Neutral Citation Number: [2011] EWHC 2214 (Ch)

Case No: 8178 of 2011

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 19/08/2011

Before :

HHJ DAVID COOKE

- -

Between :

Harborne Road Nominees Ltd	**Petitioner**
- and -	
John Greenway Karvaski (1)	**Respondents**
And	
Sitewatch Fire and Surveillance Ltd (2)	

- -
- -

Ben Shaw (instructed by **Cobbetts LLP**) for the **Petitioner**
Stuart Benzie (instructed by **Harvey Ingram LLP**) for the **Respondents**

Hearing dates: 11 July 2011

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

HHJ David Cooke:

Introduction

1. On 11 July 2011 I heard an application by the respondents to the petition, seeking an order that it be struck out as an abuse of process or alternatively that summary judgment be granted in their favour. The ground relied on is that the first respondent, Mr Karvaski, has made an offer or offers to purchase the shares in the second respondent company ("Sitewatch" or "the company") beneficially owned by Mr Paul Morris, (who is the effective complainant) the refusal of which was unreasonable and that in consequence the continued prosecution of the petition is either an abuse or is bound to fail, for the reasons set out in the well-known judgment of Lord Hoffmannn in *O'Neill v Phillips* [1999] UKHL 24. At the end of the hearing I announced my conclusion that the application should be refused, for reasons which I would set out in a written judgment. This is that judgment.

2. Sitewatch is a private company limited by shares. All the shares are registered in the name of Harborne Road Nominees Ltd, but it is common ground that it holds 50% of the shares as nominee for Mr Morris and 50% as nominee for Mr Karvaski. The petition is brought at the instance of Mr Morris, and henceforth when I refer to "the Petitioner" I am referring to Mr Morris, as the parties have done for convenience.

3. The following summary of the facts is largely as contended for by Mr Morris. These facts are in dispute in many respects, but since this is the application of the respondents, I must proceed on the assumption that Mr Morris will make out the facts that he contends for at trial. It is not part of the application that he has no reasonable prospect of doing so.

4. Mr Morris has a business, P&R Morson & Company Ltd ("PRMC"), which trades as a general services building contractor. Mr Karvaski's specialist expertise is in the supply and installation of alarms and CCTV. PRMC has a requirement for such services to be supplied as a subcontractor on projects that it is working on, and may also be in a position to influence the choice of employers and architects engaged in such projects wishing to place separate direct contracts for those services. In 2001, Mr Morris and Mr Karvaski agreed to incorporate Sitewatch as a joint-venture company to provide those services, together with access control and security services.

5. Mr Karvaski became a director of the company. Mr Morris was not appointed a director, but it is his case that the company operated on the basis that the two were equal partners in it and would co-operate fully with each other and jointly participate in all the decision-making. On Mr Morris's evidence, regular bi- monthly meetings were held between the two men at which management decisions were taken, Mr Morris taking part as if he were a duly appointed director of the company. On Mr Morris's case, it was intended that, as the company became known in its field, customers or potential customers of PRMC for relevant work would be referred to it, or subcontracts would be placed with it, but it was recognised that there was no obligation to do so on an exclusive basis.

6. In particular, Mr Morris's case is that it was agreed between the two men

   i) that the company would operate a specific dividend policy, i.e. that profits made would be divided into three parts, one third being distributed to each of

them (up to a maximum of £100,000 in any year) and the balance being retained in the company as working capital,

ii) that the company's operating budget would be agreed by both of them, and

iii) that Mr Karvaski would receive remuneration by way of salary (including a salary paid to his wife); the amount of that remuneration, and the remuneration of other employees, being a matter to be agreed between the two of them. The amounts agreed rose over time. By about the beginning of 2010, Mr Morris and Mr Karvaski agreed a budget for the financial year 2010-2011 in which Mr Karvaski and his wife would be paid a combined annual salary of approximately £88,000. In addition, each of Mr Morris and Mr Karvaski was to receive a further amount of £10,000 by way of remuneration (later increased to £13,000), before the distribution of profits by way of dividend.

Mr Morris, although not a director, was a named signatory on the company's bank account, and had access to its bank statements and other financial information, in part because Sitewatch paid a fee to use the services of employees at PRMC to draw up its management accounts from the prime financial records and to manage its payroll. As well as attending board meetings himself, another director (Mr Roger Williams, an employee of PRMC) was appointed in part to act as Mr Morris's effective representative within the company. No cheque could be issued without the signature of either Mr Morris or Mr Williams.

7. The company was clearly anticipated to be highly profitable; the budget referred to predicted profits of approximately £474,000 for the year, out of which £200,000 would be applied in paying dividends in accordance with the agreed policy.

8. On Mr Morris's case, the company continued to be run in this manner until he received a letter dated 26 November 2010 written by Mr Karvaski's solicitors Harvey Ingram (bundle, p99). That letter referred to the establishment of the company, the equal beneficial ownership of shares, and the past payment of dividends as I have set out. It went on:

> " In addition to the dividend payments, we understand that you have also received a further sum of £10,000 per annum (now increased to £13,000 per annum) from Sitewatch over the course of the past four years for which Sitewatch receives little or no benefit. We understand that this sum was paid to you, on your insistence, to match an increased salary amount that was paid to our client, and notwithstanding that you are not an employee of Sitewatch. Our client receives a salary of £67,000 per annum (including the additional payment of £13,000). Our view, and that of our client, is that this salary level is a very modest one and one which does not bear scrutiny when compared to market rates applicable to Managing Directors of similar companies to Sitewatch. This is especially so when the input our client gives to Sitewatch is taken into account.
>
> Over the course of the last nine years (since the incorporation of Sitewatch) and more particularly over the course of the last three years, our client has been the person responsible for bringing in business to Sitewatch and has effectively been the

sole driving force behind it. Without our client's input and his marketing/business development skills, Sitewatch would not be in the position that it presently is and, we believe, [it] is highly likely that it would in fact not be in existence any longer.

Our client accepts that you have added some value to the business over the last few years, and also provided valuable assistance in the first two years of the business. Whilst our client is grateful to you for this, the present position is that you have not, … for some time now, carried out an active role in the business. We understand that you no longer have any active involvement whatsoever in relation to Sitewatch. ... The understanding between yourself and our client, when the shares were initially allocated, was that you would provide input to Sitewatch and act in its best interests. Part of that understanding was that you would promote Sitewatch's interests wherever possible and use your influence where appropriate to gain work for Sitewatch.

We understand that Sitewatch has paid significant sums of money over time to [PRMC] … these sums have been paid for various services, including the preparation of management accounts and dealing with the payment of wages to Sitewatch's staff. However our client has seen very little, if anything, by way of return business from [PRMC] despite your influence with that company. We understand that other competitors of Sitewatch have been favoured by [PRMC] even when you have been in a position to pass work to Sitewatch.

For the avoidance of doubt, Sitewatch will no longer be utilising the services of [PRMC] in relation to the preparation of management accounts, the payment of wages to Sitewatch's staff or any other services.

The purpose of this letter is also to inform you that Sitewatch is unlikely [to] declare any dividends during the current financial year and may not do so during the course of the next financial year. As you will be well aware, Sitewatch has no fixed dividend policy in any event and is considering the reinvestment of all of its profits (if any are available). In addition to that the Board of directors intends to resolve to increase our client is remuneration from the company by way of commission and/or an increase in salary and/or an appropriate bonus payment …

Our client believes that it would … be in the best interests of Sitewatch for you to no longer remain as a shareholder. … Our client would be willing to purchase your share holding in Sitewatch at a price to be agreed between you and our client or, in default of any agreement, to be determined by an independent expert jointly appointed …

> We would be grateful to … hear from you as soon as possible, and in any event during the course of the next 14 days. ”

9. On or shortly before the day this letter was written, the company's Board of Directors passed a resolution removing Mr Morris from the bank mandate. Since then, his case is that he has been excluded from any participation in the management of the company and any information about its affairs. He also discovered that Mr Karvaski had on 15 November 2010 (ie shortly before this letter was sent) incorporated a separate company, wholly owned by himself, called "Sitewatch Security Ltd", which he suspected was intended to be used as a vehicle to divert business.

10. If Mr Morris's case is correct, it is easy to see why he would be extremely concerned by the contents of this letter and the surrounding events. Having been an equal partner in the business, fully participating in its management, with access to all financial information through the bank statements and the accounting information sent to PRMC and in receipt of a very substantial dividend from the company's considerable profits, he was suddenly excluded and told that unilateral moves would be made to increase Mr Karvaski's remuneration to an unspecified amount and withhold dividends from him. There was the possibility of business being diverted to another company, and of other steps being taken behind the cloak of denial of financial information which could have the effect of depressing the value of his shares. It seems clear that Mr Williams must have gone along with these moves, having ceased to represent Mr Morris's interests since he was suspended (for unconnected reasons) from his employment at PRMC in October 2010. Concern that matters might be manipulated to Mr Morris's disadvantage could only be increased by the fact that the letter contained what he regarded as serious factual inaccuracies; denying his involvement in the management of the company, denying the existence of a dividend policy and understating by about one third the amount of Mr Karvaski's remuneration.

11. Mr Morris's solicitors, Cobbetts, replied on 30 November making the point that the actions threatened by Mr Karvaski suggested that Mr Morris's interests as shareholders would be unfairly prejudiced, and going on to say:

> “ Your letter concludes by seeking to ascertain whether or not our client would be prepared to transfer his shareholding to your client … in principle our client is prepared to entertain realistic proposals. Your client should however bear in mind that our client is well aware of the current value of Sitewatch and his proposals will need to reflect our client's 50% shareholding. If your client has any to put forward, then he should do so. In the alternative, we are happy to undertake our own valuation work on the company, but … [if] your client is unable or unwilling to match any valuation, we would expect your client to agree a full third party marketing of the company.
>
> Any attempt to undermine Sitewatch and/or our client's shareholding and its value by your client, will be strenuously resisted, if necessary by an application to the court …”

12. There then followed a series of letters in which neither side was prepared to reveal its hand by naming a price, each inviting the other to do so. On 10 December, Cobbetts first mentioned *O'Neill v Phillips*, in the following passage:

> " if a fair value cannot be agreed, we suggest following the guidance in [*O'Neill v Phillips*]. This case sets out that in the event that the value of the shares is not agreed between our respective clients, it shall be determined by an accountant, whose appointment is agreed by both sides... The precise terms of reference to such an accountant will have to be agreed between us … both parties should be entitled to the same rights of access to all information about Sitewatch and Security [ie Sitewatch Security Ltd]. Further, … the business and assets of Security must be treated as the business and assets of Sitewatch. Both parties shall also have the right to make submissions to the expert. We consider this approach to be a cost-effective method of resolving any disagreement in respect of a fair value for our client's shares, subject to agreeing the process of identifying and instructing an independent accountant. Please confirm that your client agrees … "

13. Harvey Ingram then made clear the approach that has led to present application (letter of 7 January 2011, page 109):

> "… you will be aware that where an offer is made by the majority shareholder in *O'Neill v Phillips* format, that in itself will negate any claim for unfair prejudice … any petition your client presents would be liable to be struck out or stayed … [with] him suffering the costs consequences associated with that…"

Mr Karvaski was not, of course, the majority shareholder.

14. In the correspondence that followed, Harvey Ingram put forward a number of offers, and Cobbetts made one counter offer. All were expressed to be made following the principles set out in *O'Neill v Phillips*. The offers on behalf of Mr Karvaski were also said to have been made following the guidance given by Lord Millett in *CVC Opportunity Equity Partners Ltd v Demarco Almeida* [2002] UKPC 15 and the precedents included by Victor Joffe QC and others in their textbook 'Minority Shareholders: Law Practice and Procedure' (Fourth Ed, 2010).

15. Mr Karvaski's first offer was made in a letter dated 15 February 2011, and was also expressed to be an open offer pursuant to CPR part 36. It provided for a valuation as at 26 November 2010 by a chartered accountant to be agreed on by the parties or appointed in default by the President of the Institute of Chartered Accountants in England and Wales, who would have access to all the books and records of the company and receive representations from both parties, and included the following:

> " Please note that the offer relates to your client's claim of unfair prejudice only. It is not intended to encompass or compromise any other claims. In particular, it is not intended to compromise any claims that exist (or may exist) between [Sitewatch] and [PRMC] …
>
> Our client is prepared to allow your client access to all of the books and records and documents in the possession or control of the company for the purpose of preparing his written

> representations and observations (but not otherwise) … your client may be accompanied by a legal or accountancy adviser …
>
> your client will direct the transfer of shares and accept the purchase price of the shares in full and final settlement of all claims relating to the unfair prejudice which he has or may have against our client or the company. ”

16. This offer was summarily rejected, and Cobbetts forward a counter offer on behalf of Mr Morris by letter of 28 February 2011 (page 121). The differences between that and Mr Karvaski's offer included the following:

    i) the offer was expressed to be in full and final settlement not only of Mr Morris's unfair prejudice claims, but all other claims that might exist between Mr Morris and PRMC on the one hand and Mr Karvaski or Sitewatch on the other. This was relevant because Harvey Ingram had very strongly hinted that Mr Morris was regarded as being in breach either of the joint-venture arrangement between himself and Mr Karvaski, or his duty to Sitewatch, or both, by failing to refer enough business to Sitewatch,

    ii) the valuation would be at the date of acceptance of the offer, rather than 26 November 2010, with the valuer discounting the effect of any transaction reducing the value of the company after that date,

    iii) the valuer was to assume that Mr and Mrs Karvaski had continued to be paid remuneration at the rates agreed by Mr Morris,

    iv) the valuer was to calculate the amount of dividends and remuneration Mr Morris would have received had the previous policies been followed. In order that Mr Morris would receive the value of those amounts, the price for his shares was to be the value determined by the valuer on the assumption that such remuneration and dividends had been paid, plus the amount of the remuneration and dividends themselves,

    v) Mr Morris would be given access to the accounts and information of Sitewatch and Sitewatch Security Limited, in the company of any legal and/or accountancy adviser (this was intended to clarify that he did not have to choose one or the other) and any assets and business of the latter company would be deemed to belong to Sitewatch, and

    vi) The costs of the valuer were to be paid by Mr Karvaski, as were Mr Morris's costs to date, and his costs of making representations to the valuer. Mr Karvaski's proposal had been that the valuer should direct who should bear his costs, and that otherwise the parties should bear their own costs.

17. Harvey Ingram responded with a further offer by letter of 9 March 2011. In that letter:

    i) they refused to agree to compromise any claims that Sitewatch might have against PRMC,

ii) they agreed that any assets of Sitewatch Security Ltd should be treated as belonging to Sitewatch, maintaining that it was in any event dormant,

iii) they proposed that all payments by way of directors remuneration paid since 26 November 2010 "shall be included as assets of Sitewatch" and that the purchase of any property since that date should be disregarded, though the effect of these provisions is questionable since they continued the proposal that the valuation should be taken at 26 November 2010, and

iv) they agreed that Mr Karvaski would pay Mr Morris's costs on the standard basis up to the date of acceptance of the offer, provided it was accepted within 21 days.

18. That offer also was rejected, and was followed by a further offer on behalf of Mr Karvaski, by letter dated 7 April 2011. That offer moved towards Mr Morris's position in two respects as follows:

i) the valuation would be taken as fact the date of acceptance of the offer, rather than 26 November 2010, and

ii) the valuer was to determine the dividends and remuneration Mr Morris would have received up to that date, had the previous policies been followed. The letter however did not in terms provide any mechanism for Mr Morris to receive that amount

but otherwise it essentially maintained Mr Karvaski's position; in particular refusing to concede that any claims that Sitewatch might have against PRMC should be given up.

19. The petition was issued and served on the same day, 7 April 2011. Later, Cobbetts wrote formally rejecting Mr Karvaski's offer, the principal objections being:

i) there was no provision for Mr Morris to be paid the amount of dividends and remuneration determined by the valuer,

ii) the valuation should be conducted on the basis that the remuneration of all employees, and not just Mr and Mrs Karvaski, had remained as agreed by Mr Morris (this point had not previously been made),

iii) Mr Morris should be permitted to inspect documents with a legal adviser or accountancy adviser or both, and

iv) settlement without a compromise of any potential claims against Mr Morris or PRMC would not achieve a clean break between the parties, since it would leave Mr Karvaski in a position to pursue such claims on his own behalf and through Sitewatch. On the other hand, if the matter were litigated pursuant to the petition, Mr Morris would (on his case) obtain the benefit of findings that there had been no improper diversion of business.

20. This led to Mr Karvaski's further offer, by letter dated 6 May 2011. This letter objected that Mr Morris now appeared to be making additional demands. It made the following points:

i) it asserted that "if the valuer proceeds on the basis that your client would have received… dividends up to the Valuation Date… that is effectively the same as saying that these dividends will be paid (subject to the availability of distributable profits)" and said that "… our client will accept… that your client will be paid a dividend should they be declared, subject to the usual requirements of declaring dividends as discussed above". That was a reference back to two specific caveats in relation to the ability to pay dividends, the first that the accounts for the relevant year had not been completed and the second that the company had a potential bad debt "in the region of £197,000 which the company is seeking to recover by way of litigation", and

ii) it was accepted that Mr Morris could inspect the records in the company of a legal and/or accountancy adviser

but it made no concessions as to the assumption that remuneration of employees other than Mr and Mrs Karvaski had continued at the same rate, or as to compromise of any potential claims by Sitewatch against PRMC.

21. That letter was the first that Mr Morris had heard of any potential bad debt of £197,000, or litigation in connection with it. He was understandably suspicious and his solicitors wrote on 10 May demanding details of the debt and the litigation. When that information was provided, by letter of 31 May 2011 (page 268) it was said that "the bad debt in question relates to work undertaken by Sitewatch on behalf of John Sisk & Co Ltd on a site in Motherwell, Scotland. Although the initial amount of the bad debt (outstanding invoice) was for £197,000, as a result of the efforts of Sitewatch, the level of that bad debt has been reduced to its present outstanding amount of £41,955.78". No particulars were given as to how or when this reduction had occurred. It was not a point relied on by Mr Shaw, but I observe that the sudden disclosure of this alleged bad debt, followed by a rapid and only partly explained reduction in the amount, was hardly likely to ease Mr Morris's suspicions as to the way in which the affairs of the company were being conducted or the reliability of the information that he or a valuer would be given.

22. The offer of 6 May was rejected in a further letter from Cobbetts dated 11 May 2011 (page 150). In that letter they said "if our client's petition proceeds to trial, one of the issues that will be determined is whether our client did act in breach of the joint venture agreement. We are confident that the judge will make findings that our client did not, which will bind both your client and Sitewatch. We fail to see how our clients approach would amount to 'an abuse of the court process' when our client is seeking the protection of a judgment." In response, Harvey Ingram wrote on 25 May (page 152) modifying their offer so that it would compromise any claims that Mr Karvaski personally might have against Mr Morris or PRMC, but not any claims that Sitewatch might have, which, it was maintained, could not be adjudicated on in the proceedings on the petition. The attempt to include such potential claims in the scope of any compromise was said to be "prosecuting the litigation to shield an unrelated company from unrelated litigation".

23. The revised offer was stated to be open for acceptance for 7 days, and was in any event rejected by letter of 2 June 2011 (p 154).

The Law and submissions

24. *O'Neill v Phillips* was a case in which the petitioner was essentially an employee, albeit a senior one in that he was the managing director of the company. He had been given a 25% shareholding, and an additional profit share, as a reward and incentive. He complained of unfair prejudice in that his profit share was withdrawn when the company hit hard times, and that the majority shareholder had, he said, resiled from a promise to give him an additional 25% of the shares. He was not however dismissed or excluded from his management role. In that respect, the facts were far from typical. In the House of Lords, Lord Hoffmann gave the only reasoned judgment, the other Law Lords agreeing with him. The decision of the judge at first instance was restored, dismissing the petition on the basis that the petitioner suffered no prejudice, the judge having found that there was no promise that he would be permanently entitled to a 50% profit share, and no unconditional promise that he would be given a 50% shareholding.

25. Lord Hoffmann's remarks about offers were therefore obiter. They have of course been followed in a number of succeeding cases, and it is widely accepted that they provide a basis on which many shareholders' disputes can be resolved without the notoriously high cost of litigation by way of unfair prejudice petition. He said this:

> "… I think that parties ought to be encouraged, where at all possible, to avoid the expense of money and spirit inevitably involved in such litigation by making an offer to purchase at an early stage. This was a somewhat unusual case in that Mr Phillips, despite his revised views about Mr O'Neill's competence, was willing to go on working with him. This is a position which the majority shareholder is entitled to take, even if only because he may consider it less unattractive than having to raise the capital to buy out the minority. Usually, however, the majority shareholder will want to put an end to the association. In such a case, it will almost always be unfair for the minority shareholder to be excluded without an offer to buy his shares or make some other fair arrangement … the unfairness does not lie in the exclusion alone but in exclusion without a reasonable offer. If the respondent to a petition has plainly made a reasonable offer, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out. It is therefore very important that participants in such companies should be able to know what counts as a reasonable offer.
>
> In the first place, the offer must be to purchase the shares at a fair value. This will ordinarily be a value representing an equivalent proportion of the total issued share capital, that is, without a discount for its being a minority holding…
>
> Secondly, the value, if not agreed, should be determined by a competent expert. The offer in this case to appoint an accountant agreed by the parties or in default nominated by the President of the Institute of Chartered Accountants satisfied this requirement. One would ordinarily expect the costs of the

> expert to be shared but he should have the power to decide that they should be borne in some different way.
>
> Thirdly, the offer should be to have the value determined by the expert as an expert. I do not think that the offer should provide for the full machinery of arbitration or the half-way house of an expert who gives reasons. The objective should be economy and expedition, even if this carries the possibility of a rough edge for one side or the other (and both parties in this respect take the same risk) compared with a more elaborate procedure…
>
> Fourthly, the offer should, as in this case, provide for equality of arms between the parties. Both should have the same right of access to information about the company which bears upon the value of the shares and both should have the right to make submissions to the expert, though the form (written or oral) which these submissions may take should be left to the discretion of the expert himself.
>
> Fifthly, there is the question of costs. In the present case, when the offer was made after nearly three years of litigation, it could not serve as an independent ground for dismissing the petition, on the assumption that it was otherwise well founded, without an offer of costs. But this does not mean that payment of costs need always be offered. If there is a breakdown in relations between the parties, the majority shareholder should be given a reasonable opportunity to make an offer (which may include time to explore the question of how to raise finance) before he becomes obliged to pay costs. As I have said, the unfairness does not usually consist merely in the fact of the breakdown but in failure to make a suitable offer. And the majority shareholder should have a reasonable time to make the offer before his conduct is treated as unfair. The mere fact that the petitioner has presented his petition before the offer does not mean that the respondent must offer to pay the costs if he was not given a reasonable time. ”

26. The guidance provided in this passage goes into a considerable amount of detail. Nevertheless it does not have the status of legislation. The correspondence and argument between the parties in this case (eg the reference to an offer "in *O'Neill v Phillips* format") appeared in my view to approach the matter as if what had to be considered was the extent to which the offer made complied with these guidelines, or the precedents set out in Mr Joffe's textbook, and that if a sufficient degree of compliance was achieved, Mr Karvaski would inevitably be protected from any petition that Mr Morris might issue. That in my view would be a cardinal error. The question for the court is always whether in all the circumstances of the case the applicant has satisfied the conditions required to have the petition struck out, or summary judgment in his favour given on it. These Mr Shaw accurately summarised as being that it must be shown that the continued prosecution of the petition after the making of the offer amounts to an abuse of process, or was bound to fail. The issue is highly sensitive to the facts and circumstances of each case, and consideration of the

nature and terms of any offer made can only ever be an intermediate step in the process.

27. One obvious difference between this case and *O'Neill* is that Mr Morris is not a minority shareholder but an equal 50% shareholder, and he alleges that the company was established and run as a quasi partnership. In fact he is willing to consider the sale of his shares to Mr Karvaski (that is the order he seeks) but in such cases, it is by no means always obvious which of two equal holders should sell to the other. Lord Hoffmann's remarks were not made in this context, but were expressly about cases where there is a majority shareholder. Ultimately, in a breakdown of relations between a majority and a minority shareholder the solution is likely to be that the minority shareholder must exit the company, or be offered the opportunity to do so on fair terms. In the case of equal shareholders however, particularly if they are quasi partners, there is a clear potential for injustice if one of them is able to seize de facto control of the company and effectively force the other either to accept his offer to buy or be forever excluded from the participation that he bargained for and cut out from any remedy in respect of what would be a continuing breach of the quasi partnership arrangement originally made. Lord Hoffmann's remarks were not intended to have the effect of establishing a mechanism for seizure and exclusion.

28. Mr Benzie accepts that in order to succeed he must show that his client's offer was 'plainly reasonable', and further that if the petition raises any question of fact that goes to the remedy sought, rather than merely to the value of the shares, an offer that does not resolve that contest in favour of the petitioner made would not be a reasonable one. He is right to do so, and in my judgment if there is any real doubt about the matter his application must fail. He submits that all the offers made satisfied this criterion, and that the amendments made in the course of correspondence show his client almost desperately seeking to satisfy every point taken by Mr Morris, only to have new objections raised when they did so. In the end, he submits, the final offer gives Mr Morris everything he seeks by the prayer in his petition, and that the terms of it were in all material respects the terms sought by Mr Morris and so must be assumed to be reasonable. The offer thus cures the alleged unfair prejudice, and although he accepts that the petition could be amended to seek declarations that Mr Morris and PRMC are not under any liability to Sitewatch in respect of the alleged failure to refer business, that is not a matter relating to the prejudice Mr Morris says he has suffered, and continuing to prosecute the petition to seek such declarations amounts to an extraneous purpose which is itself an abuse.

29. Mr Shaw submits that an offer to buy at a valuation will not always give the petitioner all that he might achieve at trial, and in particular that an expert valuer is not in a position to determine factual and legal disputes between the parties. He cites *North Holdings Ltd v Southern Tropics L*td [1999] 2 BCLC 625, per Aldous LJ at p637 E-G:

> "Whether or not their actions amounted to a breach of their fiduciary duties is likely to depend upon the facts probably upon the extent and type of misuse. That being so, it would not be right to strike out the petition. The price to be paid for the B shares will depend upon a decision as to whether any part of the business of Kasmare is held on trust for Southern Tropics and if so, how much. That is a decision that should be taken by the court not an accountant. It follows that the offer to purchase in

> the letter of 12 June 1998 and the option in the shareholders' agreement are not sufficient to remove any potential unfair prejudice."

30. The same is likely to be true, in my judgment, where there are issues in the petition relating to allegations of breach of duty owed to the company by one or other party, if they would go to the price of the shares. To take an obvious example, if a petitioner alleges that his co-shareholder has diverted business or misapplied assets, it would not be just to require him to accept a price for his shares determined by an expert without an authoritative determination of the claim. The expert could only express an opinion whether the value given to the potential claim in the company's accounts (probably nil) was appropriate, or what effect the existence of the disputed claim might have on the price an arm's length purchaser would be prepared to pay for the shares. Neither of these would be likely to give the petitioner anything like the benefit he would receive if the dispute were resolved in his favour and the breach made good or fully allowed for in the price. The respondent, who must (at the stage of a strike out application) be assumed to be in breach, would benefit from the breach twice over in that he would not only have the proceeds of the breach itself, but be able to acquire the company at a price depressed by the consequences of his own breach.

31. A related difficulty arises, it seems to me, where one shareholder has been excluded from information about the company and there is reason to fear that the other may have committed some breach of duty. If the petitioner is obliged to accept an offer to sell his shares before he has been given a full opportunity to inspect the books and records, he will not be in a position to know if what he suspects is true. If it turns out that there is evidence of a breach, he may be contractually committed to sell at a price which will at best reflect that the company has a disputed claim. If he has refused an offer and had his petition struck out, he has no remedy at all unless he can persuade the court to permit him to present another, which would not be a foregone conclusion. That difficulty may fall away if the offeree is given a sufficient opportunity to inspect books and records before he has to decide whether to accept or reject any offer.

32. Mr Shaw submitted that there were five reasons why the offers made were, as he put it, deficient. I prefer to approach the matter, for the reasons given earlier, by considering whether, bearing in mind the five matters he criticises, the continued prosecution of the petition is an abuse or bound to fail.

No subsisting offer

33. All of the offers made had come to an end before the application was made, so that, Mr Shaw submitted, if the petition were struck out Mr Morris would be left in limbo unable to sell his shares and yet with no remedy for his continued exclusion. It might be one thing to say that if he persisted with his petition and achieved less than he was offered he should be penalised in costs, but it was another to say he should be shut out from any remedy at all. Mr Benzie sought to counter this in a number of ways:

    i) first, he submitted, this was precisely what Lord Hoffmann envisaged. If unfairness consists of exclusion without a reasonable offer to buy the shares, it is cured once such an offer is made, whether or not it is accepted. To say otherwise was a 'misunderstanding of the s 994 jurisdiction'. If this were not so 'the whole system [of offers] could not work',

ii) it was in any event, he said, not possible as a matter of contract law for an offer to be open for acceptance once it had been rejected, and all the respondent's offers had been expressly rejected by the petitioner. It is not necessary to decide the point, but I would be surprised if it were not open to parties to make an offer that remained open for acceptance, either indefinitely or until withdrawn, by suitable drafting, and

iii) on instructions, in his reply he made the offer of 25 May afresh, for a period of 28 days and then to be withdrawn only on 7 days notice. To counter another criticism, he extended its terms so that if the company made any recovery from claims against Mr Morris or Sitewatch, the price paid would be increased by 50% of the net receipt.

34. There will be cases in which an offer to buy clearly and finally cures the alleged prejudice. The straightforward situation posed by Lord Hoffmann is one; where a minority holder is in reality an employee with an incentive, the only unfair prejudice may consist of exclusion without a fair offer to buy his shares. If a fair offer is made and he rejects it, he cannot complain that he is left as a minority shareholder with all the vulnerabilities that entails. That does not mean he is forever without remedy if some further act of unfair prejudice occurs thereafter; in that respect he is in the same position as any minority shareholder would be. But he is not entitled to insist on a standing offer being made that he can accept at any time.

35. I am not however persuaded that the same will always be so in the case of equal shareholders, and particularly quasi partners. The relief they may seek is not necessarily limited to an order for sale of their shares. There is not a 'system' that gives a right to commit acts of exclusion or unfair prejudice provided an offer in specified form is made; that approaches the matter from the wrong perspective. I do not need however to explore the possibilities too far however, since in this case it is clear that the only relief Mr Morris has ever sought is that his shares be sold. I accept that if it is the case that he has been offered a sale on terms that gave him all the advantages he could reasonably expect to achieve from the petition proceedings, it would be an abuse to continue those proceedings in the face of such an offer, and that he should not be able to play fast and loose by continuing the proceedings but insisting on having the fallback of an offer on the most advantageous terms remaining open throughout. The real question therefore is whether the various offers made had that effect.

No waiver of claims by Sitewatch

36. Mr Karvaski has throughout carefully maintained his option to allege a failure to refer business and to procure that Sitewatch should be able to sue for that failure. In his final offer he agreed to give up any claims he might make personally, but not those of Sitewatch. Mr Shaw submitted that accepting such an offer would not bring the dispute to an end but merely allow Mr Karvaski to pursue his side of it, now in full control of the company. There was a fear that he would do so, attempting to claw back some of the price he had to pay. In response, Mr Benzie submitted that Mr Morris was seeking to rely on his own (assumed) wrong to perpetuate the dispute, and to continue the petition for the benefit of a third party, ie PRMC.

37. In cases such as this, typically each party to a petition will make any allegations against the other in points of claim or defence, and they will be adjudicated upon as part of the process, leading to finality between the parties. It was accepted that if, as

here, Mr Karvaski hinted at possible allegations of breach of duty by Mr Morris but declined to plead them, Mr Morris could, in principle, flush him out by seeking a declaration that there were no such breaches. Indeed, he has applied to amend the petition in that respect, if this application fails. PRMC is not, in this context, to be regarded as a separate party; it is the alter ego of Mr Morris and relations between it and Sitewatch are the very substance of the joint venture embarked on.

38. In my view, this is a substantial objection. Lord Hoffmann's remarks were prefaced by the desirability of encouraging the parties to settle their differences - it can hardly be the case that he envisaged creating a 'system' that allowed a (presumed) wrongdoer to avoid claims against him by acquiring the company while at the same time leaving him clear to pursue his own counter- allegations.

39. I do not accept that there was any substance in the counter- objections (a) that Mr Karvaski could not properly cause the company to give up genuine claims - the two men between them own (beneficially) all the shares and could procure any ratification required - or (b) that the wording proposed by Mr Morris arguably extended to unknown and unknowable claims and also debts arising in the ordinary course of business such as retention payments due to Sitewatch. It is not Mr Morris's wording that is to be considered, and Mr Karvaski could perfectly well draft a term that would get at the substance of the objection while excluding such items.

40. Nor in my view is this objection cured by the late extension of the offer to include a term that would pay Mr Morris half of any net recoveries. In determining the present application, what falls to be considered is the position at the date of the application, or (conceivably) the date of the hearing. It cannot be said, in my judgment, that the petition is an abuse or bound to fail by virtue of an offer made in the briefest terms in counsel's final remarks at the hearing itself. Further, an offer on that basis still does not resolve all the disputes between the parties and indeed invites the dispute to be reactivated in fresh proceedings with all the expense and inconvenience that would entail.

Uncertainty of the effect of the offer as to dividends payable

41. Mr Shaw submitted that the terms of the final offer as to dividends left substantial ambiguity as to the dividends Mr Morris would receive, and scope for Mr Karvaski to manipulate matters against him. Those terms were set out in the letter of 11 May. They accepted that Mr Morris would have been entitled to a dividend of one third of the distributable profits, and provided for the valuer to determine the amount Mr Morris "would have been entitled to receive up to the valuation date", ie the date of acceptance. The letter went on to say (p 145, para 6.2) "our client will accept … that your client will be paid a dividend **should they be declared**, subject to the usual requirements of declaring dividends as discussed above" (emphasis added). As indicated above, the last words were a reference back to a passage on the previous page which read "we would point out … that the company is not yet in a position to declare dividends out of the last financial year as the accounts have not yet been completed. There is also a potential bad debt in the region of £197,000…until those two issues have been resolved the company will not be in a position to pay dividends to any party…"

42. This, it was said, appeared to mean that dividends would only be paid if and when declared and if and to the extent that the accounts showed profits. Both these were in

Mr Karvaski's effective control as he controlled the Board. The valuer could not object to or change decisions of the directors.

43. I agree that this is a substantial objection. The valuer might well be able to express an opinion as to the profits for a period, whether the company had formally approved accounts or not. In that opinion, he might disagree with the accounting treatment applied by the company, for instance as to the provision for bad debts. But he could not oblige the company to adopt accounts on the basis he considered correct, still less oblige the directors to declare a dividend based on those accounts. It would require a generous interpretation of the letter with its apparent qualification limiting the entitlement to dividends "should they be declared" as obliging Mr Karvaski to declare a dividend at all, let alone in a specified timescale. Given his apparent willingness to manipulate the affairs of the company to Mr Morris's disadvantage, Mr Morris can not be criticised for being unwilling to trust him not to exploit the ambiguity. In my view the letter was further ambiguous in that it failed to make clear whether it was intended to declare a dividend out of all profits earned down to the date of acceptance, or only for financial periods completed prior to that date, or even perhaps only such dividends as had actually been declared by that date.

Failure to disregard increases in employee remuneration

44. Mr Morris initially sought a disregard for any increases in remuneration of Mr & Mrs Karvaski. That was conceded, but he then, apparently as an afterthought, extended his demand to include changes in remuneration of other employees, which was not agreed. Mr Benzie objects that what Mr Karvaski offered was what he was originally asked for, which must be assumed to be reasonable. I do not agree with that objection; certainly Mr Morris changed his mind but he did so no doubt as a result of further consideration of the possible ways in which the affairs of the company might have been adjusted to his disadvantage since he was deprived of information about it. He was in my view entitled to be suspicious, and cannot be tied down to relying only on those points that first occurred to him. If an afterthought is a reasonable objection, and in my judgment this was, it is reasonable to raise it.

45. This point flags up a more general difficulty, though I do not rely on it as it was not part of Mr Shaw's argument. If a party has been excluded from information about the company's affairs, he may be poorly placed to anticipate and cater for every means and mechanism by which the affairs of the company might be managed so as to disadvantage him in the valuation process. He may find that the language of an offer contains some pitfall that he could not have anticipated, or perhaps that the company's business has been changed to its disadvantage (an example might be that it had agreed to pay a commission on sales to a party connected with the other shareholder). If he accepts such an offer, he becomes bound by its terms (absent some special factor such as fraud or misrepresentation). In that respect he may be in a materially worse position than a litigant who will have been able to exercise rights of inspection and, if he obtains an order for sale, would have the opportunity to persuade the court that it should be crafted so as to undo the effects of any unusual transactions. He would be likely to have liberty to apply in the implementation of that order for sale and could therefore seek the assistance of the court if the valuation mechanism turned out to operate unfairly against him because of some matter he could not have known about. This too is a point which may fall away if full access is provided to information before the offer has to be accepted.

Timetable

46. The offer provided that the timetable for representations would be set by the expert. Mr Shaw submitted that this left open the possibility that an unfairly short period might be set, and said that the timetable should be spelt out in the offer itself. This point I would not accept; it seems to me that if an offer provides for a truly independent person to conduct a valuation process, it would be unreasonable to object to it simply because he was trusted to fix the timetable for that process.

Conclusion

47. In the circumstances of this case I am not satisfied that the continued prosecution of the petition is an abuse of process or bound to fail. Mr Morris may well obtain an order which is more advantageous to him in material respects than the offer made, for any or all of the reasons given. The application is dismissed.