EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2013/0004
(On appeal from the Commercial Division)

CHEMTRADE LIMITED

Appellant

and

[1] FUCHS OIL MIDDLE EAST LIMITED
[2] FUCHS PETROLUB AG

Respondents

Before:

The Hon. Mde. Louise E. Blenman — Justice of Appeal
The Hon. Mr. Mario Michel — Justice of Appeal
The Hon. Mr. Don Mitchell — Justice of Appeal [Ag.]

Appearances:

Mr. Victor Joffe, QC, Mr. Lynton Tucker, Mr. James Brightwell, and Ms. Colleen Farrington of Harneys, for the Appellant
Mr. George Bompas, QC, Mr. Adam Holliman, and Mr. Jerry Samuel of Conyers Dill & Pearman, for the 2nd Respondent

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2013: July 9, 10, 11;
September 18.

Civil appeal – Commercial law – Unfair prejudice – BVI Business Companies Act, 2004 as amended – Whether the learned judge correctly exercised his discretion in ordering that the company's articles of association be amended – Business Administration Order – Whether Purchase Order was more appropriate remedy

Chemtrade Limited ("Chemtrade") and Fuchs Petrolub AG ("Fuchs") are equal shareholders in Fuchs Oil Middle East Limited ("FOMEL"), a BVI company, and a part of the Alhamrani Group of companies in Saudi Arabia. Chemtrade and Fuchs each provided two directors to FOMEL's board. The ownership of Chemtrade was in dispute between

Sheikh Abdullah and his brothers ("the Brothers").[1] Two of the Brothers, Sheikhs Mohamed and Siraj, were the directors of FOMEL. Due to the dispute over the ownership of Chemtrade, they were never replaced. Sheikhs Mohamed and Siraj initially informed Fuchs that they had sold Chemtrade to Sheikh Abdullah and that they were no longer the Chemtrade directors on the board of FOMEL. Then, after a year, when Sheikh Abdullah had gone into possession of FOMEL and all the other Alhamrani Group of companies, Sheikhs Mohamed and Siraj began to claim that they had not sold Chemtrade to Sheikh Abdullah.

Sheikh Abdullah's plant and Group structure in Saudi Arabia provided all the logistical and administrative support required by FOMEL, so that while it would not have been impossible, it would have been very difficult and expensive to separate FOMEL from the Alhamrani Group which Sheikh Abdullah headed. Sheikh Abdullah put pressure on Fuchs not to cooperate with the Brothers, but to continue cooperating with him. He promised to compensate Fuchs if they should be subject to any court order to pay damages as a result of the Brothers succeeding in their claim to the ownership of Chemtrade. Because the articles of FOMEL provided that a board meeting was not quorate unless at least one of the directors nominated by either of Fuchs or Chemtrade was present, it was only necessary for Fuchs to decline to attend any board meeting called by Chemtrade to frustrate their effort to become involved. For a year, the Fuchs directors refused to meet with Sheikhs Mohamed and Siraj or to permit them to participate in the management of FOMEL. Sheikhs Mohamed and Siraj acting in the name of Chemtrade brought unfair prejudice proceedings against Fuchs for their exclusion from the board.

In the Commercial Court, the judge tried the ownership case brought by Sheikh Abdullah against the Brothers ("the Ownership Case") and the Unfair Prejudice Proceedings brought by Chemtrade against Fuchs at the same time. The judge held in the Ownership Case that the Brothers had not sold Chemtrade to Sheikh Abdullah. He held in the Unfair Prejudice Proceedings that Fuchs had made the wrong call in going along with Sheikh Abdullah, and that their exclusion of the Brothers from the board and the management of FOMEL amounted to unfair prejudice. He declined to order Fuchs to purchase the Chemtrade shares as urged by Chemtrade, or to make a winding up order as sought by Fuchs.

The remedy he selected was to order FOMEL's articles to be amended so that it was no longer necessary for both shareholders to be present for there to be a quorum. He continued the right of Chemtrade to appoint the chairman, so that if the Fuchs directors refused to attend a board meeting of FOMEL any decision taken would still be valid. Chemtrade appealed seeking the remedy of a Purchase Order rather than the Business Administration Order the judge had made. Fuchs cross appealed for the order of the judge to be upheld on additional grounds.

[1] The respondents in Sheikh Abdullah Ali Alhamrani v Sheikh Mohamed Ali Alhamrani et al, Territory of the Virgin Islands High Court Civil Appeal BVIHCVAP2013/0005 (delivered 18th September, unreported).

Held: dismissing both the appeal and cross-appeal and making no order as to costs, that:

1. Section 184I of the BVI Business Companies Act, 2004[2] gives the judge a discretion to make such order as he considers just and equitable, including, without limiting the generality, one of several orders which the section lists, the remedy of amending the articles being one of the possible orders listed.

2. The Business Administration Order that the judge determined was the most appropriate one in the circumstances was one of the reliefs sought by the appellant in its claim, and though the appellant would have preferred him to make a Purchase Order by which Fuchs would buy out Chemtrade it was open to the trial judge to consider the matter in the round and to make the order he felt was just and equitable.

3. The trial judge had an unlimited discretion to make such order as he thought fit with a view to bringing an end to the matters complained of, and it had not been shown that the decision had been clearly or blatantly wrong or that his discretion has been exercised erroneously.

   Ebrahimi v Westbourne Galleries Ltd. and Others [1973] AC 360 distinguished; Dufour and Others v Helenair Corporation and Others (1996) 52 WIR 188 applied.

4. In view of the fact that in the Ownership Case this court has, in a decision delivered immediately prior to this one, determined that the Brothers are not the owners of Chemtrade, but that they had in fact sold Chemtrade to Sheikh Abdullah, it would have been particularly unfortunate if the judge had ordered Fuchs in effect to buy out the Brothers' interest in Chemtrade. The proper order for this court to make would be to leave intact the Business Administration Order made by the court below, leaving it for Sheikh Abdullah and Fuchs to sort out between themselves the future arrangements for the management of FOMEL according to the agreements made between themselves.

JUDGMENT

[1] MITCHELL JA [AG]: The facts as found by the learned trial judge in this case are not in dispute. The sole area of dispute raised by the appellant Chemtrade Limited ("Chemtrade") is the remedy he selected in his judgment delivered on 21st December 2012. Fuchs Petrolub AG ("Fuchs") has filed a cross-appeal asking this

[2] Act No. 16 of 2004, Laws of the Virgin Islands, as amended by the BVI Business Companies (Amendment) Act, 2005, Act No. 26 of 2005, Laws of the Virgin Islands.

court to uphold the judgment of the learned trial judge on various additional grounds.

Chemtrade and FOMEL

[2] The background facts are set out in the judgment of this court in the dispute over the ownership of Chemtrade ("the Ownership Case")[3] delivered immediately prior to this judgment. Chemtrade is one of the companies in the industrial conglomerate of the late Sheikh Ali Mohamed Alhamrani of the Kingdom of Saudi Arabia ("KSA"). The remaining relevant facts are taken from the judgment of the learned trial judge in the court below.

[3] Chemtrade is a BVI company. It was incorporated in the Virgin Islands under the BVI Business Companies Act, 2004[4] ("the BCA"), for the special purpose of holding the 50% shareholding of the Alhamrani Group in the company known as Fuchs Oil Middle East Limited ("FOMEL"). FOMEL was also incorporated in the Virgin Islands under the BCA. The other partner in FOMEL is the second respondent Fuchs Petrolub AG ("Fuchs"), a German registered company. FOMEL is thus a joint venture company. Its purpose is to sell Fuchs branded products outside of the Kingdom of Saudi Arabia. FOMEL's product was originally entirely sourced from Alhamrani Fuchs Petroleum Saudi Arabia ("AFPSA"), another company in the Alhamrani Group. AFPSA is itself a joint venture company held between the Alhamrani Group holding 68% and Fuchs holding the remaining 32%. The purpose of AFPSA is to sell Fuchs licensed products within the Kingdom of Saudi Arabia.

[4] FOMEL's Memorandum of Association provides for two classes of shares, Class A and Class B shares. Chemtrade holds all the A shares through two Alhamrani Group companies, AUC and AIG. Fuchs holds all the B shares. Each class of

[3] Sheikh Abdullah Ali Alhamrani v Sheikh Mohamed Ali Alhamrani et al, Territory of the Virgin Islands High Court Civil Appeal BVIHCVAP2013/0005 (delivered 18th September 2013, unreported).
[4] Act No. 16 of 2004, Laws of the Virgin Islands.

shareholders has the right to appoint two directors to the board. FOMEL's Articles of Association provide that the board shall consist of four members and that the board shall not be quorate unless one director from each class is present. FOMEL's board consists of two directors appointed by Fuchs ("the Class B Directors") and two directors appointed by Chemtrade ("the Class A Directors"). At all material times, the Class B Directors have been Mr. Alf Untersteller and Mr. Stefan Fuchs. The Class A Directors are Sheikhs Mohamed and Siraj. If a vote of the directors results in a tie, the chairman has a casting vote. It was common ground that to the date of this dispute the casting vote had never been used and there had been an understanding that all matters would be dealt with by mutual agreement.

[5] Sheikh Mohamed has at all material times been, and remains, the chairman. Accordingly the directors of FOMEL appointed by Chemtrade controlled the chairmanship of FOMEL. Since a quorum required one of each class of directors to be present at a Board meeting, each class could prevent a meeting from taking place by mere non-attendance.

The Board of Grievances

[6] Sheikh Mohamed and the Brothers[5] on the one side, and Sheikh Abdullah and the sisters on the other, fell into a family dispute over the assets of Sheikh Ali Mohamed at the end of 1999. This dispute, as has been detailed in the judgment in the Ownership Case, was resolved by a Sharia law process of 'takharuj' mediated in February 2008 by the Saudi court known as the 'Board of Grievances'. Takharuj in this case involved Sheikh Mohamed and the Brothers valuing the jointly held assets of the Alhamrani Group and giving Sheikh Abdullah the option to either buy or sell (the "Buy/Sell Agreement"). Sheikh Abdullah opted to buy in May 2008, and on paying the agreed purchase price became the sole owner of all

[5] The respondents in Sheikh Abdullah Ali Alhamrani v Sheikh Mohamed Ali Alhamrani et al, Territory of the Virgin Islands High Court Civil Appeal BVIHCVAP2013/0005 (delivered 18th September 2013, unreported).

the Brothers' shares in the Alhamrani Group, subject to his sisters' interests. Due to an ambiguity in the Offer Letter, which omitted to list Chemtrade in the list of assets that had been valued for the purpose of arriving at a price, a dispute arose in late 2009 as to whether Chemtrade/FOMEL was included in the assets purchased by Sheikh Abdullah.

[7] AFPSA's Articles of Association provide that the Board of Directors will consist of three directors appointed by the Alhamrani Group company AUC, and two directors appointed by Fuchs. Accordingly, since his purchase of AFPSA in 2008, Sheikh Abdullah has had full and undisputed control of the Board of AFPSA. AFPSA not only manufactured and supplied Fuchs branded lubricants to FOMEL for distribution, it also provided various support functions including logistical and financial services. In about the year 2006, FOMEL's staff in the tax-free zone of Sharjah, UAE, was reduced to a minimum, and most of its employees were relocated to AFPSA's offices in Jeddah in KSA. FOMEL's commercial infrastructure as well as the entirety of its product line was from that time supplied by AFPSA. Equally, FOMEL's receivables, and thus the vast majority of its cash, were held in AFPSA bank accounts. These arrangements gave Sheikh Abdullah *de facto* control over FOMEL's cash, staff and operations from the moment he took control of AFPSA in December 2008. Yet, despite the operational merger of the two companies, they at all times remained distinct companies. They both retained their separate corporate structure, separate directorships, and separate licensing agreements with Fuchs. As the learned trial judge found, legally "FOMEL was no more than one of AFPSA's ad hoc customers. There was no formal joint venture agreement between the two companies."[6]

[8] For nearly a decade prior to the acquisition by Sheikh Abdullah of AFPSA in the Buy/Sell Agreement, the Fuchs directors of FOMEL, Dr. Stefan Fuchs and Mr. Alf Untersteller, had worked exclusively with the directors nominated by the Alhamrani

[6] At para. 17 of the learned judge's judgment.

Group, principally Sheikhs Mohamed and Siraj. These two built up an excellent working relationship with the Fuchs directors. This was a relationship based on complete trust and confidence. By contrast, the Fuchs directors hardly knew Sheikh Abdullah.

[9] By Judgment 1080 of 11th August 2008 and Judgment 1220 of 22nd October 2008 the Appeal Court of the Board of Grievances in the KSA ordered the enforcement of the Buy/Sell Agreement in favour of Sheikh Abdullah as purchaser. The Ministry of the Interior, the enforcement arm of the Board of Grievances, took possession of the lands and companies held by the Alhamrani Group and on 3rd December 2008 handed them over to Sheikh Abdullah. The agreed purchase price was handed over to the Brothers. Shortly before they were evicted, the Brothers moved out of the Group Headquarters taking many of the Chemtrade/FOMEL company documents with them. Sheikh Abdullah moved in to replace them, and, believing that he had purchased all of the various Group companies, including FOMEL and AFPSA, made various changes to their management. He also treated the Group's share in the assets of FOMEL as if he owned them, as he undisputedly did those of AFPSA.

[10] By November 2009 it became apparent that one area of dispute was emerging. The question was whether Chemtrade/FOMEL was included in the Buy/Sell Agreement. This dispute was initially litigated between Sheikh Abdullah and the Brothers in the courts of KSA. By agreement among them, the litigation in KSA was stopped, and the dispute was put before the Commercial Court in the Virgin Islands for determination. This is the Ownership Case. At the conclusion of its trial, the learned trial judge found by his judgment of 21st December 2012 that Chemtrade was not a part of the Buy/Sell Agreement, and that the shares continued to be held by the children of Sheikh Ali in Sharia shares. He upheld the Brothers' claim through Chemtrade to their right to act as the Class A directors of FOMEL.

[11] When, therefore, Sheikh Abdullah marched into the Group Headquarters in December 2008, pursuant to the enforcement proceedings he brought in KSA to enforce his acquisition by 'takharuj' of the Brothers' share in the Alhamrani Group assets, the Fuchs directors, as the learned trial judge found, had perforce to accept his control and ownership of the Alhamrani Group's 50% interest in FOMEL. Sheikh Abdullah was in *de facto* control of the Alhamrani Group interest in FOMEL between the date of his going into possession in December 2008 and 21st December 2012, the date of the judgment in the court below.

The Unfair Prejudice Proceedings

[12] When, after approximately one year, the Brothers began to lay a claim to the Chemtrade shares (and the Alhamrani Group interest in FOMEL), there was no disputing that Sheikh Abdullah, who owned and controlled AFPSA, was in physical control of FOMEL. At the same time, the Alhamrani Group's directors of record of Chemtrade were Sheikhs Mohamed and Siraj. This put the Fuchs directors, as the learned trial judge found, in an invidious position. On the one hand, they had developed over the years a close relationship with Sheikhs Mohamed and Siraj. On the other hand, Sheikh Abdullah not only claimed to own FOMEL but he was in physical control of its assets and employees, and of most of FOMEL's cash.

[13] Between his takeover in December 2008 and the commencement of the Brothers' claim to ownership in November 2009, Sheikhs Mohamed and Siraj made no suggestion to the Fuchs directors that they had any further interest in Chemtrade. On the contrary, as detailed in the judgment in the Ownership Case, they wrote Fuchs advising that they had sold Chemtrade to Sheikh Abdullah. It was only in November 2009 that they began to express a belief that they were still owners and entitled to exercise the rights of the Class A directors in the management of Chemtrade. On 18th December 2009 Sheikhs Mohamed and Siraj wrote to the Fuchs Directors to express their concerns about Sheikh Abdullah's control of FOMEL, and gave notice convening a FOMEL board meeting to take place in

London. On learning of this, Sheikh Abdullah made it clear to Mr. Fuchs and Mr. Untersteller that if they were to attend board meetings with Sheikh Mohamed and Sheikh Siraj, he would suspend supplies from AFPSA to FOMEL. Mr. Fuchs and Mr. Untersteller replied to Sheikhs Mohamed and Siraj by a letter approved in advance by Sheikh Abdullah making excuses for their not being able to attend the proposed board meeting.

[14] As the learned trial judge found, Mr. Fuchs and Mr. Untersteller appear to have simply caved in to Sheikh Abdullah's threats. They made no attempt to join with Sheikhs Mohamed and Siraj. Instead, they colluded with Sheikh Abdullah in the production of letters setting out his threats which they relied on to justify their non-attendance at board meetings between the beginning of 2010 and the judgment in the court below in December 2012. Had Sheikh Abdullah ceased supplying FOMEL, its business, so far as it then depended upon such supplies, would have dried up, once it had exhausted its current inventory, until a new supplier could be found.

[15] Fuchs made no objection when Sheikh Abdullah helped himself to sums of money belonging to FOMEL lodged in the AFPSA accounts. So in 2010 he took US$18.5m, claiming he was entitled to it by way of dividend. In late 2011 Fuchs arranged with Sheikh Abdullah to withdraw a similar amount of US$18.5m for itself. Fuchs was well aware there could be no dividend because FOMEL had no functioning board to declare one. Nor did Fuchs discuss these withdrawals with Sheikhs Mohamed and Siraj.

[16] Meanwhile, Chemtrade acting on the instructions of Sheikhs Mohamed and Siraj brought proceedings against Fuchs in the Commercial Court of the Virgin Islands for unfair prejudice. They contended that Fuchs' failure to attend FOMEL board meetings caused the company prejudice by hampering an effective response to Sheikh Abdullah's withdrawals. As the judge found, there were in addition various strategic questions that arose that required FOMEL board attention. Sheikhs

Mohamed and Siraj were not kept informed about the tricky issues that were arising with regard to licensing agreements and call options that the company could have benefited from if the board had met. By the failure of the Fuchs Class B share directors to attend FOMEL board meetings, thus making a legal board meeting impossible, Chemtrade was prevented from participating in any of the discussion on the management of FOMEL's business that they were entitled to participate in.

[17] Sheikh Abdullah secured the continuing cooperation of Fuchs by promising to indemnify Fuchs and FOMEL against any sum which Fuchs or FOMEL might be ordered to pay to Chemtrade or the Brothers. The agreement also made elaborate provision for cooperation in Fuchs' defence of the proceedings ("the Compensation and Cooperation Agreement"). The impact of that agreement was that, if Fuchs did not do what Sheikh Abdullah instructed it to do in the defence of the proceedings, the indemnity would lapse, and the advantageous terms FOMEL enjoyed from AFPSA would be withdrawn. On the other hand, if they did what he asked and they suffered any court damages, he would pay it for them.

[18] The issue before the trial judge in the Unfair Prejudice Proceedings was whether what Fuchs had done or failed to do amounted to unfairly prejudicial conduct of FOMEL's affairs. Fuchs' case was simply that, in the face of Sheikh Abdullah's threats to cease supplying FOMEL, FOMEL's interests were best served by their complying with his demands and acquiescing in his dealings with FOMEL's funds until the ownership dispute could be resolved. As the judge found, on any reasonable view of the matter, Fuchs was in a difficult position. Fuchs had first been assured by Sheikhs Mohamed and Siraj that they were out of Chemtrade. For a year between December 2008 and November 2008 Sheikhs Mohamed and Siraj left Sheikh Abdullah in full possession and control of the Alhamrani Group's interest in FOMEL and in cooperation with Fuchs. Then, in November 2009 they were told the opposite. Until the Ownership Case was judicially determined, Fuchs could not know which side was right.

[19] The reliefs sought by Chemtrade in its Re-Re-Re-Amended Statement of Claim were for:

(1) an order pursuant to section 184I(2)(a) of the BCA requiring the shares of Chemtrade in FOMEL to be purchased by FOMEL or by Fuchs;

(2) an order pursuant to section 184I(2)(c) and (d) regulating the future conduct of FOMEL's affairs and/or amending the memorandum and/or articles of association of the Company, in such a way as the Court considers just and equitable for the purpose of ensuring or facilitating that the business and affairs of the company are conducted by, or under the direction or supervision of the directors of the company;

(3) an order pursuant to section 184I(2)(e) and/or the inherent jurisdiction of the Court for the appointment of a receiver or receivers of the company for such period and on such terms and with such powers as the court thinks fit; or

(4) such further or other order within section 184I(2) as the Court considers just or equitable.

[20] In view of the learned trial judge's finding on 21st December 2011 in the Ownership Case that the Brothers had not sold Chemtrade/FOMEL to Sheikh Abdullah, he not surprisingly found in the Unfair Prejudice Proceedings that Chemtrade and the Brothers had been unfairly prejudiced by Fuchs' conduct towards them. It was unfair to prevent a shareholder with the right to do so from participating through its appointees in the board level management of a company, however pure one's motives.

[21] The remedy decided on by the learned trial judge is found at paragraph [188] of his judgment. It reads:

> "[188] On the other hand, I do not consider that the appropriate remedy in this case is to compel Fuchs to buy the Brothers out. The

> unfair prejudice of which the Brothers complain is of having been frozen out of management at board level. They do not complain that the affairs of FOMEL are going to be taken in directions unacceptable to them as shareholders, or that their investment has been or is going to be jeopardized as a result of actions taken by their fellow shareholder or that if they are compelled to remain as shareholders they will be financially disadvantaged by arrangements designed to benefit Fuchs to the prejudice of the Brothers. The unfairness of which they complain will disappear if I order that FOMEL's Articles of Association be amended to provide that the quorum for meetings of its board shall be any two directors. I will further direct that the amended Articles of Association provide that unless short notice is accepted, board meetings must be convened on not less than 14 calendar days notice and may be held only on days which are business days in each of the Kingdom of Saudi Arabia and the Federal Republic of Germany. The casting vote will remain with the chairman for the time being. In my judgment, the facts call for no more radical remedy than this. The parties must agree the form of the necessary amendments to give effect to my order."

[22] The remedy he imposed was to order FOMEL's Articles of Association to be amended to provide that the quorum of shareholders shall be any two directors ("a Business Administration Order"). He made other consequential amendments. In his view the facts before him called for no more radical remedy than that. He refused to make an order, as requested by Chemtrade in its closing submissions, that Fuchs purchase its shares in FOMEL at a price to be valued by the Court ("a Purchase Order"). He also refused to wind up FOMEL as requested by Fuchs in their closing submissions. The result of the order he made is that Chemtrade as the party which suffered unfair prejudice from the deadlock between the participants in FOMEL now has the ability to control meetings of the company's board and will as a result be able to enforce its exercise of that control.

[23] Chemtrade's contention in the appeal was that the learned trial judge erred in making the Business Administration Order that he did. It urges that he should have made a Purchase Order. The complaint is that there was no citation of authority in the judgment, or any statement of the principles which the judge was

applying, beyond those that can be gleaned from paragraph 188 of the judgment. His order erred in superimposing new rights and obligations onto those under which the parties had operated.[7] The complaint is that in his judgment he does not take into account relevant considerations of loss of trust and confidence. He took into account irrelevant considerations such as the failure of the Brothers (or Chemtrade) to complain for the period of a year after Sheikh Abdullah went into possession. While he considered trust and confidence on the part of Fuchs, he failed to consider whether Chemtrade had lost trust and confidence in Fuchs at all. Continuing trust and confidence on both sides was a pre-requisite to the making of a Business Administration Order. He failed to consider that Fuchs had allied themselves to Sheikh Abdullah and supported his approach to the legal proceedings while being aware of the ill-feeling between the Brothers and Sheikh Abdullah. They had, in October 2011, entered into two Compensation and Cooperation Agreements which bound them to support Sheikh Abdullah in his litigation with the Brothers in exchange for his holding them harmless. It must have been apparent to Fuchs that taking the side of Sheikh Abdullah would be a highly inflammatory move.

[24] In light of the earlier judgment in this Court in the Ownership Case, which has held that Sheikh Abdullah is the owner of Chemtrade and hence of the Alhamrani Group interest in FOMEL, one is tempted to observe that Fuchs in cooperating with Sheikh Abdullah did not act prejudicially towards Chemtrade, but acted in accordance with the wishes of the true sole shareholder who was alone entitled to appoint the Chemtrade directors of FOMEL. The appeal might then be dismissed, and Sheikh Abdullah left to sort out by agreement with the Fuchs Directors the future structure and conduct of FOMEL's affairs. However, in the event this dispute goes further, I should set out my opinion on the merits of the appeal brought by the Brothers in the Unfair Prejudice Proceedings.

[7] Re J E Cade & Son Ltd. [1991] BCC 360 at 372A-B.

[25] It is my opinion that the order made by the learned trial judge, the remedy he selected from among those provided by the statute and those proposed by the litigants before him, was exactly the right order for the following reasons.

[26] First, the Act provides expressly for such a remedy. Section 184I of the BVI Business Companies Act, 2004 as amended by the BVI Business Companies (Amendment) Act, 2005[8] provides as follows:

> "(1) A member of a company who considers that the affairs of the company have been, are being or are likely to be, conducted in a manner that is, or any act or acts of the company have been, or are, likely to be oppressive, unfairly discriminatory, or unfairly prejudicial to him in that capacity, may apply to the Court for an order under this section.
>
> (2) If, on an application under this section, the Court considers that it is just and equitable to do so, it may make such order as it thinks fit, including, without limiting the generality of this subsection, one or more of the following orders
>
> (a) in the case of a shareholder, requiring the company or any other person to acquire the shareholder's shares;
>
> (b) requiring the company or any other person to pay compensation to the member;
>
> (c) regulating the future conduct of the company's affairs;
>
> (d) amending the memorandum or articles of the company;
>
> (e) appointing a receiver of the company;
>
> (f) appointing a liquidator of the company under section 159(1) of the Insolvency Act on the grounds specified in section 162(1)(b) of that Act;
>
> (g) directing the rectification of the records of the company;

[8] Act No. 26 of 2005, Laws of the Virgin Islands.

(h) setting aside any decision made or action taken by the company or its directors in breach of this Act or the memorandum or articles of the company.

(3) No order may be made against the company or any other person under this section unless the company or that person is a party to the proceedings to which the application is made."

The order the learned trial judge made was, therefore, validly within the exercise of his judicial discretion in accordance with section 184I(2)(d) of the Act.

[27] Second, the relief of a Business Administration Order by amending the Articles to remove the cause of the failure of Chemtrade to call a meeting of the board of FOMEL, granted by the learned trial judge, was one of the four alternative reliefs sought by Chemtrade in their claim. Though in their submissions at the conclusion of the trial they urged him to make a Purchase Order by which Fuchs would buy them out, it was open to the trial judge to consider the matter in the round and to make the order he felt was just and equitable.

[28] Chemtrade's appeal against the decision as to remedy is two pronged. First, they urge that his reasons are insufficient or are misplaced. Second, they say that the remedy is unusual and that a Purchase Order obliging Fuchs to buy out their interest is more in accordance with case law and the normal practice in the Commonwealth.

[29] As to the first prong, the appeal against the reasons set out at paragraph 188 of the judgment, Chemtrade complains that the only reason for the decision came at the end of a long judgment, and was contained in one paragraph. Chemtrade describes the decision as stated baldly. It is clear, they urge, from the learned judge's comments in the transcript at the subsequent hearing on costs on 26th February 2013, that this was, in reality, the sole basis of his decision. The complaint is that he made an order to stop the principal (but not the only) unfair prejudice of which the Brothers (by which he meant Chemtrade) had complained.

They consider that he viewed Fuchs' unfair prejudice as minor. Chemtrade, therefore, appeals against his statements of fact in paragraph 188 on the basis that they are inaccurate statements of the position it put forward at trial. The judge was applying, they complain, a test of proportionality in deciding what remedy to award. While Chemtrade's position was that a Business Administration Order was a possibility, the hearing proceeded on the basis that such an order was highly unlikely. Such orders were described by the learned judge himself in a comment in the transcript as not simply relatively rare but "unknown", and a Purchase Order was the almost inevitable remedy if Chemtrade succeeded.

[30] Chemtrade also appeals against the learned trial judge's finding that Fuchs continued to have trust and confidence in Chemtrade. This was contradicted, they urged, by Fuchs' pleading in their Re-Re-Re-Amended Defence and Counterclaim when they sought the remedy of the appointment of a liquidator on the basis that it was just and equitable that a liquidator should be appointed. The pleaded point in Fuchs' Counterclaim was that it was of the essence of the joint venture partnership in AFPSA and FOMEL that the two should be ultimately owned and controlled by one and the same Alhamrani Group as the other. As a result of the failure to include Chemtrade in the Buy/Sell agreement, which had resulted in the sale of AFPSA to Sheikh Abdullah while leaving Chemtrade in the hands of the Brothers, the joint venture had ended. Yet, they complain, he gave no reason for dismissing their assertions to the contrary. Also, he made no finding as to whether the Class A Directors continued to have any trust and confidence in Fuchs. They submit that such a finding was necessary if an order other than a Purchase Order was going to be considered.

[31] Then, Chemtrade complains about a comment made by the learned judge at a subsequent hearing on costs. He remarked, "I limited the relief in the way I did because it seems to me the punishment has got to fit the crime."

[32] It is common ground that FOMEL constitutes a joint venture in the nature of a quasi-partnership. It is clear from the case law that a quasi-partnership, involving a small number of persons working closely together, generally depends on the continuing trust and confidence of the parties in order to function. Chemtrade relies on dicta by Lord Wilberforce in the House of Lords in the case of Ebrahimi v Wesbourne Galleries Ltd. and Others.[9] Here, two partners, the appellant Ebrahimi, and one Nazar, formed a company to take over their partnership business and were its first directors. The articles of association gave the company in general meeting the power to remove a director by ordinary resolution. Soon afterwards Nazar's son George became a director, and each shareholder transferred some of their shares to him with the result that Nazar and George became the majority shareholders. No dividends were paid, and all the company's profits were paid out in director's fees. When after some years a disagreement arose, Nazar and George voted Ebrahimi off the board of directors. Ebrahimi petitioned for an order that they should purchase his shares in the company or sell their shares to him, or alternatively that the company be wound up. The High Court ordered a winding up. The Court of Appeal allowed an appeal, holding that in the case of a quasi-partnership company the exercise by a majority in general meeting of the power to remove a director from office was not a ground for holding that it was just and equitable that the company should be wound up unless it were shown that the power had not been exercised *bona fide* in the interests of the company, and the appellant had failed to show that his removal had not been justified and in the best interests of the company. On appeal to the House of Lords it was held, allowing the appeal, that a limited company was more than a mere legal entity and the rights, expectations and obligations of the individuals behind it among themselves were not necessarily merged in its structure. While the "just and equitable" provisions did not entitle a party to disregard the obligation which he assumed by entering a company, it enabled the court to subject the exercise of legal rights to equitable considerations of a personal character arising

[9] [1973] AC 360.

between individuals which might make it inequitable to insist on legal rights or to exercise them in a particular way. In the present case, the appellant and Nazar had joined in the formation of the company on the basis that the character of the association between themselves, i.e., that the appellant was entitled to participate in the management, would, as a matter of personal relation and good faith, remain the same. Nazar having in effect repudiated that relationship and the appellant having lost his right to a share in the profits and being in that respect at the mercy of Nazar and George and being unable to dispose of his interest without their consent, the proper course was to dissolve the association by winding up the company. As Lord Wilberforce said,

> "The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.
>
> It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a 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 articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often

> be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere."[10]

One of the primary complaints of Chemtrade is that the learned judge, in exercising his discretion as to remedy, erred in failing (a) to make proper consideration of the fact that FOMEL was a quasi-partnership when determining what was the appropriate remedy; and (b) to make adequate findings about trust and confidence. If he had done so he would have found that it was common ground between the parties that there was no continuing trust and confidence between the parties, so that the maintenance of the status quo would not be an appropriate order to make. Certainly, there was in evidence a vast amount of material shewing Fuchs's cooperation with Sheikh Abdullah, and the increasing frustration of Sheikhs Mohamed and Siraj at their failure to prise FOMEL and Fuchs away from Sheikh Abdullah. It is Chemtrade's view that the FOMEL board of directors was a small one, similar to that in the Westbourne Galleries case, and a just and equitable remedy to the unfair prejudice to which the Chemtrade directors in FOMEL had been subject was a Purchase Order compelling Fuchs to purchase the Alhamrani Group interest and not a Business Administration Order, so that the exercise of the judge's discretion should be overturned.

[33] The principles which govern an appeal to this court against an exercise of discretion have been set out in Dufour and Others v Helenair Corporation and Others,[11] per Sir Vincent Floissac CJ:

> "We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to

[10] At 379A.
[11] (1996) 52 WIR 188.

> take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."[12]

The judge's available remedies upon which he exercised his discretion are set out in section 184I(2) of the BCA set out above at paragraph 25. There is no doubt from a review of the many authorities that were cited in this appeal that the court has a wide discretion to do what is considered fair and equitable in the exercise of this jurisdiction, and that buy-out orders or Purchase Orders are commonly made. The judge is called upon to put right and cure for the future the unfair prejudice which the claimant has suffered at the hands of the other shareholder of the company. The unacceptability to the petitioner of the relief that the court otherwise considers appropriate is doubtless a major consideration to be taken into account when deciding whether to grant that relief.[13] Nothing less than a clean break is likely in most cases of proven fault to satisfy the objectives of the court's power to intervene. Nor is there any doubt that a 50% shareholder, or even a majority shareholder, may petition where he is prejudiced by a minority with voting control.[14] Nor is there any doubt that the appropriateness of the remedy should be determined as at the date of the hearing.[15]

[34] Having considered all the authorities put before the Court, including those from Britain, Canada, Australia and New Zealand, the principles that should inform the exercise by the Court of a discretion under section 184I(2) seem clear. While none of the authorities from other jurisdictions amount to a direct statement of the law of the Virgin Islands, it is certain that in following the principles elucidated by the various authorities, the judge must exercise his discretion within the

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[12] At pp. 190-191.
[13] Re Neath Rugby Ltd. (No 2) [2008] BCC 390 at para. 91.
[14] Re H. R. Harmer Ltd. [1958] 3 All ER 689 at 705.
[15] Grace v Biagioli [2006] BCC 85 in the judgment of the English Court of Appeal delivered by Patten J, at p.107.

boundaries of what is permissible. His discretion is unfettered, and general guides to the solution of individual cases do not bind him. The assessment of the seriousness of the unfairly prejudicial conduct and the decision as to the appropriate remedy when it is established are matters of judgment for the trial judge. The remediation is normally expected to be prospective. The appropriate remedy should be selected to regulate the affairs of the company to avoid further oppression or unfair conduct. The court has an unlimited jurisdiction to make such order as it thinks fit with a view to bringing an end to the matters complained of. The discretion being a judicial one is to be exercised when the court considers it just and equitable to do so with restraint and in an appropriate manner.

[35] The third reason why the judge's order was the right one is that I am not satisfied that a Purchase Order was so clearly the only order that the judge should have made that his making the Business Administration Order that he did was clearly and blatantly wrong. The order amending the company's articles has been put into effect, and, in the months that have passed since the judgment in December 2012 Fuchs has paid back the monies which it removed from the accounts and, while relations between the Fuchs directors and Sheikhs Mohamed and Siraj remain strained, the company continues to function. Sheikh Abdullah has withdrawn logistical and staff support from FOMEL, and the company has had to source produce elsewhere than from AFPSA. The original trust and confidence between the two shareholders has probably been irreparably damaged, but I am not satisfied that this is determinative in this case. One permissible aim of the court in making an order under section 184I(2) is to redress the unfair prejudice while keeping its interference within a reasonable compass. This was clearly the aim of the learned trial judge and that aim was a perfectly proper one. Chemtrade has not persuaded me that the discretion has been plainly and wrongly exercised or has been exercised on some erroneous principle of law. It has not been established that the court below has either erred in principle or that the order it made is otherwise unjust. Certainly, his jocular, off the cuff remark in the costs

proceedings, after he had given his judgment, that "the punishment has got to fit the crime" cannot seriously be used against him to suggest that he either took into account irrelevant factors or that he gave too little weight to relevant factors. While the guidance of the House of Lords in the Westbourne Galleries case[16] above is wise and, in similar circumstances, this court would feel obliged to rule in the same way, the order made by the learned trial judge in the circumstances of this case cannot be faulted for the reasons given above.

[36] A Purchase Order is particularly inappropriate at this time, when this court has upheld the appeal of Sheikh Abdullah in the Ownership Case and found that he was in fact the purchaser of all the Alhamrani Group interest in Chemtrade and FOMEL. It is the duty of the court to apply one of the remedies permitted by the statute that seems most appropriate at the time of the hearing in question. One remedy might be to undo the order made by the learned trial judge and to return the FOMEL constitution to the state it was prior to his order. However, I have not been asked to do that by anyone. In my view this court ought not to interfere with the exercise of the discretion of the court below. I would leave intact the Business Administration Order made by the court below, leaving it for Sheikh Abdullah and Fuchs to sort out between themselves the future arrangements for the management of FOMEL according to the agreements made or to be made between themselves. Accordingly this appeal must fail, with no order as to costs. Any costs incurred by Fuchs will fall to be dealt with according to the terms of the

[16] See para. 32 above.

Compensation and Cooperation Agreement between themselves and Sheikh Abdullah. The cross-appeal is also dismissed with no order as to costs as its presentment added nothing to the argument or to the costs.

Don Mitchell
Justice of Appeal [Ag.]

I concur.

Louise E. Blenman
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal