THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2013/0009

BETWEEN:

[1] STARAY CAPITAL LIMITED
[2] MARLON RAY CHEN

Appellants

and

CHA, YANG (also known as Stanley)

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mde Louise E. Blenman — Justice of Appeal
The Hon. Mde. Gertel Thom [Ag.] — Justice of Appeal [Ag.]

Appearances:

Mr. Stephen Atherton, QC and Mr. Oliver Clifton for the Appellants
Mr. Matthew Collings, QC and Mr. Jeremy Child for the Respondent

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2014: January 9;
July 14.

Amendment to company's articles of association by shareholders' resolution – Compulsory redemption of shares pursuant to shareholders' resolution – Whether resolution in interests of company – Applications to adduce fresh evidence

The second appellant, Mr. Chen, is a Chinese national and an entrepreneur with expertise in the coal mining industry. Mr. Chen met the respondent, Mr. Cha, in 2005 and some years later, the two decided to participate in a coal mining project ("the Project") in British Columbia, Canada. The first appellant, Staray Capital Limited ("Staray"), was incorporated for the purpose of being used as a vehicle to facilitate Mr. Chen and Mr. Cha's participation in the Project. When Mr. Chen first discussed the Project with Mr. Cha, Mr. Cha told him that he was a partner at the law firm King & Wood in the People's Republic of China ("PRC"), and that he was qualified to practise both in the PRC and the USA. It was agreed that 80% of the shares in Staray would be issued to Mr. Chen and the remaining 20%, to

Mr. Cha. Staray was incorporated in the British Virgin Islands on 22nd March 2010, with Mr. Chen and Mr. Cha as the only directors.

On 9th June 2011, Staray and the owners of the Project signed a shareholders agreement. A separate company, HD Mining International Limited, was incorporated to execute the Project and Staray was granted 5% of the shares of this company.

The relationship between Mr. Chen and Mr. Cha began to deteriorate after Mr. Chen tried to get Mr. Cha to transfer some of his (Mr. Cha's) shares to Mr. Chen so that they could be passed on to one Mr. Kong, and Mr. Cha refused to do so. Mr. Chen had claimed that Mr. Kong was instrumental in bringing them into the Project. On 8th September 2011, Mr. Cha was removed as a director of Staray by a shareholders' resolution passed by Mr. Chen and on 26th October 2011, the Memorandum and Articles of Association of Staray were amended by Mr. Chen by a shareholders' resolution, Mr. Chen being the 80% shareholder. This resolution inserted a sub-regulation 3.8 into the Staray's Articles of Association, which stated that the company may compulsorily redeem any or all shares held by a shareholder who has been found to have either made material misrepresentations in the course of acquiring its shares, or committed an act that may result in the company incurring or suffering any pecuniary, legal, regulatory or administrative disadvantage or liability or negative publicity, which it might not otherwise have suffered. Mr. Chen alleged that Mr. Cha had made material misrepresentations at their first meeting when the Project was discussed, with regard to his position in the law firm King & Wood, as well as his eligibility to practise law in the PRC and the USA. Accordingly, pursuant to the shareholders' resolution, Mr. Chen sought to have Mr. Cha's shares in Staray redeemed. A redemption notice was sent to Mr. Cha notifying him that his shares would be redeemed as at 11th November 2011. Mr. Cha sought and obtained an injunction on 9th November 2011, preventing the redemption of the shares. He subsequently filed a claim in which he sought, inter alia, an order that the amendment to the Articles of Association of Staray made by the resolution be removed, and such orders as may be made pursuant to section 184I of the BVI Business Companies Act, 2004[1] as the Court thought fit.

In the court below, the learned judge found that: (1) the shareholders' resolution to amend the Articles of Association of Staray was in the interests of the company; (2) the redemption notice issued pursuant to the amended articles to redeem the respondent's shares was invalid; and (3) the respondent was not entitled to relief under section 184I of the BVI Business Companies Act, 2004. The appellants appealed the second of these findings while the respondent filed a counter notice of appeal, challenging the first and the third findings.

Held: dismissing both the appeal and counter appeal and ordering that the appellants pay the respondent's costs of the appeal fixed at two-thirds of the costs in the court below, that:

1. The learned judge correctly applied the relevant legal principles in coming to a determination on whether the amendment to Staray's articles of association was

[1] 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).

valid. Even if an amendment to a company's articles of association operates to the disadvantage of a minority shareholder, this does not automatically mean that the resolution which amended the articles was passed in bad faith. The learned judge considered whether the amendment was so oppressive as to cast doubt on the bona fides of Mr. Chen and found that it was not. This was a finding which was open to the learned judge on the facts, having regard to the nature of the amendment and the fact that Mr. Cha could only be affected by it if he had acquired his shares by making material misrepresentations which were fraudulent or negligent or had committed some act that may have resulted in Staray suffering detriment which it might not otherwise have suffered. Further, the amendment did not only apply to Mr. Cha, but equally to all shareholders of Staray.

Citco Banking Corp NV v Pusser's Ltd and another [2007] UKPC 13 applied; Allen v Gold Reefs of West Africa, Limited [1900] 1 Ch 656 applied; Shuttleworth v Cox Brothers and Company (Maidenhead), Limited, and Others [1927] 2 KB 9 applied.

2. The learned judge's finding that Mr. Chen did not rely on the representations made by Mr. Cha in agreeing for Mr. Cha to acquire shares in Staray was a finding of fact and thus, an appellate court would only interfere with such a finding in special circumstances, such as where it was based on a misapprehension of the evidence. The learned judge having heard all of the evidence and having had the distinct opportunity to observe the witnesses, it was open to him, on the evidence which was before him, to make the findings that he made. No compelling grounds have been shown to justify reversing these findings of the learned judge.

   Chiverton Construction Limited et al v Scrub Island Development Group Limited Territory of the Virgin Islands High Court Civil Appeal BVIHCVAP2009/0028 (delivered 19th September 2011, unreported) followed.

3. For Staray to redeem its shares held by Mr. Cha under the new Article 3.8 which had been inserted by the shareholders' resolution, the appellants would have been required to show firstly, that Mr. Cha committed an act; secondly, that that act may have resulted in the company suffering one or more of the consequences outlined in the article; and thirdly, that Staray might not otherwise have suffered or incurred such consequences. The appellants were required to adduce evidence to discharge this burden; it was not sufficient for them to simply state an act or acts committed by Mr. Cha. They needed to go further and show that the act or acts of Mr. Cha may have resulted in Staray suffering one or more of the consequences and also that Staray might not otherwise have suffered the consequences. The learned judge found that there was no evidence sufficient to show this. There is therefore no basis to interfere with the findings of the learned judge on this issue.

4. The appellants' failure to prove all of the requirements of Article 3.8 does not amount to a breach of the terms of Staray's articles of association, nor does it amount to using the provisions of the articles in a manner which equity would regard as contrary to good faith. The redemption notice issued pursuant to Article

3.8(b), being an invalid notice, was of no effect and therefore, Mr. Cha would not have suffered any prejudice. In such circumstances, a court would not exercise its discretion under section 184I(2) of the BVI Business Companies Act, 2004, to grant any of the reliefs outlined in that subsection. The role of the section 184I jurisdiction is to protect shareholders against the breach of the terms on which they agreed the affairs of the company should be conducted, and against inequity resulting from the exercise of strict legal power of those conducting the affairs of the company. Neither of these two situations were present in this case. There is therefore no basis to interfere with the finding of the learned judge that Mr. Cha had failed to establish that service of an invalid notice was unfair within the meaning of section 184I.

JUDGMENT

[1] THOM JA [AG]: This is an appeal against orders made by Bannister J [Ag.] on 13th February 2013 and 25th April 2013 in which he found that a resolution to amend the Articles of Association of the first appellant ("Staray") was in the interest of Staray, a redemption notice issued pursuant to the amended Articles of Association was invalid, the respondent was not entitled to relief under section 184I of the BVI Business Companies Act, 2004,[2] and ordered the appellants to pay 40% of the respondent's costs.

Background

[2] Mr. Cha, Yang ("Mr. Cha"), a Chinese national by birth, was admitted to practise law in the State of New York ("New York") in 1997. On 11th September 2001 he became a United States citizen. In December 2001 he obtained the People's Republic of China ("PRC") Law Certificate which permitted him to practise law in the PRC. He practised law in the PRC at various law firms including the law firm of King & Wood.

[3] Mr. Marlon Ray Chen ("Mr. Chen") is a Chinese national and an entrepreneur with expertise in the coal mining industry.

[4] Mr. Cha and Mr. Chen met in 2005 and over the years a friendly relationship developed between them.

[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).

[5] In March 2010 Mr. Chen became aware of a coal mining project in British Columbia, Canada ("the Project"). On 20th March 2010 Mr. Chen discussed the Project with Mr. Cha. Mr. Cha told Mr. Chen that he was a partner at King & Wood and qualified to practise both in the PRC and in the US. Mr. Chen and Mr. Cha agreed to participate in the Project. They also agreed that a company should be incorporated to be used as the vehicle to facilitate their participation in the Project. Mr. Chen would be issued with 80% of the shares and Mr. Cha with 20%. Pursuant to this agreement, on 22nd March 2010, Mr. Chen gave instructions to Ms. Tam of S.Y. Yang & Company, who were corporate services providers, to form a company. As a result Staray was incorporated in the Virgin Islands ("BVI") with Mr. Chen and Mr. Cha being the only directors.

[6] Mr. Chen and Mr. Cha held several meetings with the principals of Canadian Dehua International Mine Limited, Dehua Lyliang International Mines Group Inc. and Huiyong Holding Group Company Limited ("the owners of the Project"). Around May 2011, it became evident that an agreement would be reached with the owners of the project for Staray to participate in the project.

[7] On 9th June 2011, Staray and the owners of the project signed a shareholders agreement. The company HD Mining International Limited ("HD Mining") was incorporated to execute the project. Staray was granted five percent (5%) of the shares of HD Mining.

[8] Between 18th May 2011 and 14th July 2011 Mr. Chen and Mr. Cha had several meetings during which Mr. Chen tried to get Mr. Cha to transfer some of his shares in Staray to Mr. Chen for him to pass on to Mr. Kong who Mr. Chen claimed was instrumental in bringing them into the Project. Ultimately Mr. Cha did not transfer any of his shares in Staray. Thereafter the relationship between Mr. Chen and Mr. Cha broke down.

[9] On 2nd August 2011 a PRC company Beijing Enlight Media Co Ltd, of which Mr. Cha was a director, issued a listing announcement in which Mr. Cha was

described as a partner in King & Wood and as a Chinese national without a permanent residence permit from any other country. Mr. Cha agreed that this information was not entirely accurate since he had the right to reside permanently in the United States.

[10] On 8th September 2011 Mr. Cha was removed as a director of Staray by a shareholders' resolution passed by Mr. Chen.

[11] On 26th October 2011 the Memorandum and Articles of Association of Staray were amended by Mr. Chen by a shareholders' resolution, Mr. Chen being the 80% shareholder.

[12] Pursuant to the resolution, on the said 26th October 2011 a redemption notice was sent to Mr. Cha notifying him that his shares would be redeemed as at 11th November 2011. Mr. Cha sought and obtained an injunction on 9th November 2011 preventing the redemption of his shares. Mr. Cha then filed a claim in which he sought among other things an order that the amendment to the Articles of Association of Staray made by the resolution be removed, and such orders as may be made pursuant to section 184I of the BVI Business Companies Act, 2004 as the Court thinks fit.

Judgment Below

[13] The learned judge having heard the claim delivered two judgments, the first on 13th February 2013 ("the First Judgment") and the second on 25th April 2013 ("the Second Judgment").

[14] In the First Judgment the learned judge found that Staray was not a quasi partnership company, the resolution was passed bona fide in the interest of Staray; representations made by Mr. Cha that he was a partner in King & Wood, and that he was qualified to practise in both the US and the PRC were not material misrepresentations within Article 3.8(a); there was no evidence that Mr. Cha had committed any act with the potential to cause any of the consequences referred to in Article 3.8(b); there was no evidence that Staray had suffered or may suffer any

of the pleaded detriments; that the redemption notice was invalid; and that Mr. Cha was entitled to an injunction.

[15] In the second judgment the learned judge considered what reliefs should be granted to Mr. Cha and decided that none should be granted. He awarded Mr. Cha 40% of his costs.

[16] Mr. Chen/Staray appealed the judge's findings in the First Judgment in relation to Article 3.8(a) and Article 3.8(b) and the costs order in the Second Judgment.

[17] Mr. Cha in his counter notice of appeal appealed the judges' findings in relation to the issue of a quasi partnership (but this was not pursued at the hearing of the appeal); that the resolution was bonafide in the interest of Staray, and on the Second Judgment, the finding that Mr. Cha was not entitled to any relief under Section 184I and the award of reduced costs of forty percent (40%).

Issues on Appeal/Counter Appeal

[18] At the hearing of this appeal, the following issues arose:

(a) Whether the learned judge erred in finding that statements made to Mr. Chen by Mr. Cha did not amount to material misrepresentations within the provisions of Article 3.8(a).

(b) Whether the learned judge erred in his interpretation and application of Article 3.8(b).

(c) Whether the learned judge erred in awarding costs to Mr. Cha.

[19] On the counter notice of appeal:

(d) Whether the learned judge erred in finding that the resolution amending the Articles of Association was bona fide in the interest of Staray.

(e) Whether the learned judge erred in finding that Mr. Cha was not entitled to any relief under Section 184I of the BVI Business Companies Act, 2004.

(f) Whether the learned judge erred in awarding Mr. Cha only 40% of his costs.

Fresh Evidence

[20] At the hearing of this appeal both Mr. Chen/Staray and Mr. Cha made applications to adduce fresh evidence.

[21] I will deal with the application by Mr. Chen/Staray first.

[22] The principles by which an appellate court is guided in determining whether to admit fresh evidence at the hearing of an appeal are the principles outlined in the case of Ladd v Marshall,[3] being (i) the evidence could not have been obtained with reasonable diligence for use at the trial; (ii) the evidence is such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive, and (iii) the evidence is such as is presumably to be believed. In applying these principles the Court will give consideration to the overriding objective of dealing with cases justly.

[23] Mr. Chen/Staray in their application seek to adduce two opinions from the Shanghai Municipal Bureau of Justice ("the Shanghai Bureau") which were produced in response to complaints filed by Mr. Chen against Mr. Cha. The opinions are dated 24th March 2013 ("the First Opinion") and 1st July 2013 ("the Second Opinion"). The Application is supported by an affirmation of Mr. Chen.

[24] The Shanghai Bureau opined that in relation to his application for (i) a licence to practise in the PRC, (ii) annual registration licence and (iii) change of practise institution, Mr. Cha had provided all of the documents required under PRC law. He made no other disclosure. More specifically he did not disclose that he held US citizenship. In relation to whether Mr. Cha had violated any of the laws of the PRC when he obtained his Lawyer's Qualification Certificate on 7th December 2001 and at which time he had acquired US citizenship in September 2001, the Board opined that if Mr. Cha had ceased to be a Chinese national on 7th

[3] [1954] 1 WLR 1489.

December 2001 he had violated the requirements of Article 4 of the Measures for Evaluation and Granting of Lawyer's Certificate (Promulgated on 1st January 1997, and repealed on 26th February 2009).

[25] It is not disputed that conditions (i) and (iii) of Ladd v Marshall are satisfied. The fresh evidence could not have been obtained with reasonable diligence for use at the trial since the opinions are dated 24th March 2013 and 1st July 2013, and the trial was held between 28th and 31st January 2013. The opinions are sufficiently credible as they are from the State Regulatory Authority in the PRC which issued the licence to practise in the PRC to Mr. Cha in the first instance.

[26] The second condition is in dispute. Mr. Atherton, QC referred to the finding which the learned judge made at paragraph 85 of the First Judgment:

> "I therefore conclude that Mr Cha's qualification as a PRC lawyer was valid. As a matter of fact, I would have had difficulty concluding otherwise, since Mr Cha was registered by the BMBoJ. I accept Mr Liu's evidence that the registers of the BMBoJ are conclusive on matters of this sort until rectified. It cannot be right that a member of the public can be heard to assert that a person registered with the BMBoJ is not a qualified lawyer merely because he asserts that he should never have been registered in the first place. This Court can be in no different position. A person may, of course, assert that an individual should never have been registered because he had practiced material deception in obtaining his qualification, which is what Mr Chen asserts in the present case. I decline, however, to make a finding, on the evidence which I have heard, that Mr Cha practiced deception on the BMBoJ in order to become admitted as a Chinese lawyer. The issue was not put to Mr Cha and there are other possible reasons apart from fraud why the registration was granted and subsequently maintained. I am not prepared to make findings of fraud without solid material entitling me to do so."

[27] Mr. Atherton, QC submitted that on the basis of the new evidence, the learned judge would have had no option but to have found or at least inferred that Mr. Cha was not validly licensed to practise law in the PRC because he should never have been registered to so practise. Mr. Cha was registered and licensed to practise law in the PRC only because he failed to disclose to the licensing authority that he had possessed US citizenship and was therefore no longer a PRC national. Article 3.8(a) was therefore applicable. Also Mr. Cha's violation of the law of the

PRC as stated in the opinion put Staray at risk of suffering one or more of the detriments referred to in Regulation 3.8(b).

[28] Mr. Collings, QC in response submitted that the condition was not satisfied as the fresh evidence only shows that Mr. Cha was in breach of Article 4 of the Measures for Evaluation and Granting of Lawyer's Certificate.

[29] I agree that the fresh evidence would probably have influenced the conclusion to which the learned judge arrived at paragraph 85 of the judgment, as it relates directly to the two issues of which Mr. Chen and Staray complain, being firstly, whether Mr. Cha obtained his shares as a result of material misrepresentations, and secondly that Mr. Cha's conduct in obtaining his PRC qualification and license to practise by failing to disclose that he was a US citizen may result in Staray suffering one or more of the consequences set out in Article 3.8(b).

[30] Mr. Chen/Staray having complied with all of the conditions and having regard to the overriding objectives of the Court, I would grant the application to adduce the fresh evidence.

Respondent's Application

[31] Mr. Cha made application to adduce fresh evidence being (i) a certificate from the Beijing Municipal Bureau of Justice ("the Beijing Bureau") dated 6th November 2013 confirming that Mr. Cha was a registered partner of the law firm of King & Wood from 19th January 2011 to 20th April 2012 and (ii) evidence concerning a conversation between Mr. Chen and Mr. Zhang. The application is supported by an affirmation of Mr. Cha.

[32] At the hearing of the application Mr. Cha did not seek to adduce evidence relating to the conversation.

[33] In relation to the certificate, Mr. Collings, QC submitted that all of the conditions of Ladd v Marshall were satisfied. The certificate was only available after the trial. If the learned judge had the benefit of the Beijing Bureau's certificate he would not

have made the finding which he made at paragraph 53 of the first judgment that Mr. Cha was never a partner at the law firm of King & Wood and the evidence was credible it being a certificate from a PRC regulatory authority.

[34] Mr. Atherton, QC opposed the application on the ground that (a) no explanation was given by Mr. Cha as to why the evidence was not available at the trial, and (b) the fresh evidence does not show that Mr. Cha was a partner of King & Wood on 20th March 2010 which is the material time that Mr. Chen contends that Mr. Cha misrepresented the position that he was a partner in King & Wood.

[35] Having reviewed Mr. Cha's affirmation, I find there is no evidence from Mr. Cha that the fresh evidence could not have been obtained for use at the trial. The issue that Mr. Cha's representation that he was a partner in King & Wood was a material misrepresentation was raised in the amended defence. Mr. Cha was then put on notice. The certificate is dated 6th November 2013. There is no evidence that Mr. Cha tried to obtain the certificate but was unable to do so prior to the trial. Also, I agree with the submission Mr. Atherton, QC that the certificate does not show that Mr. Cha was a partner in King & Wood at the time the learned judge found that the representation was made being 20th March 2010. The certificate only shows that Mr. Cha was a partner in King & Wood from January 2011 to April 2012. It is unlikely that this certificate would have an important influence on the outcome of the case. I would therefore refuse the application.

Resolution Amending Articles of Association

[36] The relevant part of the resolution which amended the Articles of Association reads as follows:

> "The following be inserted as Sub-Regulation 3.8 of the Articles of Association:
>
> "3.8. If a Shareholder is found to have:
> (a) made material misrepresentations (whether fraudulent or negligent) in the course of acquiring its Shares; or
> (b) committed an act that may result in the Company incurring or suffering any pecuniary, legal, regulatory or administrative disadvantage or liability

or negative publicity which the Company might not otherwise have incurred or suffered,

(such Shareholder being a "Defaulting Shareholder");

the Company may compulsorily redeem any or all Shares held by the Defaulting Shareholder, by giving 15 days' notice to the Defaulting Shareholder (the "Compulsory Redemption Notice Period").

Upon expiry of the Compulsory Redemption Notice Period and such compulsory redemption under this Sub-Regulation 3.8 being exercised by the Company, such Defaulting Shareholder will be entitled to receive the fair market value (without discount for any minority stake) as determined by a recognised international independent third party business valuer (the "Valuation") in respect of the Shares so redeemed (the "Redemption Shares"). The Valuation shall be conducted as soon as possible to determine the fair market value of the Redemption Shares as at the date of the compulsory redemption notice and the redemption price shall be paid to such Defaulting Shareholder within reasonable time period of the Valuation report setting out the fair market value of the Redemption Shares having been given to the directors of the Company.

Notwithstanding any other provisions of these Regulations, from the expiry date of the Compulsory Redemption Notice Period until the register of members of the Company has been updated to remove the name of such Defaulting Shareholder, the Defaulting Shareholder shall have no other Shareholder's rights except the right to receive the redemption price and the right to receive any amounts declared but not yet paid by the Company in respect of the Shares so redeemed."

[37] Mr. Collings, QC contended that based on the findings of fact made by the learned judge he ought to have found that the resolution was not passed in the bona fide interest of Staray. Further, the learned judge wrongly assessed the validity of the resolution on a hypothetical basis rather than on the facts as found by him which shows that Mr. Chen wanted Mr. Cha out of Staray. In so doing he failed to follow the principles in Citco Banking Corp NV v Pusser's Ltd and another.[4] Staray had no separate interest in the resolution, which was a matter between the shareholders only. The purpose of the resolution was to enable Mr. Chen to receive the prime value of Staray's 5% interest in HD Mining when the project matures and not to have to share 20% of it with Mr. Cha.

[4] [2007] UKPC 13.

[38] Mr. Atherton, QC in response argued that the learned judge correctly applied the legal principles in determining the legitimacy of the power exercised by Mr. Chen in passing the resolution.[5]

Discussion

[39] Section 89 of the BVI Business Companies Act, 2004 empowers a majority of the shareholders to amend the Articles of Association of a company. While the section does not contain any limitation on the exercise of this power, such provisions have long been interpreted as not confirming an absolute power but is subject to implied limitations.

[40] It is common ground between the parties that the principles to be applied in determining whether an amendment to the Articles of Association of a company was valid, is the test in Citco Banking Corp NV, which is, whether in the opinion of the shareholders the alteration of the articles was for the benefit of the company and whether there were grounds on which reasonable men could come to the same decision.

[41] The learned judge's application of the principles is to be found at paragraph 69 of the First Judgment. It reads:

> "Applying these principles to the resolution of 26 October 2011, it seems to me that it is not possible for me to say that a company in general meeting cannot reasonably take the view that shareholders who have acquired their holdings as a result of misstatements, whether fraudulent or negligent, or who have committed acts which may result in the company incurring or suffering disadvantage or negative publicity, should have their shares redeemed at a valuation. By itself the amendment is not so oppressive or extravagant as to cast doubts upon the *bona fides* of Mr. Chen in professing the view that it was in the best interests of Staray that Mr. Cha should cease to be associated with it. The charge of malice falls away accordingly. Once that point is reached, the fact that Mr. Cha was, when it was passed, the only person capable of being affected by the amendment is, in my judgment, irrelevant."

[5] See: Allen v Gold Reefs of West Africa, Limited [1900] 1 Ch 656; Shuttleworth v Cox Brothers and Company (Maidenhead), Limited, and Others [1927] 2 KB 9; and Citco Banking Corp NV v Pusser's Ltd and another [2007] UKPC 13.

[42] The above shows that the learned judge correctly applied the principles in Citco Banking Corp NV to the facts. The amendment simply provided for Staray's shares to be redeemed where they were acquired as a result of misrepresentation or where the conduct of a shareholder may result in Staray suffering detriment which it might not otherwise have suffered. The learned judge found, in effect, that it was reasonable for a company to take the view that members who had acquired their shares by misrepresentation or who had committed acts which may result in the company suffering detriment should have their shares redeemed. While the learned judge did find that Mr. Chen wanted Mr. Cha out of Staray, the principle that has emerged from the authorities of Citco Banking Corp NV; Allen v Gold Reefs of West Africa, Limited;[6] and Shuttleworth v Cox Brothers and Company (Maidenhead), Limited, and Others[7] is that an amendment which operated to the disadvantage of a minority shareholder would not automatically mean that the resolution was passed mala fides. The question still remains whether the amendment was for the benefit of the company. If the resolution was so oppressive as to cast suspicion on the honesty of those responsible for it or so extravagant that no reasonable men could really consider it for the benefit of the company then it would be struck down. The learned judge considered whether the amendment was so oppressive as to cast doubt on the bona fides of Mr. Chen and found that it was not. This was a finding open to the learned judge on the facts, having regard to the nature of the amendment and the fact that Mr. Cha could only be affected by the amendment if he had acquired his shares by making material misrepresentations which were fraudulent or negligent or had committed some act that may result in Staray suffering detriment which it might not otherwise have suffered. Further, the amendment did not only apply to Mr. Cha, it applied equally to all shareholders of Staray. Accordingly I would dismiss this ground of the counter appeal.

[6] [1900] 1 Ch 656.
[7] [1927] 2 KB 9.

Article 3.8(a)

[43] The relevant part of Article 3.8(a) reads as follows:

> "If a Shareholder is found to have:
>
> (a) made material misrepresentations (whether fraudulent or negligent) in the course of acquiring its Shares; …
>
> the Company may compulsorily redeem any or all Shares held by a Defaulting Shareholder, by giving 15 days notice to the Defaulting Shareholder …"

[44] Mr. Atherton, QC contended that the following statements by Mr. Cha were material misrepresentations:

(a) He was a partner in the law firm of King & Wood.

(b) He was qualified to practise in the PRC.

(c) He was qualified to practise in the State of New York.

[45] It was conceded by Mr. Collings, QC that in view of the decisions of Richard Butler-Creagh v Aida Hersham;[8] Mach Marketing International SA v MacColl;[9] and Leslie Leithead Pty. Ltd. v Barber,[10] the learned judge erred in finding that Staray could not rely on a pre-incorporation misrepresentation. Nothing turns on this concession since the learned judge at paragraph 74 of the first judgment determined the issue of material misrepresentation on the basis that Mr. Chen was the representee and Staray could rely on the representations.

[46] Mr. Atherton, QC contends that the learned judge erred in finding that there were no material misrepresentations. He submitted that for a misrepresentation to be material, the representation need not be the sole representation. It may be one of a number of representations. Also it does not have to be, nor does it have to be shown to be the sole effective cause of the representee's conduct. Therefore the fact that other representations were made to Mr. Chen by Mr. Cha on which he relied does not mean that the representations that Mr. Cha was a partner in King & Wood and that he was entitled to practise law both in the PRC and the USA were

[8] [2011] EWHC 2525 (QB).
[9] [1995] BCC 951.
[10] (1965) 65 SR (NSW) 172.

not relied on by Mr. Chen. Mr. Atherton, QC relied on the case of Assicurazioni Generali SpA v Arab Insurance Group (BSC).[11]

Partnership In King & Wood

[47] Mr. Atherton, QC submitted that the learned judge having found that Mr. Cha told Mr. Chen that he was a partner in the firm of King & Wood and he was not a partner, wrongly concluded that this misrepresentation was not material. The learned judge failed to take proper account of the unchallenged evidence of Mr. Chen that this was one of the reasons Mr. Cha was appointed General Consul of Staray, King & Wood being one of the most prominent law firms in the PRC. Further Mr. Cha's background role was to introduce Staray's business partners to appropriate players in the capital markets, this role Mr. Cha could not fulfill being a mere employed lawyer.

Practice In The PRC

[48] Mr. Atherton, QC submitted that the learned judge having found based on the expert evidence that (i) Mr. Cha had lost his PRC nationality on 11th September 2001 when he became a citizen of the US; (ii) in order to be granted a qualification to become a lawyer in the PRC via the "verification route", Mr. Cha would at the relevant time being December 2001 have had to have been a citizen of the PRC and he was not; (iii) for Mr. Cha to obtain and then maintain a licence to practise law in the PRC, Mr. Cha would have had to have been a citizen of the PRC which he was not; (iv) Mr. Cha could not have obtained nor would he have been able to maintain his licence to practise law in the PRC had Mr. Cha informed the relevant licensing authority that he was a citizen of the United States; the learned judge erred in not concluding that:

(a) Mr. Cha's qualifications as a PRC lawyer were not in fact valid;

(b) Mr. Cha had misrepresented the position to Mr. Chen or Staray on 20th March 2010 when stating that he was validly qualified to practise law in the PRC;

[11] [2002] EWCA Civ 1642.

(c) Mr. Cha must have failed to inform the relevant licensing authority in the PRC that he was not a citizen of the PRC, this was the only explanation why Mr. Cha would have been granted a licence to practise law in the PRC.

[49] Mr. Atherton, QC next submitted that part of the reason for the learned judge's error was his misunderstanding of the evidence of Mr. Zhang, the expert witness of Mr. Chen. The learned judge erroneously found that Mr. Zhang did not challenge the conclusion of Mr. Cha's expert witness that for Mr. Cha to be granted his qualification to practise law in the PRC in December 2001 it did not matter that Mr. Cha was not a citizen of the PRC at the time. However, Mr. Zhang did challenge the evidence of Mr. Liu. Had the learned judge considered this evidence he would have concluded that the misrepresentation was material.

Practice in New York

[50] Mr. Atherton, QC contended that the learned judge having concluded that Mr. Cha was not licensed to practise law in the State of New York since his license had lapsed in November 2006 contrary to what Mr. Cha had represented at the meeting of 20th March 2010, erred in finding that the representation was not material. This error was caused by the judge's opinion that the misrepresentation was in some way bizarre. The unchallenged evidence of Mr. Chen was that it was important to the Project and to Staray's role in the Project that Mr. Cha was entitled to practise law in the State of New York. There was no basis on which the learned judge could have concluded that the representation was not material.

[51] Mr. Collings, QC in response submitted that Article 3.8(a) which provides for redemption of a member's shares if the member acquired the shares as a result of misrepresentation must be construed strictly.[12] The misrepresentations were not material misrepresentations for the purpose of Articles 3.8(a). They were not relied upon by Mr. Chen.

[12] Re Coroin Ltd (No 2) [2013] 2 BCLC 583.

[52] Mr. Collings, QC also submitted that this ground relates to findings of fact made by the learned judge, and the appellate court would only interfere if the finding was blatantly wrong. The learned judge reached careful findings on the totality of the evidence with the benefit of having seen the parties extensively cross-examined. The Court of Appeal should therefore not interfere.[13]

Discussion

[53] The reasons for the learned judge's finding that Mr. Cha did not make any material misrepresentations to Mr. Chen on 20th March 2010 are outlined at paragraph 74 of the First Judgment:

> "Quite apart from that, while I have found that Mr. Cha told Mr. Chen on 20 March 2010 that he was a partner in [King & Wood] (which he was not) and qualified to practice in both the PRC (which he was, although as will be seen there are questions whether he should have been) and the US (he was qualified, although then not licensed to practice there) Mr. Chen's stated reasons for agreeing to take Mr. Cha into the project had nothing to do with whether or not Mr. Cha was at the time a partner in, or merely employed by [King & Wood]. Mr. Chen's evidence was that he took Mr. Cha in because of Mr. Cha's reputation as an expert in capital markets and IPO's and because he thought, bizarrely, that Mr. Cha's New York qualification would be an advantage in dealing with Canadian mining concerns. He also valued Mr. Cha's linguistic skills. Mr. Cha was correct to tell Mr. Chen that he was qualified in New York. Restoring his right to practice was a mechanical matter of paying his back dues, something which Mr. Cha did on 4th September 2012. Nor is there any evidence that at any time before he ceased to take part in Staray's affairs Mr. Chen/Staray needed or was even likely to need to call upon Mr. Cha to appear in the Courts of New York. In my judgment and on the assumption that Mr. Chen is to be treated as the representee for these purposes, there is no evidence that Mr. Cha made any material misrepresentations to Mr. Chen on 20 March 2010."

[54] Mr. Atherton QC's challenge to the learned judge findings is twofold. Firstly the learned judge erred in finding that the representation of Mr. Chen that he was qualified to practise both in the PRC and the US were not misrepresentations, and

[13] See: Chiverton Construction Limited et al v Scrub Island Development Group Limited (Territory of the Virgin Islands High Court Civil Appeal BVIHCVAP2009/0028 (delivered 19th September 2011, unreported)); Biogen Inc. v Medeva Plc [1997] RPC 1; Mutual Holdings (Bermuda) Limited and others v Diane Hendricks and others [2013] UKPC 13; and Mr Robert Cooper & Ors v Fanmailuk.com Limited & Anr [2009] EWCA Civ 1368.

secondly that the learned judge erred in finding that none of the representations of which Mr. Chen/Staray complain were material misrepresentations.

Misrepresentations

Practice in PRC

[55] While the learned judge erred when he stated that Mr. Zhang did not challenge the conclusion of Mr. Liu, as the evidence shows that Mr. Zhang did challenge Mr. Liu's conclusion, the learned judge's finding that Mr. Cha was qualified to practise in the PRC was not simply based on Mr. Liu's conclusion but was based on the fact that Mr. Cha was registered by the Beijing Bureau and that the register of the Beijing Bureau was conclusive. The issue however is whether this was a correct finding. The Court admitted the fresh evidence of Mr. Chen/Staray being two opinions of the Shanghai Bureau in which the Bureau opined that if Mr. Cha had lost his PRC nationality he would not have qualified to obtain the PRC Lawyer's Qualification Certificate. The learned judge having found based on the expert evidence that Mr. Cha would have ceased to have Chinese nationality on 11th September 2001, then having regard to the fresh evidence, Mr. Cha would not have been validly qualified as a PRC lawyer. The representation by Mr. Cha that he was so qualified was a misrepresentation.

Practice in USA

[56] Mr. Atherton, QC argued that Mr. Cha was not entitled to practise in the US because his licence was not valid. However the representation which the learned judge found that was made to Mr. Chen was that Mr. Cha was qualified to practise in the PRC. This was a finding that was open to the learned judge on the evidence. Mr. Chen in his witness statement at paragraph 27 stated:

> "During our discussion it became clear that Mr Cha was very keen to be part of the Project. He explained to me that… he was qualified to practice law in the PRC and in the United States."

It was not disputed that Mr. Cha had acquired the necessary qualification to practise in New York but that his licence had lapsed. The learned judge correctly

found that restoring his licence was merely a matter of paying his back dues. Therefore the representation was not a misrepresentation.

Material Misrepresentation

[57] The finding by the learned judge that Mr. Chen did not rely on the representations in agreeing for Mr. Cha to acquire shares in Staray is a finding of fact. It is settled law that an appellate court would only interfere with the finding of facts by a trial judge in special circumstances such as where the judge's finding was based on a misapprehension of the evidence. This principle has been stated by the Court of Appeal on numerous occasions, one of the most recent being in Chiverton Construction Limited et al v Scrub Island Development Group Limited[14] where Baptiste JA stated:

> "To the extent that Chiverton seeks to challenge findings of fact it undoubtedly faces a serious hurdle. As stated by the Privy Council in Jervis and KST Investments Ltd v Victor Skinner[1] [*(Commonwealth of the Bahamas) [2011] UKPC 2 at para 9*] "In any appeal which challenges a judge's findings of fact the appellant has an uphill task. The judge has had the opportunity of seeing and hearing the witnesses and the authorities show that a court of appeal will be very slow to interfere with them. In Stevenson v AMP General Insurance (NZ) Ltd.,[2] [*New Zealand [2006] UKPC 30*] Lord Hope said at paragraph 12:
> '… an appellate court is constrained when considering findings of fact made by a trial judge, for the reasons identified by Tipping J. in Rae v International Insurance Brokers (Nelson Marlborough) Ltd … where he said:
>
> > "Appellants often wish to treat appeals as retrials on matters of fact. Counsel must, of course, be faithful to their instructions, but they have a duty to make it plain to their clients that the ambit of an appeal on fact is very narrow. Any tendency or wish to engage in a general factual retrial must be firmly resisted. The court will not reverse a factual finding unless compelling grounds are shown for doing so.""[15]

[58] The learned judge had before him the evidence of Mr. Chen in his witness statement at paragraphs 26, 27, 31 and 32 where he stated:

> "26. At this meeting I provided Mr. Cha with a copy of the 2009 exploration report and various other documents concerning the Project with which I

[14] Territory of the Virgin Islands High Court Civil Appeal BVIHCVAP2009/0028 (delivered 19th September 2011, unreported).
[15] At para. 8.

had been provided … I also explained the expertise which I required to assist me with my role in the Project. At this stage I only intended Mr. Cha to act as my legal advisor on the Project.

"27. During our discussion it became clear that Mr. Cha was very keen to be part of the Project. He explained to me that he was well placed to assist me: he was a partner in King & Wood, the largest law firm in the PRC; he was qualified to practice law in the PRC and in the United States; and he could undertake the legal work which the Project required. Mr. Cha said that he had excellent connections in the PRC's capital markets and would be able to introduce investors to the Project in order to secure payment of the Security Deposit. He also explained that he would be able to assist with any future IPO of the Project.

…

"31. During the course of this meeting I decided that I was happy to give Mr. Cha part of my equity stake in the Project in exchange for his assistance. We agreed that, at the very least, Mr. Cha would:

(a) procure and introduce investors to the Project, and in particular find investors to fund the Security Deposit that the Project required;

(b) provide the relevant legal services which the Project required, including the drafting and review of legal documents;

(c) begin preliminary work towards the listing of the Project on the Hong Kong stock exchange or on another exchange; and

(d) act as an English interpreter during negotiations and meetings connected with the Project (as I do not speak English well)."

[59] In addition to the evidence in the witness statement the learned judge also had before him Mr. Chen's testimony under cross-examination which included evidence that when he met with Mr. Cha on 20th March 2010 he only intended Mr. Chen to act as legal advisor of the Project. He went on to explain that this was so because he had a lot of famous attorney friends in China but a lot of them do not speak English well and while they may specialise in litigation they are not specialised in capital money markets. He had also learnt from the King & Wood website which stated Mr. Cha was not just an attorney but he was a specialist in capital market transactions. Mr. Cha promised to begin preliminary work towards

an IPO on the Hong Kong Stock Exchange. He further testified that he valued Mr. Cha's experience and expertise.

[60] The learned judge having heard all of the evidence and having had the distinct opportunity to observe the witnesses, it was open to the learned judge on the evidence which was before him to make the findings which he did. No compelling grounds have been shown for this Court to reverse the findings of the learned judge.

Article 3.8(b)

[61] Mr. Atherton, QC's submission on this issue is twofold. Firstly, he submitted that the learned judge erred in his interpretation of Article 3.8(b) when he interpreted the provision to mean that Staray must have actually suffered detriment as a result of the conduct of the member before it could seek redemption of the member's shares. The plain meaning of the words and applying the established tenets of contractual construction as stated in Chartbrook Ltd and Another v Persimmon Homes Ltd and Another[16] and Rainy Sky SA v Kookmin Bank,[17] the correct interpretation of Article 3.8(b) was that Staray was entitled to seek the redemption of a member's shares where that member through his conduct exposed the company to the risk of detriment as outlined in the Article.

[62] Secondly, the learned judge having found that:

(i) Mr. Cha was not in fact a partner in King & Wood;

(ii) Mr. Cha had failed to inform the relevant licensing authority in the PRC that he was in fact a citizen of the United States and failed to inform it that he was not in fact a citizen of the PRC;

(iii) Mr. Cha had the right to reside permanently in the US;

(iv) The concealment of a person's nationality and residency status in public announcements by listed companies amounted to fraud in the PRC;

[16] [2009] UKHL 38.
[17] [2011] 1 WLR 2900.

(v) BEM, a company in which Mr. Cha was at the relevant time a director, had issued a listing announcement that described Mr. Cha as a partner in King & Wood, a citizen of the PRC and without a right of permanent residence in any country other than the PRC; and

given that Mr. Cha was a director of Staray, in making the serious misrepresentations, Mr. Cha's conduct fell properly within the terms of Article 3.8(b).

[63] Mr. Collings, QC in response submitted that the learned judge correctly interpreted Article 3.8(b) and that the finding of the learned judge that there was no evidence that the conduct of Mr. Cha may result in Staray suffering detriment which it might not otherwise have suffered, was a finding open to the learned judge on the evidence. The learned judge's findings are not such as would permit the Court of Appeal to interfere on the established principles.

Discussion

[64] It is an established principle of law that in interpreting contractual documents such as Articles of Association of a company, that where the words are unambiguous the Court must give effect to the plain meaning of the words in the documents.[18]

[65] The relevant part of Article 3.8(b) reads as follows:

> "If a Shareholder is found to have:
>
> …
>
> (g) committed an act that may result in the company incurring or suffering any pecuniary, legal, regulatory or administrative disadvantage or, liability or negative publicity which the Company might not otherwise have incurred or suffered,
>
> (such shareholder being a "Defaulting Shareholder").
>
> the Company may compulsorily redeem any or all shares held by the Defaulting Shareholder, by giving 15 days notice to the Defaulting Shareholder … ."

[18] See: Chartbrook Ltd and Another v Persimmon Homes Ltd and Another [2009] UKHL 38; Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900; and Attorney General of Belize and Others v Belize Telecom Limited and Another [2009] 1 WLR 1988.

[66] This is an unambiguous provision which the Court would give its plain meaning, being that Staray may redeem the shares of a member if the member committed an act which had the potential or some likelihood of resulting in the consequences named which consequences Staray might not otherwise have suffered.

[67] The learned judge's findings in relation to this Article are set out at paragraph 75 and 76 of the judgment as follows:

> "[75] As for the new Article 3.8(b) (commission by a shareholder of an act that may result in the company suffering, pecuniary, legal, regulatory or administrative disadvantage or liability or negative publicity) which the company might not otherwise have incurred or suffered there is no evidence that Mr Cha has committed any 'act' with the potential to cause any of those consequences. The 'acts' relied upon in paragraph 27 of the amended defence are (1) that Mr. Cha concealed his US citizenship from the Chinese Justice Department in order to fraudulently acquire and thereafter maintain his PRC practice licence; (2) that he made fraudulent statements to Chinese public companies to the effect that he was a Chinese licensed practicing lawyer with Chinese nationality and without the right of permanent residence in any foreign country and fraudulently acquired the position of independent director of various public companies; and (3) that Mr. Cha has violated the laws of the United States, in respect of which Staray filed a complaint with the IRS in early June 2012.
>
> "[76] No evidence at all was led as to the third of these complaints. As to the first and second, and leaving aside whether the acts themselves have been established, there was no evidence that Staray has suffered or may suffer any of the pleaded detriments in consequence ('which the Company would not otherwise have ... suffered'). No evidence was led to show that as a result of these alleged acts Staray has become exposed to a pecuniary, legal, regulatory or administrative disadvantage or liability or that it has or may suffer any negative publicity which it might not otherwise have suffered. Any negative publicity which *Staray* has suffered (none was proved) will have come about not as the result of Mr. Cha's alleged acts but only as a result of Mr. Chen's own energetic efforts to blacken Mr. Cha's name as widely as possible, including by bringing a judicial review claim in Staray's name against the BMBoJ. Even if Mr. Chen persists in his campaign, I cannot see how Staray itself will be prejudiced." (my emphasis)

[68] Mr. Atherton, QC's submission that the learned judge misconstrued Article 3.8(b) is hinged on line 4 of paragraph 76 where the learned judge stated ("which the Company would not otherwise have … suffered"). This quotation is indeed incorrect in that it stated "would" instead of "might". In my view this does not show that the learned judge misconstrued the Article, this was simply an error in quotation. The learned judge at the commencement of paragraph 75 correctly stated the provisions of Article 3.8(b). When paragraphs 75 and 76 are read together it is clear that the learned judge correctly interpreted Article 3.8(b) to mean that a company may redeem a member's share where he committed an act which had the potential or some likelihood that might result in the company suffering detriment which it might not otherwise have suffered.

[69] Turning to the second limb of Mr. Atherton, QC's submission that the learned judge did not properly apply Article 3.8(b) to the facts, the learned judge found that there was no evidence that any of the acts of Mr. Cha relied on by Mr. Chen and Staray may result or has resulted in Staray suffering any of the consequences stated in the Article.

[70] For Staray to redeem its shares under this Article, the onus was on Mr. Chen/Staray to show firstly, that Mr. Cha committed an act, secondly that act may result in the company suffering one or more of the consequences outlined in the Article and thirdly that Staray might not otherwise have suffered or incurred such consequences. Mr. Chen/Staray were required to adduce evidence to discharge this burden. It was not sufficient for Mr. Chen/Staray to simply state an act or acts of Mr. Cha. They needed to go further and show that the act or acts may result in Staray suffering one or more of the consequences and also that Staray might not otherwise have suffered the consequences. The learned judge having heard the evidence found that there was no such evidence. Mr. Atherton, QC did not refer to any evidence that was before the learned judge on which it was open to the learned judge to find that the acts relied on may result in Staray suffering any of the consequences outlined in the Article which it might not otherwise have suffered.

[71] At the commencement of this judgment two opinions of the Shanghai Board were admitted into evidence. In the second opinion the Shanghai Board stated that if Mr. Cha had lost his Chinese nationality at the time he acquired his Lawyer's Qualification Certificate he would have violated Article 4 of the Measures For Evaluation Certificate. While this evidence refers to conduct of Mr. Cha, it was necessary for Mr. Chen/Staray to also show by credible evidence that this act of Mr. Cha may result in Staray suffering one or more of the consequences and that Staray might not otherwise have suffered. No such evidence was adduced by Staray. There is therefore no basis to interfere with the findings of the learned judge. This ground of appeal, in my view, also fails.

Business Companies Act – SECTION 184I

[72] The learned judge found that the notice of redemption was invalid but declined to grant any relief under section 184I, his reason being that Mr. Cha had failed to establish that any of the acts of which he complained was unfair, discriminatory or oppressive so as to engage the section 184I jurisdiction.

[73] Mr. Collings, QC only relied on one of the acts of which Mr. Cha complained in the lower court that the service of an invalid notice to redeem the minority's shares is a breach of the terms on which the affairs of the company should be conducted, and was prejudicial and unfair unless it was clearly necessary in the interests of the company.[19] The learned judge, in finding that Mr. Cha had not made out his case under section 184I and was therefore not entitled to relief pursuant the section, had failed to follow or consider the principle established in Grace v Biagoli and Others,[20] Orr v D S Orr & Sons (Holdings) Ltd;[21] and Re Tobian Properties Ltd.[22]

[19] See: O'Neill and Another v Phillips and Others [1999] 1 WLR 1092; and Re Phoenix Office Supplies Ltd [2003] 1 BCLC 76.
[20] [2005] EWCA Civ 1222.
[21] [2013] CSOH 116.
[22] [2012] EWCA Civ 998.

[74] Mr. Collings, QC next submitted that this ground relates to the exercise of the discretion of the learned judge and the appellate court would only interfere on the principles outlined in Dufour and Others v Helenair Coporation Ltd and Others;[23] and Edy Gay Addari v Enzo Addari.[24] However in this instance the Court of Appeal is entitled to interfere for the following reasons: (i) The learned judge was wrong to hold that Mr. Cha had not made out his case under section 184I. (ii) The circumstances pointed to the necessity for wider relief. It was not adequate to leave Mr. Cha to a future remedy in respect of any further dealing involving a breach of duty on the part of the directors.

[75] Mr. Atherton, QC in response submitted that this ground was not against the exercise of the learned judge's discretion but rather is an appeal against the facts found by the learned judge such as caused him to conclude that Mr. Cha had failed to establish any basis for the invocation of the jurisdiction under section 184I. There is no basis for the Court of Appeal to interfere with the findings of the learned judge.

Discussion

[76] The relevant provisions of section 184I are subsections (1) and (2). They read 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;

[23] (1996) 52 WIR 188.

[24] Territory of the Virgin Islands High Court Civil Appeal BVIHCVAP2005/0002 (delivered 27th June 2005, unreported).

(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;

(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."

[77] Section 184I gives the Court a wide discretion to make such orders as it thinks fit where the affairs of a company are conducted in such a manner that is oppressive, unfairly discriminates or prejudices a member.

[78] Section 184I is in similar terms to sections 459(1) and 461 of the UK Companies Act 1985, the provisions of which were reviewed by the English Court of Appeal in O'Neill and Another v Phillips and Others[25] and Re Phoenix Office Supplies Ltd[26] and Grace v Biagoli and Others. In Re Phoenix Auld LJ stated the purpose of section 459 as follows:

> "Section 459 has two roles, as explained by Lord Hoffmann in *O'Neill v Phillips* … First, it protects shareholders against the breach of terms on which they have agreed the affairs of the company should be conducted, through the articles of association or, say, some collateral agreement. Second, it protects them against some inequity that makes it unfair for those conducting the company's affairs to rely upon their strict legal power, for example, a resolution by majority shareholders to remove a minority director under s 303 of the 1985 Act."[27]

[25] [1999] 1 WLR 1092.
[26] [2003] 1 BCLC 76.
[27] At p. 85.

[79] In Grace v Biagoli and Others the English Court of Appeal summarised the principles in O'Neill and Another v Phillips and Others as follows:

> "(1) The concept of unfairness, although objective in its focus, is not to be considered in a vacuum. An assessment that conduct is unfair has to be made against the legal background of the corporate structure under consideration. This will usually take the form of the articles of association and any collateral agreements between shareholders which identify their rights and obligations as members of the company. Both are subject to established equitable principles which may moderate the exercise of strict legal rights when insistence on the enforcement of such rights would be unconscionable.
>
> (2) It follows that it will not ordinarily be unfair for the affairs of a company to be conducted in accordance with the provisions of its articles or any other relevant and legally enforceable agreement, unless it would be inequitable for those agreements to be enforced in the particular circumstances under consideration. Unfairness may, to use Lord Hoffmann's words, 'consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith' … the conduct need not therefore be unlawful, but it must be inequitable;
>
> (3) Although it is impossible to provide an exhaustive definition of the circumstances in which the application of equitable principles would render it unjust for a party to insist on his strict legal rights, those principles are to be applied according to settled and established equitable rules and not by reference to some indefinite notion of fairness;
>
> (4) To be unfair, the conduct complained of need not be such as would have justified the making of a winding-up order on just and equitable grounds as formerly required under s 20 of the Companies Act 1948;
>
> (5) A useful test is always to ask whether the exercise of the power or rights in question would involve a breach of an agreement or understanding between the parties which it would be unfair to allow a member to ignore. Such agreements do not have to be contractually binding in order to found the equity;
>
> (6) It is not enough merely to show that the relationship between the parties has irretrievably broken down. There is no right of unilateral withdrawal for a shareholder when trust and confidence between shareholders no longer exist. It is, however, different if that breakdown in relations then causes the majority to exclude the petitioner from the management of the company or otherwise to cause him prejudice in his capacity as a shareholder."

[80] The notice was issued pursuant to Article 3.8(b). The notice outlined the grounds on which the notice was issued. While the learned judge found that Mr. Chen/Staray had failed to prove all of the requirements of the Article, this does not amount to a breach of the terms of the articles of association, nor does it fall within the second limb of unfairness as referred to in O'Neill and Another v Phillips and Others. In any event the notice being an invalid notice was of no effect and therefore Mr. Cha would not have suffered any prejudice. Indeed Mr. Collings, QC did not advert the Court to any evidence of prejudice that Mr. Cha has suffered or is likely to suffer by the service of the invalid notice on him. In such circumstances, a court would not exercise its discretion under section 184I(2) to grant any of the reliefs outlined in the subsection. The role of the section 184I jurisdiction is to protect shareholders against the breach of the terms on which they agreed the affairs of the company should be conducted, and against inequity resulting from the exercise of strict legal power of those conducting the affairs of the company. Neither of these two situations were present in this case. There is therefore no basis to interfere with the finding of the learned judge that Mr. Cha had failed to establish that service of an invalid notice was unfair within the meaning of section 184I.

Costs

[81] Mr. Atherton, QC submitted that Mr. Chen/Staray were the successful parties in the lower court and they ought not to have been required to pay any of Mr. Cha's costs. Rather, Mr. Cha should have been required to pay some or all of their costs.

[82] Mr. Collings, QC in response submitted that the circumstances in which the Court of Appeal will interfere with an award of costs are circumscribed.[28] Mr. Collings next submitted that the learned judge's award of only 40% of Mr. Cha's costs was wrong and it is open to the appeal court to reconsider the issue of costs. Mr. Cha was the successful party, the general rule as to entitlement to costs applied in his

[28] Re Neath Rugby Ltd (No 2) [2009] 2 BCLC 427.

favor. A departure from the general rule is not justified simply because a successful party loses on some points. There has to be something more such as a party's conduct and reasonableness.[29]

[83] The issue of costs is dealt with comprehensively in Parts 64 and 65 of the Civil Procedure Rules 2000. While the general rule is that a successful party is entitled to costs, rule 64.6 gives the Court a discretion to award a successful party only a specified portion of his costs and/or order a successful party to pay all or part of the costs of an unsuccessful party. The Court in deciding which party is liable to pay costs must have regard to all of the circumstances and in particular to the matters outlined in rule 64.6(6).

[84] The learned judge in making the order for costs considered the circumstances of the case, the fact that both parties had success and addressed his mind to rule 64.6(6). It is a well settled principle of law that an appellate court would not interfere with the exercise of the discretion of the trial judge unless the case falls within the principles outlined in Dufour and Others v Helenair Coporation Ltd and Others and Edy Gay Addari v Enzo Addari. Those principles are very well known I will therefore not repeat them. This case does not fall within those principles. There is therefore no basis to interfere with the exercise of the learned judge's discretion in his award of costs to the respondent.

[29] HLB Kidsons (a Firm) v Lloyds Underwriters [2007] EWHC 2699 (Comm).

Conclusion

[85] In conclusion, for the reasons given above, I would dismiss the appeal and counter appeal. I would order that the appellants pay the respondent's costs of this appeal fixed at two thirds of the costs in the court below.

Gertel Thom
Justice of Appeal [Ag.]

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Louise E. Blenman
Justice of Appeal