 was that at least purportedly at a meeting of the board of JFM on 8th August 1992, he had procured that 10,000 shares in JFM were allotted to Lawrence. It was at a board meeting of 18th September 1992 that another 7,000 shares were allocated for the purpose of distribution to the seven children in accordance with the Chinese memorandum.

- [8] In January 1993, after John's death, Lawrence distributed the 7,000 shares to each of the siblings as well as himself. He also arranged for each of them and himself to receive HK\$5 million. Whether this was by way of a dividend or an advance (i.e. a loan) is in dispute. JFM also paid the estate duty due on John's estate. Again the appropriate treatment of this sum is in dispute.
- [9] On 30th April 1993 there was another meeting of shareholders chaired by Alex where the siblings resolved that JFM should be liquidated. Lawrence never acted on that resolution.
- [10] On 28th January 1994 there was a shareholders' meeting of JFM. Lawrence authorised a further distribution of HK\$1 million to each of the siblings. Kenneth was appointed as an additional director of MHD.
- [11] On 21st February 1994 a shareholders' resolution purported to remove Lawrence as a director. He responded, through Baker & Mackenzie, to say that the removal was invalid because he held 11,000 shares. This was the first time the existence of the 10,000 share distribution had been shared with the other siblings. This revelation prompted the beginning of over a quarter of a century of litigation.
- [12] On 24th September 1996, Hubert, Tong, Ronald and Bertha started proceedings in the Hong Kong courts seeking a declaration that the Chinese memorandum was John's last will. As part of these proceedings orders were obtained for the forensic examination of 8th August 1992 minutes and the ten share certificates for 1,000 shares each issued or purportedly issued to Lawrence.
- [13] On 29th November 1999 the four siblings issued fresh proceedings in Hong Kong asserting that the minutes and share certificates had forged signatures, alternatively that they were signed by John without his knowledge or consent. By judgment of 30th April 2004 Deputy High Court Judge Anthony To found that the minutes of 8th August 1992 were forged.¹ John, he found, signed four of the share certificates in

¹ [2004] HKCFI 177 at [94] and [95].

the mistaken belief these were the certificates for distribution to the siblings; he did not sign the other six. Lawrence had practised a fraud on his father.

[14] On 26th May 2005 the Hong Kong Court of Appeal (Cheung, Tang JJA and Kwan J) dismissed the appeal.² It found that John did not know and could not have known the content of the August minutes and the ten share certificates. However, it did not uphold the deputy judge's finding of fraud on the basis that fraud had not been pleaded. Nor did it uphold his finding of forgery, holding at para [31] that "unless the judge was satisfied that the signatures were not genuine he should not have so found."

[15] On 23rd May 2006 the Hong Kong Court of Final Appeal (Bokhard, Chan, Ribeiro PJJ and Fuad and Eichelbaum NPJJ) allowed an appeal by Lawrence.³ It concluded that the evidence did not show that John lacked knowledge when he signed the August minutes and the ten share certificates. Ribeiro PJ, giving the only reasoned judgment of the Court, held:

"89. Various categories of cases, such as those involving breaches of trust or fiduciary duty or other conduct which equity impugns as a species of fraud in equity, have been held to justify such equitable intervention [setting aside documents]. However, the courts have emphasised that the doctrine does not involve some vague notion of unconscionability but requires the establishing of specific grounds for relief, with proof of the necessary elements."

[16] On the basis that forgery had not been established, he went on to find that no adequate case had been made out to set aside the August minutes and the signatures affixed to the share certificates.

[17] The result of the Hong Kong proceedings was that Lawrence held 11,000 shares and the other six siblings 1,000 each. Lawrence subsequently purchased the shares of Alex, Hubert and the estate of Kenneth. Lawrence's evidence at the first

² [2005] HKCA 227.

³ [2006] HKCFA 59.

part of the trial as to the modality of the purchases was: “I deducted their shareholders’ loans and the outstanding share capital that they owed to the Company from the value of their shareholdings.” Leon J was later to comment in this Court: “The effective result in economic terms must have been that the Claimants involuntarily partly paid the purchase prices. This was wrongful conduct by [Lawrence].”⁴ (There is, however, an issue, which I deal with below, as to whether the advances were loans or outstanding capital, or whether the monies were paid as dividends.)

[18] After losing in the Hong Kong Court of Final Appeal, Ronald, Bertha and the estate of Tong took no immediate further action. Lawrence’s case is that the Hong Kong property market in 2006 was in bad shape and that JFM and MHD were struggling. This was caused in part by improper behaviour of his siblings during the interregnum between the judgment of 2004 and the Court of Final Appeal’s decision in 2006, when the siblings had control of the companies. This is not a matter for me to determine at the current stage of these proceedings. Lawrence says that after he took control again the companies performed better, helped by a rising property market in Hong Kong. I shall come back to this.

[19] In 2014 Ronald, Bertha and Tong’s estate issued the unfair prejudice claim under section 184I of the **BVI Business Companies Act 2004** now before me.⁵ The complaint as originally pleaded was that Lawrence had, in breach of the Articles of Association, failed to provide any financial information, so that the claimants did not know if they had any claim for dividends. The relief sought was an order for production of the financial information and the cancellation of a shareholder resolution waiving the provision of financial information. No claim for a buy-out was made.

[20] The trial before Leon J was listed for three days commencing on 13th October 2015. At the commencement of the trial, the judge acceded to an application by the

⁴ [2016] ECSCJ No 143. The quotations are from [85] and [86] respectively.

⁵ No 16 of 2004, Laws of the Virgin Islands.

claimants to amend their pleadings to add a claim for a buy-out. So far as material, the order of that date recited that:

“...Upon Counsel for the Claimants’ assurance that the Claimants will not adduce further evidence in chief consequent upon the amendments sought and will in the usual way not go outside the four corners of the pleaded case

By consent it is ordered:

1. [Permission to amend]
2. In the event of the Court ordering that the Second Defendant should buy the shares of the Claimants:
 - (a) The basis and principles for determining the price for the shares shall be determined at a future hearing following filing and service by the parties of statements of case and written submissions on the evidence adduced at this trial;
 - (b) The means by which the valuation process shall be conducted shall be determined at the future hearing.”

[21] On the third day of the trial, after the evidence was complete, Mr. Parker QC, who then as now appeared for the claimants, asked for an adjournment so he could make an application for an amendment of the claimants’ pleadings. The judge granted the adjournment, but an appeal to the Court of Appeal against the granting of the adjournment was successful on 12th January 2016.⁶ The trial resumed and was heard over 23rd, 24th and 25th February and 26th May 2016.

[22] On 23rd February 2016, the judge ordered:

- “1. [Various documents in a supplementary bundle] will be entered into the record as evidence adduced at this trial on the basis that the Documents:
- a. Will not be received for determining unfair prejudice;
 - b. May be used by the Claimants in submissions on the witness statements of the Second Defendant and identification of the documents that would have been put to the Second Defendant by the Claimants in lieu of cross-examination;
 - c. Subject to (a) and (b) above, may be used by any party in closing submissions; and

⁶ BVIHCMAP2015/0016. Written reasons were given on 12th February 2016, but have not been reported or given a neutral citation number.

- d. Will be available to be used and considered at the further hearing, if any... in respect of how to value the shares;

2. The Further Hearing will determine whether the shares of each of the Claimants are valued at 1/7th or 1/17th of the value of the equity of the First Defendant.”

[23] On 16th August 2016 the judge handed his judgment down.⁷ He found the claim for unfair prejudice was proven. He ordered the provision of the financial information; he set aside the shareholders’ waiver of the requirement to provide financial information and the amendment of the Articles of Association; and he ordered that the claimants’ shares be bought out. Provision was made for pleadings and a further case management conference.

[24] Lawrence appealed. On appeal the Court of Appeal set aside the buy-out order made by Leon J, but otherwise dismissed the appeal.⁸ The Court’s judgment was handed down on 30th June 2017.

[25] The claimants then appealed to the Privy Council. That appeal was heard on 26th November 2020. The Privy Council’s advice was promulgated on 15th January 2021.⁹ They allowed the appeal and restored the order of Leon J. The delay of nearly three and half years until the matter came for a hearing is, Lawrence asserts, largely due to the claimants’ delay in putting together the agreed record of the proceedings below. The significance of the delay to the issues before me, I shall consider below.

The issues

[26] The issues for me to determine are:

- (a) The 1/7th versus 1/17th issue;

⁷ [2016] ECSCJ No 143.

⁸ [2017] ECSCJ No 165, sub nom. J F Ming Inc and another v Ming Siu Hung, Ronald and others.

⁹ [2021] UKPC 1, [2021] BCC 438.

- (b) The claims in respect of malfeasance by Lawrence in the management of JFM, their relevance to the valuation exercise, and the extent to which they are justiciable;
- (c) Whether the claimants' claim survives in respect of dividends which JFM could have paid, but did not in fact pay;
- (d) The appropriate treatment of the monies paid to shareholders in 1993 and 1994 and the estate duty paid by JFM in respect of John's estate;
- (e) The date on which the valuation should be taken;
- (f) An application to amend the claimants' pleadings, of which the main point of contention was the attempt to introduce issues of Hong Kong law.

The 1/7th versus 1/17th issue

- [27] As to the first issue, Mr. Parker QC accepts each claimant holds "numerically" 1/17th of the shares, whilst Lawrence and a company of his hold 14/17^{ths}. He submits:¹⁰

"However, it is sufficiently clear from the evidence that, on the balance of probability, all siblings believed (rightly) that John Fook, the father of the seven siblings, intended that each sibling should have the same economic interest. [The claimants] plead a common understanding between the father and his children that any capital distribution amongst the children would be on an equal basis. The father's intention that each should share equally in JFM, but that Lawrence should have the management of JFM, appears clearly from 1977 incident and the Chinese Memorandum."

- [28] Mr. Parker QC relied on the well-known passage in the judgment of Hoffman LJ in **Re Saul D Harrison & Sons plc**,¹¹ where he said:

"Not only may conduct be technically unlawful without being unfair: it can also be unfair without being unlawful. In a commercial context, this may at first seem surprising. How can it be unfair to act in accordance with what the parties have agreed? As a general rule, it is not. But there are cases in which the letter of the articles does not fully reflect the understandings upon which the shareholders are associated. Lord Wilberforce drew

¹⁰ Claimants' skeleton paras [68]-[69].

¹¹ [1994] BCC 475 at pp 489-490.

attention to such cases in a celebrated passage of his judgment in **Re Westbourne Galleries**¹² which discusses what seems to me the identical concept of injustice or unfairness which can form the basis of a just and equitable winding up:

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

Thus the personal relationship between a shareholder and those who control the company may entitle him to say that it would in certain circumstances be unfair for them to exercise a power conferred by the articles upon the board or the company in general meeting. I have in the past ventured to borrow from public law the term 'legitimate expectation' to describe the correlative 'right' in the shareholder to which such a relationship may give rise. It often arises out of a fundamental understanding between the shareholders which formed the basis of their association but was not put into contractual form, such as an assumption that each of the parties who has ventured his capital will also participate in the management of the company and receive the return on his investment in the form of salary rather than dividend. These relationships need not always take the form of implied agreements with the shareholder concerned; they could enure for the benefit of a third party such as a joint venturer's widow. But in **Re Westbourne Galleries** Lord Wilberforce went on to say:

'It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that the company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the

¹² [1973] AC 360 at p 379.

articles. The superimposition of equitable considerations requires something more.’

Thus in the absence of ‘something more’, there is no basis for a legitimate expectation that the board and the company in general meeting will not exercise whatever powers they are given by the articles of association.”

[29] There are a number of difficulties in the way of Mr. Parker QC’s submission. Firstly Leon J says in his substantive judgment at [39]ff that:

“it may be helpful to set out the common positions of the parties, followed by the parties’ respective positions.

40. The parties agreed that this was not a ‘*quasi*-partnership’ situation, a classic ‘family business’ in which all members work, or a classic ‘legitimate expectations’ case.

41. The parties agreed that this was not a case of the Claimants having been unfairly excluded from management roles.

42. Also they agreed that this Court cannot order a ‘no fault divorce’; a court-ordered buy-out of the Claimants absent a finding of unfair prejudice.

43. The Claimants are minority shareholders in the Company with no greater — and no lesser — rights than those to which minority shareholders are entitled.”

[30] The claimants are now asserting a very much greater right than they would have as minority holders of 3/17ths of the equity. Moreover they disavowed any “legitimate expectation”. That concession must in my judgment include the claim to 1/7th each of the capital benefit. Further, I agree with Ms. Leahy QC’s point that the approach now taken by the claimants is contrary to the important case management order made by Leon J on 13th October 2015. This was effectively the *quid pro quo* for allowing the claimants to seek the buy-out remedy.

[31] Secondly, the effect of the Chinese memorandum was dealt with the Hong Kong Court of Final Appeal. That Court said:¹³

¹³ [2006] HKCFA 59 at [75].

“The Chinese memorandum was essentially a letter written by the father to his children expressing fatherly concerns, giving fatherly advice and informing them of how he intended his assets to be distributed after his death. If the father had previously acted inconsistently in relation to his assets in a legally binding manner but had conveyed a different (and therefore misleading) message in the Chinese memorandum, the contents of the Chinese memorandum, not being legally operative, could not be relied on in themselves to set aside the earlier legally binding acts. Similarly, if the father had changed his mind after having read out the documents to his children he could, with or without informing them of his change of mind, go on to make binding arrangements for his assets to be differently distributed. The Chinese memorandum [in] itself would not found a cause of action or give rise to an equity to upset such subsequent transactions.”

- [32] Mr. Parker QC seeks to get around this finding that there is no cause of action or equity on which the claimants can rely by saying:¹⁴

“It would be unconscionable for Lawrence, having received the Additional Shares on the basis of an understanding that they were not to be used to disturb the economic equality of ownership but solely to ensure his control of the company, to rely upon the shares to deprive his siblings of the economic equality that their father intended that they should have. It cannot be right for the Court to do by the terms of its buy-out order that which it would have been unconscionable for Lawrence to have done.”

- [33] The difficulty with this in my judgment is that unconscionability does not *in itself* give rise to any legal rights. It is only if unconscionability feeds into the elements of a cause of action at law or a claim in equity, that it has legal relevance. It is not a freestanding concept on which the Court can grant relief: it requires more.

- [34] The duty of good faith is the opposite twin to unconscionability. Lord Hoffman in **Neill v Phillips**¹⁵ explains how the twin concepts come into English and BVI law:

¹⁴ Claimants' skeleton at [91].

¹⁵ [1999] 1 WLR 1092 at pp 1098-99.

“[C]ompany law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman *societas*, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.”

- [35] It is probable that this correlates to the duty of good faith implied into “relational” contracts (which brings with it a “trust that the other party will act with integrity and in a spirit of cooperation”): see **Yam Seng Pte v International Trade Corp**,¹⁶ **Sheikh Tahnoon Shakhboot Al Nehayan v Kent**¹⁷ and **Candey Ltd v Bosheh**.¹⁸ However, in the current case, given the long history of animosity, ever since the 1977 incident, the relationship between the shareholders cannot in my judgment be considered relational in this sense — however much John might have wanted brotherly and sisterly love to abound between his children. Likewise any quasi-partnership duty of good faith is excluded, by reason of there being (as was common ground between the parties) no quasi-partnership.
- [36] Thirdly, if there had been some mutual understanding between Lawrence and his siblings and if that mutual understanding were otherwise of some legal effect, that mutual understanding would have been completely destroyed by the siblings’ unsuccessful attempt to remove him as a director by the resolution of 21st February 1994 and their subsequent successful attempt to take control between the first instance Hong Kong judgment in 2004 and the Court of Final Appeal determination in 2006. Given the siblings’ attempts to exclude him from management of JFM, it is in my judgment not unconscionable for Lawrence to take the view that the siblings should be restricted to their legal rights as minority shareholders and nothing more.

¹⁶ [2013] EWHC 111 (QB), [2013] 1 All ER (Comm) 1321, [2013] 1 CLC 662, [2013] 1 Lloyd's Rep 526.

¹⁷ [2018] EWHC 333 (Comm), [2018] 1 CLC 216.

¹⁸ [2022] EWCA Civ 1103 at [30].

[37] Fourthly, Ms. Leahy QC argues that it is an abuse of process for the claimants to be pursuing this argument now and contrary to **Henderson v Henderson**.¹⁹ She submits that the 1/7th versus 1/17th issue:²⁰

“is in substance a re-run of the HK proceedings. Further, the HKCFA expressly identified that one issue it had to decide as an essential element of the claim was whether there was any viable legal or equitable basis, either in the pleadings or in the evidence, for setting aside the share certificates. But the Claimants’ claim in this jurisdiction depends upon showing that there is a legal or equitable basis for ignoring the legal ownership of the shares recorded in the share certificates and giving effect to the alleged mutual understanding. The HKCFA has held to the contrary, and it cannot be open to the Claimants to contend otherwise. ...[I]t is a **Henderson** abuse of process for the Claimants to seek to pursue the claim in the BVI arising out of precisely the same facts that they relied upon unsuccessfully against Lawrence in Hong Kong. This is not simply a case where the same facts are relied upon in two essentially identical claims against the same defendant — which would be unjust in itself. What is particularly abusive is that the claim has been brought in the back door through an unfair prejudice claim 16 years after the HKCFA judgment was delivered.”

[38] Mr. Parker QC seeks to sidestep this issue by saying that the unconscionability claim is not a legal or equitable claim and therefore could not be litigated in the Hong Kong courts. However, in my judgment this puts him between a rock and a hard place: if the unconscionability claim was actionable, then it could and should have been litigated in Hong Kong; if the unconscionability claim is not actionable, then that is the end of the matter — there is no claim cognizable either by this Court now or by the Hong Kong courts then.

[39] As I discuss under the second argument above, in my judgment there can as a matter of law be no freestanding independent claim for unconscionability, so the claimants lose under the latter part of the analysis. If I am wrong in this, however,

¹⁹ (1843) 3 Hare 100. See now *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] UKSC 46, [2014] 1 AC 160.

²⁰ Skeleton paras [68] and [69].

then in my judgment it is a claim which should have been pursued in the Hong Kong proceedings. It is a **Henderson** abuse to take the point now before this Court.

[40] Lastly, Mr. Parker QC argued that the Court has a discretion as to what remedy it gives if an unfair prejudice claim succeeds. I agree. The paradigm example is ordering a buy-out with no discount given for the fact that the shareholder being bought out merely has a minority share. However, although wide (see **Grace v Biagioli**²¹) a remedy has always to be appropriate at the time of judgment. Leon J, as upheld by the Privy Council, found that unfair prejudice was caused by Lawrence's failure to provide financial information and ongoing refusal to permit oversight of his management of JFM. No finding was made as to the 1/7th versus 1/17th point; I have concluded that the claimants have no legal or equitable right to a 1/7th capital interest each. It would in my judgment be an exorbitant exercise of the Court's discretionary powers to give the minority shareholders relief based on 3/7^{ths} of JFM's value, when their only legal and beneficial interest in JFM was 3/17^{ths}: see **Re Tobian Properties Ltd.**²² As a matter of discretion, I would refuse such relief.

[41] Accordingly, in my judgment, the claimants are entitled to be bought out, but only on the basis that they each own 1/17th of JFM.

The valuation issue: Lawrence's alleged defalcations

[42] I turn then to an important issue on valuation. The claimants allege that Lawrence has over many years as against JFM been guilty of numerous breaches of his fiduciary duties as director. He caused JFM to lend him money at low or nil rates of interest. He diverted investment opportunities away from JFM to his own companies for his own personal benefit. The claimants say that, when a valuer carries out a valuation of JFM, that valuer should take into account the monies owed by Lawrence to JFM.

²¹ [2005] EWCA Civ 1222, [2006] 2 BCLC 70 at [73].

²² Sub nom. Maidment v Attwood [2012] EWCA Civ 998, [2013] 2 BCLC 567.

- [43] Mr. Parker QC explained how this would work. The valuer would look at each allegation of misfeasance. The valuer would then have his or her own legal counsel, who would advise on the legal merits of each allegation. The valuer would then be able to put a figure on value of JFM's claim against Lawrence.
- [44] Ms. Leahy QC submits that this is wrong in principle and in any event unworkable in practice. If a claim of this type was to be pursued against Lawrence, then it had to be by way of derivative claim. It cannot be brought as a side-wind to an unfair prejudice claim.
- [45] In order to understand the difference, it is helpful to consider an example. Suppose Smith is a director of a company, but not a shareholder in it. She extracts two tranches of \$1 million each from the company. The extractions are potentially in breach of her fiduciary duties to the company. Mr. Parker QC submits — rightly in my judgment — that a value can be put on the claims for the \$2 million. The way that would be done is to look at the first \$1 million claim. Suppose counsel advises that there is a 30 per cent chance of success, then the claim would be worth \$300,000, less, say, 10 per cent for litigation risk, to produce \$270,000 as the value. (There might be a further discount for the risk that Smith was not worth the money and there would need to be consideration of adverse costs liabilities, but we can keep things simple.) Suppose then that counsel advised the second \$1 million claim has a 60 per cent chance of success. That would mean it was worth \$600,000 less 10 per cent litigation risk, so as to give a valuation of \$540,000.
- [46] So far so good. Suppose the same scenario, but this time with a director, Jones, who is also a shareholder. Mr. Parker submits exactly the same process can be undertaken when assessing the value of a company on an unfair prejudice claim. I disagree. The difference is that in the first scenario, regardless of the Court's decision, Smith is not going to be liable to pay anything. The issue is solely between the claimant and the company. Any claim against Smith must be brought by the company later. Smith will have a full opportunity to defend herself. In this second scenario, however, Jones is going to suffer a pecuniary loss, because she will have

to pay the minority shareholders out of her own pocket. (It is exactly the same situation in the current case. Lawrence would be liable for 3/17ths of the value put on the claims against him.)

[47] The unfairness in my judgment is this. Take the first \$1 million claim. If counsel's advice is correct and then there is only a 30 per cent chance of success, then on balance of probabilities Jones is likely to win at the trial of any claim brought against her by the company (or in a derivative action). There is no reason why she should be liable for any part of the \$270,000 valuation placed on that claim. By contrast, on the second claim, if counsel is right, she should be liable for the full \$1 million, but she might well consider she had a reasonable chance of defeating the claim completely at trial and decide to take that risk. Mr. Parker's approach prevents these key aspects of procedural fairness occurring.

[48] There is a fundamental difference between pinning liability on a defalcating director, which is a binary decision — either she is liable or she is not —, and a loss of a chance type claim, which is what Mr. Parker's methodology produces.

[49] The authorities support this differencing. The earlier cases of **Re Chime Corp Ltd**,²³ **Waddington Ltd v Thomas**²⁴ and **Re Charnley Davies Ltd**²⁵ were approved by the English Court of Appeal in **Taylor Goodchild Ltd v Taylor**.²⁶ Newey J, giving the judgment of the Court, held that:

“[C]ases such as **Chime** and **Waddington** show that the legitimacy of a shareholder asking for relief in favour of the company by way of unfair prejudice petition rather than derivative claim is very questionable: for instance, Bokhary PJ spoke in **Chime** of the circumstances in which an order of that kind could properly be made being ‘rare and exceptional’ in any case of complexity if they could arise at all. The concerns expressed in **Chime** and **Waddington** related in part to the prospect of a wrong to a company being pursued by someone other than the company. In the present case, pursuit of the [work in progress] and Account of Profits Claims

²³ (2004) 4 HKCFAR 546 (Bokhary PJ).

²⁴ [2008] HKCFA 63, [2009] 2 BCLC 82 (Lord Millet NPJ).

²⁵ [1990] BCC 605 at p 625 (Millet J).

²⁶ [2021] EWCA Civ 1135.

in the unfair prejudice proceedings would not merely have involved their being advanced by a shareholder rather than the company to which the liabilities are said to be owed, but would have required the joinder of an additional party...”

He then discussed the adverse case-management implications of allowing such issues to be litigated in unfair prejudice proceedings.

[50] In my judgment, this is not one of those exceptional cases where remedies which are more properly the subject of a derivative claim should be permitted to be brought in the course an unfair prejudice claim. Accordingly, it stands to be barred as a matter of law.

[51] Even if there was scope in law for allowing the claims against Lawrence to proceed at the valuation stage, on case management grounds I would refuse the application. Mr. Parker QC has not yet put forward a draft Scott schedule. However, this is a case where there are dozens of properties and advances of money which are potentially the subject of breach of fiduciary duty claims. A Scott schedule might well have over one hundred entries. Each of these, if properly tried out between Lawrence and the siblings (derivatively on behalf of the company), would be potentially a multi-day action. The valuer-with-the-advice-of-counsel approach proposed by Mr. Parker as a short-cut through all this is also, for the reasons already given, procedurally unfair.

[52] Even if the short-cut were not otherwise flawed, I agree with Ms. Leahy QC’s point that the trial of these issues would be unmanageable. Presumably counsel who advised the valuer would have to be cross-examined on each particular of malfeasance alleged and on his or her reason for putting at 30 per cent or 60 per cent or some other percentage the chance of the JFM’s success on the individual head of claim. The judge would then have to assess the evidence adduced on Lawrence’s behalf on each point (which counsel advising the valuer would not have heard when making his or her percentage assessment for the purpose of the valuation report). The judge would then have to reach a view *not* on whether

Lawrence was guilty of breach of fiduciary duty, but rather as to whether counsel was correct in the percentage assessment of the prospects of success.

[53] These case management considerations are reinforced by the urgent need to bring some finality to this case. Lawrence is now 85 years old. Ronald and Bertha must be of a similar age. Tong, of course, is already dead. Even if matters were more finely balanced, I would still refuse to allow the breach of fiduciary duty claims to be prosecuted in this action.

[54] For the avoidance of doubt, I should make clear what this ruling entails as regards loans made by JFM and its subsidiaries to Lawrence. The claimants seek to have the loans revisited, so that notional interest at a commercial rate (either simple or compound) can be added to them. The only basis for such a claim is that Lawrence was guilty of malfeasance in making the loans at low or non-existent rates of interest. In my judgment these claims cannot be pursued as part of the unfair prejudice claim. This limits the claimants at the valuation stage to reliance solely on the sums owed by Lawrence to JFM and its subsidiaries as appears the books and accounts of JFM and its subsidiaries at the valuation date.

The failure to pay dividends

[55] The claimants complain that after the initial payments in 1993 and 1994, Lawrence ensured that JFM never made any further distribution. They say that JFM should have paid dividends on a regular basis. They seek an order that gives them these “missing” dividends with interest.

[56] In my judgment, this claim gives rise to an impermissible degree of double-counting. If JFM had paid dividends, then JFM would have been unable to invest those monies in the business. The current valuation of JFM would therefore have lower. The claimants cannot claim both. The primary remedy sought is a buy-out, so the missing dividend claim falls away. In my judgment the dividend claim cannot be pursued as a matter of law.

[57] Further, even if this were wrong, there are overwhelming case management reasons for refusing this form of relief. If part of the relief granted for unfair prejudice included the missing dividends, then the Court would need to carry out a two part exercise. Firstly, it would have to determine what a fair dividend would have been in each year from 1994 to 2017. This is itself no easy task. Few companies distribute all their profit as dividends. The Court would have to determine what a reasonable share of the profit for distribution would have been in each of these years. This would involve a detailed analysis of the accounts for each year and consideration of what investment opportunities were available to JFM in each year. The Court would then have to determine how a reasonable board of directors would have exercised its commercial judgment on the splitting of profits between a payment of dividends and the reinvestment of the monies.

[58] Secondly, the Court would need to determine what profits JFM would have made in each year, if it had not reinvested the monies which should have paid as a missing dividend. It does not seem to me that this would be a merely mechanical exercise of calculating what proportion of the capital would have been paid by way of dividends and then deducting future profits by that proportion. There would in each year need to be a factual investigation into what investments JFM would have been unable to make in each of the years, if JFM had paid dividends, and what profits JFM would have foregone by paying the dividends. This would be an extremely complicated assessment of hypothetical facts, with the impact on profits in 1995 having to be carried forward to 1996 and so forth, each year depending on the *cumulative* effect of adjustments to previous years.

[59] On this ground too, I would refuse to allow the dividend claim to be advanced.

The loan versus dividend issue

[60] The parties dispute the proper analysis of the payments of HK\$5 million and HK\$1 million in 1993 and 1994 respectively, and the payment by JFM of the estate duty on John's estate. Lawrence says that these monies are repayable by the claimants.

[61] Mr. Parker QC submits that the monies were all paid by way of dividend. In his skeleton he says (omitting references):

“81. Firstly:

(1) The evidence in the HK proceedings (which was before the BVI Court) in support of the \$5m payment being by way of dividend, consisting of [passages in the evidence of Days 3, 6 and 7]. The Judgment of Deputy High Court Judge To [at paras [4] and [103]]... the payment as being a dividend.

(2) The evidence in the HK proceedings in support of the \$1m payment being by way of dividend... The HK FI Judgment [at paras [5] and [103]] described the payment as being a dividend.

(3) The letter of Robinson Management Ltd, of which the receiver appointed for the HK proceedings, Mr. Robinson, was a partner, dated 26 November 2004 referred to this \$6 million as having been paid as ‘a dividend distribution’.

82. Secondly, whilst Lawrence has sought to say that these payments were not absolute payments but repayable, he has not suggested that they were expressly paid as loans at the time. The alleged obligation to repay arises out of them being ‘advances’: see paras. 22, 41 and 57 of his 1st witness statement in these proceedings and the letter of Robin Bridge & John Liu... dated 25 February 2005. The payments can only have been ‘advances’ against dividend payments.

83. Thirdly, Lawrence has claimed in these proceedings that the payments were made because his siblings pestered him for money. But if they were simply loans then there would have been no need for him to take a loan in the same amount as his siblings: but he did take the same amount, consistent with all the siblings being entitled to share equally in capital distributions from the company.”

(Mr. Parker also makes a fourth point, but I find this point less convincing.)

[62] These three points in my judgment are compelling reasons for holding that the distribution of HK\$6 million to each of the seven siblings was by way of dividend and I so find. The same goes for the payment of estate duty.

[63] For the avoidance of doubt, this finding does not permit Lawrence to reopen historic issues. In particular, the valuation will proceed on the basis of the monies which he owes to JFM and its subsidiaries as they appear in the books and accounts of JFM

and its subsidiaries as at the valuation date. On its face this amounts to different treatment of monies as between Ronald, Bertha and Tong's estate on the one hand and Lawrence on the other. However, so far as Lawrence is concerned, the difference in treatment is justified by the fact that there has been a whole series of loans from JFM and its subsidiaries to and repayments by Lawrence. The claimants say that Lawrence did not pay any or any adequate interest on various of the loans; however, I have held that that is not a matter for determination as part of this claim. It is not right in my judgment to reopen just one part of what would be a complicated taking of an account when other aspects (like the interest which would have been properly payable) are not to be reopened. Lawrence must take the rough with the smooth.

- [64] Further, Lawrence expressly pleads that the monies paid out were loans, so that on the valuation the monies owed by him and by him as assignee from Alex, Hubert and Kenneth's estate would on his case need to be taken into account. The claimants deny that they themselves are indebted to JFM. Even if they were wrong in that denial, however, they would have a potential limitation defence, whereas Lawrence has acknowledged the debt in the pleadings and the company accounts.

The valuation date

- [65] I turn then to the valuation date. Although some other dates have been canvassed, by the time of the hearing before me, the claimants' preferred date was 31st March 2017 (the accounting year end nearest Leon J's date of judgment) and Lawrence's 31st March 2021 (the date of the most recent audited accounts).
- [66] Ms. Leahy QC sets out the law in these terms, with which I did not understand Mr. Parker QC to disagree substantially:

“(1) The choice of the date at which shares are to be valued for the purposes of a purchase order under section 184(2) is a matter for the exercise of the discretion of the Court: **Re Elgindata Ltd.**²⁷

²⁷ [1991] BCLC 959 at p 1006c-d.

(2) The general [rule] is that ‘an interest in a going concern ought to be valued at the date on which it is ordered to be purchased’: see **Profinance Trust SA v Gladstone**.²⁸ That is, a current valuation, because the date of the purchase order will generally be the closest date to the date of the actual valuation: see **Profinance** *per* Robert Walker LJ at [33]; and see **Dinglis v Dinglis**.²⁹

(3) The rationale for this general rule is obvious, viz., to ensure ‘...the shares [...] be valued at a date as close as possible to the actual sale so as to reflect the value of what the shareholder is selling’: **Profinance**... at [33].

(4) However, the general rule is no more than the ‘starting point’. The overriding requirement is that the date of valuation should be fair on the facts of the particular case: **Profinance**... at [60].

(5) Accordingly, in the exercise of its discretion, the Court can select a different date to ensure that the valuation is fair to both parties and is proportionate to remedy the unfair prejudice suffered: see **Re Abbington Hotel Ltd**.³⁰

(6) The choice of valuation date therefore calls for an evaluation of a number of factors, including the history of events in issue in the litigation: see **Re Bird Precision Bellows Ltd**.³¹

(7) The Courts have also repeatedly emphasised that there must be fairness to both parties. In particular, a minority shareholder is not entitled to a one-way bet. That is, a minority shareholder whose shareholding has been subjected over time to fluctuations in value in the ordinary course of the company’s business cannot pick and choose an exit date which is most advantageous to him: see, for example, **Profinance** at [61(iv)].

(8) There are many (perhaps hundreds) of cases where, in fairness to one side or the other, the Court has departed from the general rule and applied a different date as the starting point. However, these are of limited assistance, each one turning on its own facts and circumstances. The following examples are therefore only intended to illustrate the wide set of circumstances in which the Court will select a different valuation date in favour of the minority or majority.

(9) In **Scottish Co-operative Wholesale Society Ltd v Meyer**,³² as a result of the prejudicial conduct of the majority, the company’s value (and

²⁸ [2001] EWCA Civ 1031; [2002] 1 WLR 1024 (Robert Walker LJ) at [60].

²⁹ [2019] EWHC 3327 (Ch) at [55].

³⁰ [2012] 1 BCLC 410.

³¹ [1986] Ch 658.

³² [1959] AC 324.

the minority shareholding with it) [had] been significantly reduced by the relevant date. As such, an early valuation date was required in fairness to the claimant.

(10) On the opposite side of the line, in **Re Elgindata**, Warner J took the date of his buy-out order in 1990 as the appropriate date for valuation, even though the fortunes of the company had declined considerably since 1987, when they were at their peak, and indeed since 1989 when the petition was presented. The facts were that, although the petitioner had established unfairly prejudicial conduct on the part of the respondent, that was only in respect of certain improper ‘perks’ which had not had any material impact on profitability, and so the decline in value since 1987 was not attributable to the respondent’s conduct. Warner J thought that in those circumstances, ‘to fix a date for the value of the shares at or near the time when the company’s fortunes were at their peak would be grossly unfair to [the respondent].’

(11) In **Re Regional Airports Ltd**,³³ Hart J (at p 83) expressed a preference for taking the most up-to-date valuation available, since ‘To do otherwise risked the possibility that the petitioners might unfairly benefit from my shutting my eyes to a foreseeable “post balance sheet” event.’

(12) In **Re Edwardian Group Ltd**,³⁴ Fancourt J at [632-636] held that it was possible and proportionate to allow for culpable delay on the part of the petitioner in commencing proceedings by fixing the valuation date at an earlier date.”

[67] I start my consideration of the appropriate valuation date in accordance with the guidance in **Profinance** that the start point for the share purchase should be “the date on which it is ordered to be purchased”. I do not accept Ms. Leahy QC’s submission³⁵ that “the starting point is a current valuation which means, in the particular circumstances of the present case, July 2022 or as close thereto as is sensible in all the circumstances.” The starting point is the order of Leon J.

[68] The next relevant consideration is that the reason a valuation date in 2017 was not fixed by Leon J was that Lawrence decided to appeal. Now it is true that there was

³³ [1999] 2 BCLC 30.

³⁴ [2018] EWHC 1715 (Ch), [2019] 1 BCLC 171.

³⁵ At para [75] of her skeleton.

a substantial delay between the 2017 Court of Appeal judgment and the 2021 advice of the Privy Council. The exact reasons for the delay were not argued before me, although Lawrence's position is that the delay was caused by the claimants' sloth in putting the record together for the Privy Council, their making various dilatory applications and a change of legal representation. It seems to me that, insofar as the delay is the claimants' fault, it is something which can be compensated for by the disallowance of the full period of interest which would otherwise be payable.

[69] Lawrence's complaint is that the real estate market in Hong Kong has fallen between 2017 and 2021, so that JFM's asset base has fallen from HK\$1.82 billion to HK\$1.5 billion. This point is answered in Mr. Parker QC's skeleton at para [118]:

"[T]hat deterioration would have happened had the 16 August 2016 order been implemented in the ordinary way and not been delayed by Lawrence's failed appeal. The Court held that Lawrence should thereafter be the sole owner and all movements in the property market be for his account. Lawrence should not be better off because of a failed appeal. [The claimants] were in no way responsible for the market's deterioration."

[70] I do not accept Ms. Leahy's submission that giving a 2017 valuation date would be to give the claimants a "one-way bet". If the property market had continued to rise, no doubt Lawrence would have been pressing for the 2017 date. The market could have gone either way. At para [84], Ms. Leahy traces the claimants' delay back to the period 2006 to 2014, however, in my judgment that cannot be relevant to a choice between a 2017 and a 2021 valuation date.

[71] Standing back and considering in the round the exercise of my discretion in this matter, there are in my judgment insufficient reasons to change the valuation date from that which would have followed from the Leon J judgment, had there been no appeal. Accordingly I fix the valuation date as 31st March 2017.

The amendment application

[72] My conclusion in relation to issue (b) (the relevance of JFM's malfeasance claims to the valuation exercise) means that most of the contentious points on the proposed amendments go. There is no need now to plead any questions of Hong Kong law. I anticipate the other minor amendments can be agreed by the parties without my having to make a formal determination.

Costs

[73] In the draft judgment I circulated, I proposed to reserve the costs. This was on the basis that I would be hearing the next (and hopefully last) part of the claim in October 2022. Unfortunately that has not proved possible and the matter will be heard by another judge in May 2023. I agree with the submission on behalf of Lawrence that it is unsatisfactory to reserve costs to another judge.

[74] My preliminary view on costs is this. When deciding the costs of the case overall, the starting point is that the successful party is entitled to costs: CPR 64.6(1). However, the Court is entitled to take into account "whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings": CPR 64.6(6)(c). The Court must "have regard to all the circumstances": CPR 64.6(5).

[75] The current hearing has had both substantive and case-management elements to it. On the substantive issues, each side has had some successes and failures. The honours are in my judgment roughly even. That does not automatically mean there should be no order for costs. As a starting point, the ultimate winner of this litigation has a claim to costs, even on issues on which the winner lost. On the other hand, making all the costs costs in the case would not recognise that the ultimately losing party had some success. Looking at matters overall, and bearing in mind that there were also case-management elements, my preliminary view is that half the costs should be costs in the case and that there should be no order in respect of the other half of the costs.

[76] If the claimants wish to dissuade me from making that costs order, they should make written submissions within seven days. If Lawrence wishes to dissuade me, then he should make written submissions within fourteen days (which can also respond to any submissions made by the claimants). The claimants should make any submissions in reply within twenty-one days.

Conclusion

[77] Accordingly, I direct:

- (a) That the valuation proceed on the basis that each of the claimants is entitled to 1/17th of the capital of JFM;
- (b) That the valuation shall not include any elements reflecting claims of JFM against Lawrence, apart from any loans made by JFM and its subsidiaries to Lawrence as they appear in the books and accounts;
- (c) That no claim can be made for missing dividend payments;
- (d) That the valuation date shall be 31st March 2017;
- (e) That the parties should agree any amendments proposed by the claimants to their pleadings in accordance with the guidance given by this judgment;
- (f) That any timetabling issues be resolved on paper;
- (g) That issues of costs be determined in the manner set out above.

Postscript

[78] Following the hearing of this second stage of the action (Stage 2A) over 26th and 27th July 2022, I distributed a draft copy of this judgment to the parties on 5th August 2022 so the parties could submit any corrections. That draft did not include the section entitled “The loan versus dividend issue” at paras [60]ff above.

[79] On 16th August 2022, Ms. Christodoulou on Lawrence’s behalf wrote to the Court as follows:

“The Phase 2A Hearing was listed for the Court to hear the issues set out at Annex A of the CMC order dated 31 May 2022 (the CMC Order). Those issues included whether the Claimants should be permitted to pursue... the ‘Loan Claim’ in Phase 2.

The... Loan Claim are defined in the CMC Order as follows:

...
'Loan Claim' means the issue of whether the payments made by JFM to the Claimants pleaded in section VII.B of the Points of Claim, and the estate duty paid by JFM on behalf of the Claimants, should be treated as loans or dividends or returns of capital.

We note from the contents of the Draft Judgment that His Lordship has not as yet made a ruling on these issues.

Lawrence's submissions in respect of these issues can be found at paragraphs 46 to 61 and 68 to of his skeleton argument dated 21 July 2022. Lawrence's Leading Counsel also made oral submissions in relation to both issues at the hearing. In summary:

...
2. As regards the Loan Claim:

- a. Lawrence's pleaded position is that the loans must be taken into account as loans in the valuation exercise. As such, he accepts that his liability to JFM for HK\$48m (being the HK\$12m loan made to him and the equivalent loans made to Vendors which he has assumed) must be treated as assets of JFM for the purposes of the valuation.
- b. However, the Claimants say that payments made to them should be treated differently, not as assets of JFM, but as dividends or a return of capital. This is a brand new claim and would require disclosure and cross-examination in relation to historic payments.
- c. In any event, the Claimants cannot have it both ways. Either all the payments are loans, in which case the Claimants must give credit for the payments made to them in the valuation exercise, or none of the payments were loans, in which case the payments made to Lawrence and the other siblings should not be treated as assets of JFM.
- d. It follows that the Claimants will not derive any financial benefit from this claim. In fact, they are likely to be much worse off.
- e. For these reasons, the Court should not, on case management grounds, permit the claims to proceed.

We respectfully invite his Lordship to rule on the... Loan Claims in the Draft Judgment so that the parties know whether or not these claims are to be addressed at the Phase 2B Hearing."

[80] Pursuant to that invitation I added the relevant section at paras [60]ff as set out above. As can be seen I determined the loan issue adversely to Lawrence.

[81] By a further letter of 22nd August 2022, yesterday, Ms. Christodoulou submitted:

“In paragraph 3 of the CMC Order made by his Lordship on 31 May 2022..., the Court was to determine the issues set out in Annex A of the CMC Order. Annex A provided that the Court was, at the Phase 2A Hearing to:

1. Decide whether it had jurisdiction to determine the Loan Claim at the valuation stage of the proceedings;
2. Decide whether it was an abuse of process/contrary to the overriding objective/unfair/prejudicial for the Claimants to pursue the Loan Claim at the valuation stage of the proceedings; and
3. In the event that the Court concluded that it had jurisdiction and that it was appropriate for the Claimants to be permitted to pursue the Loan Claim in Phase 2B, the Court was to give directions for the determination of that claim.

For those reasons, [Lawrence] did not file any evidence in relation to the Loan Claim or make any substantive submissions in relation to the Loan Claim (or the substantive points made by Mr. Parker QC in his submissions). Indeed, [Lawrence’s] draft order makes express provision for the filing of further evidence in the event that the Loan Claim is permitted to proceed.

It appears from paragraphs [62]-[64] of the Judgment that the Court may have determined that it does have jurisdiction to consider the Loan Claim and that it is permissible for the Claimants to pursue it in Phase 2B [i.e. the third and final stage of the litigation]. The Court is respectfully invited to reconsider this aspect of its Judgment so that it reflects the agreed scope of the [July 2022] hearing. In other words, rather than rule on the substance of the Loan Claim, the Court is invited instead to confirm (if it be the case) that the Claimants are entitled to pursue the Loan Claim in Phase 2B and give any appropriate directions in relation to the determination of that claim at Phase 2B.

As a matter of procedural fairness, and in order to do justice between the parties, if the Loan Claim is permitted to proceed, it is respectfully submitted that [Lawrence] should have the opportunity to file evidence on this matter (explaining why he does not accept the Claimants’ summary of the Hong Kong proceedings), cross-examine the Claimants’ witnesses and make written and oral submissions on the substance of the issue.”

[82] In my judgment, in adding the section at paras [60]ff, I did what Ms. Christodoulou asked me to do in her letter of 16th August. The five points in para 2 of her letter are expressed widely. She gives no indication in that letter that the issues should be

more narrowly circumscribed. It is wrong to allow Lawrence to come back (having lost on this issue) and argue that the issue should have been determined on more narrow grounds. That would allow Lawrence to have a second bite at the cherry before the judge who will hear the last stage of the action.

[83] In any event, my determination of the loan issue is fully justified on case management grounds. Lawrence admits he owes monies to JFM, whereas the claimants dispute that they owe monies. For the reasons given, the claimants have on balance of probabilities the better case on the monies they are said to owe. There is no injustice in putting a stop to this part of this interminable litigation.

[84] For these reasons, save for this postscript, I hand the judgment down in the final form originally distributed to the parties.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar