In The Supreme Court of Bermuda

CIVIL JURISDICTION

2025 No 333

IN THE MATTER OF PHL LIMITED

AND

In the matter of a PETITION under Section 111 and Section 161 (b) of the Companies Act 1981

BETWEEN: **ILYA ZUBAREV** **PETITIONER**

-AND-

PHL LIMITED **RESPONDENT**

RULING

Application to strike out the petition under RSC Order 18 rule 19 (1) (a)

In Chambers

Martin J

Date of Hearing: **29 May 2026**

Date of Ruling: **29 June 2026**

Appearances

Steven White and James Sellick of Walkers Bermuda Limited for PHL Limited

Christian Luthi of Conyers Dill & Pearman Limited for the petitioner

Introduction

1. This is the court's Ruling in relation to an application by PHL Limited ("the company") to strike out the petition in this matter as disclosing no reasonable cause of action under Order 18 rule 19 (1) (a) of the Rules of the Supreme Court 1985 ("the RSC").

2. The petition has been brought against the company under section 111 of the Companies Act 1981 by a shareholder who alleges that the affairs of the company have been conducted in a manner oppressive or prejudicial to his interests such that it would be just and equitable to wind up the company, but that to make such an order would be unfairly prejudicial to his interests, and so an order should be made requiring the company to but the petitioner's shares at their fair value. This is usually called the "alternative remedy" to a winding up order.

3. The relevant terms of section 111 (so far as material for the purposes of this Ruling) are as follows:

> ***Alternative remedy to winding up in cases of oppressive or prejudicial conduct***
> *111.*
>
> *(1) Any member of a company who complains that the affairs of the company are being conducted or have been conducted in a manner oppressive or prejudicial to the interests of some part of the members, including himself, or where a report has been made to the Minister under section 110, the Registrar on behalf of the Minister, may make an application to the Court by petition for an order under this section.*
>
> *(2) If on any such petition the Court is of opinion—*
> *(a) that the company's affairs are being conducted or have been conducted as aforesaid; and*
> *(b) that to wind up the company would unfairly prejudice that part of the members, but otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up,*
>
> *the Court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in future, or for the purchase of the shares of any members of the company by other members of the company or by the company and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise.*

4. In addition, the petitioner seeks an order for the winding up of the company under section 161 (b) of the Companies Act 1981 on the basis of various (alleged) failures by the company to comply with the mandatory requirements of the Companies Act 1981 to hold its annual general meetings, lay financial statements before the shareholders, and appoint directors and auditors. This is an alternative claim which is independent from the claim under section 111, but the same factual matters are relied upon for the grant of relief under each section.

5. The relevant terms of section 161 (b) provide as follows:

> *"161 In addition to any other provision in this or any other Act prescribing for the winding up of a company a company may be wound up by the court if--*
>
> *(b) subject to section 88 default is made in holding the statutory meeting or failing to comply with section 84 or 89;"*

Summary and disposition

6. The court is satisfied that the elements pleaded in the petition both as to fact and law are sufficient for the petitioner to seek relief under sections 111 and 161 (b) of the Companies Act 1981, and that the court would not be justified in striking the petition out as disclosing no reasonable cause of action.

7. The reasons for this conclusion are set out in more detail below, but in summary the court is satisfied that the matters alleged in the petition disclose arguable grounds upon which the court could make a winding up order on the basis of the conduct alleged.

8. The court is not determining the merits of the claims made in the petition, but merely that they could (if proved at trial) justify the court making such an order. The court is not deciding that the court would grant the relief sought if the matters pleaded are proved but is deciding that it would be within the court's jurisdiction and power to do so. Whether the could will grant the relief under either section is a matter that will be determined at the trial of the petition, after hearing all the evidence and the legal arguments.

9. The court therefore must dismiss the company's application. The court will hear the parties as to the costs of the application.

Brief background facts

10. The following statement of facts is taken from the petition. These facts are assumed to be true for the purposes of this application, but the court has not made any determination of the accuracy of the facts, some of which may be the subject of dispute[1]. The following facts set the context in which the petition has been presented and the context in which the application to strike it out has been made.

11. The company is a holding company which owns holdings and investments in subsidiaries and other operating companies which are engaged (broadly) in the development and 'commercialisation' of 'software virtualisation', cloud infrastructure and related information technology businesses.

12. The petitioner is a minority shareholder of the company, although he is the largest single shareholder of the company if his interests as a preferred shareholder are treated as having been fully converted. The petitioner owns 57,475,084 Common Shares, 23,991,506.5 Series A Preferred Shares 7,276,821 Series B Preferred Shares 2,976,190.5 Series C Preferred Shares

[1] It appears that the main allegations upon which the petitioner relies are not in fact the subject of any real dispute.

and 1,680,672.5 Series 1 Preferred Shares which together amount to 44.32% of the issued shares of the company on an 'as converted' basis.

13. The petitioner is not a director of the company, but because of the size of his holdings in the company, he was afforded access to the financial statements and other materials that were prepared for the board and participated in board decision making. However, his access to financial statements and participation in board proceedings has recently been stopped.

14. As part of the terms of and conditions of the Amended and Restated Certificate of Designation, Preferences and Rights of the Series A, Series B, Series C and Series D Preferred Shares and the Series 1 and 2 Preferred Shares ("the Certificate of Designation") the company agreed that it would not take any "Major Actions" (as defined) without the prior approval of at least 66.6% of the holders of the issued Series B and Series C Preferred Shares voting as a single class. This requirement gave the petitioner (in effect) a right of veto or blocking power over the company's ability to undertake the defined Major Actions, which included incurring any indebtedness over US$1 million in value.

15. It is alleged that the company did in fact incur indebtedness of over US$1 million without the consent of the holders of 66.6% of the issued Series B and Series C Preferred Shares in breach of the Certificate of Designation. There was a borrowing of EUR 2.5million in June 2024 and the capitalisation of interest of USD7.7 million in 2025, which falls to be treated as incurring additional indebtedness even though the original debt obligation was approved. (This allegation is not denied but the court would in any event proceed on the basis that it was true for the purposes of this application.)

16. The company has also failed to convene annual general meetings for the three calendar years 2022, 2023 and 2024 in breach of the requirements of section 71 of the Companies Act 1981, and as a result has also not complied with the obligations to (i) lay the financial statements for those years before the shareholders (ii) appoint (or waive the appointment of) an auditor or (iii) appoint directors in accordance with the bye laws and in breach of sections 84, 87, 88, 89, 90 and 91 of the Companies Act 1981. (These allegations are also not denied.)

The petition

17. The petitioner complains that the matters set out above are oppressive or prejudicial to his interests as a shareholder. The petitioner says that the denial of informal access to financial information and participation in board proceedings is detrimental because he had understood that this was agreed, and he has much more limited access to current financial information.

18. In addition, the petitioner complains that the company's failure to convene the annual general meetings and lay the financials before the shareholders has denied him his statutory rights to attend the AGM and ask questions or challenge the presentation of the company's financial statements. In addition, the petitioner says the clear breach of the terms of the Certificate of Designation show that the company has broken its bargain with him and the other preferred shareholders (of which he is the largest), which is clear evidence of unfair and prejudicial conduct of the affairs of the company.

19. The petitioner says that these matters are ongoing and that the court could make an order for the winding up of the company on the just and equitable ground as a result of the manner in which the affairs of the company have been conducted. But instead of winding the company up, which he says would be prejudicial to his interests, the petitioner seeks an order that the company purchase his shares at fair value.

20. Separately, the petitioner says that the various defaults in complying with the requirements of the Companies Act 1981 (referred to above) justify a winding up order under section 161 (b) of the Companies Act 1981 which provides that the court may wind up a company if there is a default in laying the financial statements before the shareholders in annual general meeting once a calendar year under section 84 or appointing an auditor annually under section 89, subject to the power of the shareholders to waive those requirements. No such waivers have been obtained, and so it is submitted that the court has power to wind the company up on this basis as well.

The company's response and application to strike out the petition

21. The company's position in relation to the petitioner's claims is that they do not amount to oppressive or prejudicial conduct. In summary the company makes four broad points.

22. First, the company says that the failures to convene AGMs and lay the financial statements before the company in general meeting, appoint auditors and re-elect directors constitute technical and remediable breaches of the Companies Act 1981 and the court would never in reality make a winding up order in respect of a solvent company as a result of these matters on any basis, and especially not the just and equitable ground.

23. The company relied upon a *dictum* of Sir Richard Scott VC in **Re A Company (No 004415 of 1996)**[2] for the proposition that the court will strike out a claim where there is in reality no chance of the court actually making a winding up order.

24. Second, the company says that because these breaches affect all shareholders equally, there is no prejudice to one part of the shareholders so that the statutory requirements for the grant of the oppression remedy are not met. The company relied upon a dictum of Harman J in **Re A Company *ex parte* Glossop**[3] which was to the effect that a failure to declare a dividend would not qualify as oppressive conduct because it applied equally to all shareholders. Therefore, the company submitted that the conduct alleged in the petition could not amount to oppressive conduct of a minority for the purposes of section 111.

25. Third, the breaches of the Certificate of Designation are also minor and constitute breaches of contract which have not resulted in any loss or damage to the petitioner, so they cannot justify a winding up on the just and equitable ground. Therefore, the company submits that if the court would never in reality make a winding up order, the petition is bound to fail and ought to be struck out as disclosing no reasonable cause of action.

[2] [1997] 1 BCLC 479 at 491 b.
[3] [1998] BCLC 701.

26. Fourth, the company criticises the petition on the ground that it does not allege any claim of oppression against those in control of the company and the petition is therefore defective because the company is only ever a nominal defendant in a section 111 petition. The company relied upon a *dictum* of Hoffman J (as he then was) in **Re Crossmore Electrical & Civil Engineering Ltd**[4] where he said:

> *"The company is a nominal party to the s 459 petition, but in substance it is a dispute between two shareholders. It is a general principle of company law that the company's money should not be expended on disputes between shareholders: see Pickering v Stevenson (1872) LR 14 Eq 322."*

27. The company also relies upon the statement of principle set out in **Saxon Woods Investments Ltd v Costa**[5] which explained that the company does not have an independent interest in the proceedings merely because the there have been breaches of the company's constitution or because an order for the purchase of a shareholder's shares may be made against the company. Deputy Insolvency and Commercial Court Judge Raquel Agnello KC explained it in the following terms:

> *"Equally, it is also not determinative that the relief, if granted would have some legal effect on the company, by winding it up or causing a change in its value by reason of an ordered sale of shares etc. In my judgment, what is required is a careful analysis of what the alleged hostile litigation (or threat thereof) and whether it really is against the company in the true sense. In many section 994 petitions, and the one before me is no exception, there are allegations pleaded which refer to breaches by the company of a shareholders' agreement or of the articles of association. Such allegations do not make the company anything more than a nominal defendant. The reality is that those breaches of the company of the articles and/or a shareholders' agreement or attributed to the wrongdoers being the other shareholders and/or directors acting on their behalf. Allegations of wrongful exclusion of a director in breach of the articles or of terms of a shareholders' agreement are classic examples. Those allegations are then relied upon as part of the unfairly prejudicial conduct of those in control of the company. Those types of allegations are not to be viewed, in general, as being hostile litigation against the company. They are clearly based on allegations of wrongdoings against either the directors acting at the direction of the majority shareholders or the shareholders themselves."*

28. Usually this principle is cited in support of the notion that the company should not expend its resources in active participation in a section 111 petition because the issues to be determined are in the nature of a shareholder dispute. The company says the principle also applies to prevent a claim being presented against the company as a sole respondent because the oppressive conduct must be the result of actions taken by those in control of the company's affairs, be they shareholders or directors or both.

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[4] (1989) BCLC 137 at 138 e-g.
[5] [2023] EWHC 2154 Ch at paragraph 65.

29. In relation to the secondary basis for the presentation of the petition under section 161 (b), the company says that the failures to comply with the statutory requirements to convene the annual general meetings of shareholders and present financial statements are technical and would be insufficient in real terms to justify the court in exercising its discretion to wind the company on this ground.

Strike out principles

30. Before turning to address the principal arguments, it is appropriate to have in mind the general principles that apply to the court's assessment of a strike out application. The power to strike out is only to be exercised in plain and obvious cases. In relation to disclosing a reasonable cause of action, only the pleadings are to be taken into account, assuming the facts asserted are true and are capable of being proved at trial. However, the facts alleged when proved must (not may) amount to a cause of action resulting in a judgment in the plaintiff's favour, even if not the specific relief prayed.

31. The claim must have some chance of success, or raise some question fit to be decided by the court, and the court is not to engage in a prolonged examination of disputed points of fact or law[6]. In relation to a strike out on the basis of abuse of process, the court must be satisfied that the claim is obviously unsustainable, or otherwise in some way involves a serious misuse of the court's process[7].

32. A strike out application is not an appropriate procedure for determining controversial points of law in a developing area[8]. A strike out application should not generally be granted unless it is clear that no amendment could remedy the deficiency in the pleaded claims[9]. The power to strike out a petition under section 111 is sparingly used because the nature of the claim is not to remedy the infringement of a legal right or the breach of a legal duty[10].

33. In an oppression petition the court is asked to apply equitable principles to determine whether the conduct of the respondents justifies a winding up order, and if so whether it would be unfair to the petitioner to apply that remedy, and to give alternative relief. The court is engaged in the assessment of conduct which is fact specific which generally requires the allegations made to be tested at a trial[11].

34. The court has in mind in particular the statements of the Bermuda Court of Appeal in **Chiang and Pacific Holdings Ltd v Kistefos Investment AS**[12], which have been applied in **Re Full Apex Holdings Ltd**[13] and **Re Kingboard Copper Foil Holdings Ltd**[14] by Kawaley J (as he then was).

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[6] White Book commentary (1999) at 18/19/10.
[7] **Michael Jones v Stewart Technology Services Ltd** [2017] Bda LR 117 at 26 per Hellman J.
[8] **Bidzina Ivanishvili v Credit Suisse Life (Bermuda) Ltd** [2018] Bda LR 87 (SC) at paragraph 19 per Hargun CJ.
[9] Notes to the 1999 White Book RSC Order 19 rule 19 rule 2 at pages 349-353.
[10] See *Hollington on Shareholder Rights* (10th Ed) at para 9-23 citing **Virdi v Abbey Leisure** [1990] BCC 60 Ch D and **Re Copeland & Craddock Ltd** [1997] BCC 294 CA per Bingham, LJ at 300.
[11] **Tucker v Hamilton Properties Limited** [2017] Bda LR 136 at paragraph 11 per Subair Williams J.
[12] [2002] Bda LR 50 CA.
[13] [2012] Bda LR 9 (SC).
[14] [2012] Bda LR 5 (SC).

35. The material ingredients of a sustainable petition under section 111 are that the allegations must be clearly enough pleaded that the respondent(s) understand the case they have to meet, and that those allegations if proven would be sufficient to justify the court making the orders prayed. Even where material particulars are omitted, the court will normally grant the petitioner the opportunity to amend the petition. The court will only exercise its exceptional jurisdiction to strike out a petition if it is plain and obvious that even if the grounds alleged in the petition are proved the petition *must* fail[15].

The court's assessment of the grounds in support of the petition

36. It is helpful to start by making the obvious point that the court is not now determining whether the court *would* make a winding up order because it is just and equitable to do so on the grounds alleged, or on the basis that there has been a failure to comply with the requirements of sections 84 and 89 of the Companies Act 1981. It is only necessary for the court to be satisfied that the court *could* do so for the purposes of determining this application[16]: it is only if the court concludes that there is *no ground* upon which the court could reach the conclusion that it is just and equitable to wind the company up on the grounds alleged, or for failure to comply with sections 84 and 89, that the court would be justified in striking the petition out.

Breach of statutory requirements to hold AGMs

37. Taking the principal grounds alleged, the court is satisfied that a breach of the company's statutory obligations to comply with the minimum requirements to convene the annual general meetings and appoint auditors, in addition to breaching the certificates of designations, which were the basis of the petitioner's investment of loan capital, could justify the court in concluding that the company's affairs are or have been carried on in a manner oppressive to the petitioner.

38. The court considers that compliance with the basic statutory requirements for an annual general meeting of shareholders at which the directors must lay the financial statements, seek the appointment of auditors (or waive their appointment) and re-elect the directors is the minimum standard of accountability of the company's directors to the company's shareholders.

39. A breach of those requirements without lawful excuse or reasonable explanation, especially where repeated over the course of more than one annual period, would in my view be a ground on which the court could conclude that the company's affairs have been conducted in a manner oppressive to the interests of the shareholders and justify a winding up order on the just and equitable ground. A number of cases have supported the notion that such failures can be sufficient to amount to unfairly prejudicial conduct which would justify the making of a winding up order on the just and equitable ground[17].

40. For example, in **Re A Company (No 00789 of 1987) *ex parte* Shooter**, Harman J expressed his view in the following terms[18]:

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[15] **Re A Company (No 007936 of 1994)** (1995) BCC 705 Ch D.
[16] See Kawaley CJ in **Annuity & Life Reassurance Ltd v Kingboard Chemical Holdings Ltd** [2015] SC (Bda) 76 Com at paragraph 13 (decision partially reversed on appeal on another point).
[17] See the academic commentary in Professor MacPherson's contribution to the Modern law Review in *Winding up On the Just and Equitable Ground* (May 1964) at page 299.
[18] [1990] BCLC 384 at 393 c.

> *"I respectfully agree with Peter Gibson J that being late is, plainly a trivial matter and not a matter which would properly found any petition. But, regrettably, it is nothing like the present case. This present case is of repeated failure, year over year over year, to hold annual general meetings or to lay accounts before members, so that the members were wholly deprived of any opportunity to consider the affairs of the company, to vote on the re-election of directors, or in any other way to know what was going on. As it seems to me, that conduct, not the absence of filing bu the conduct in depriving members of their right to know and consider the state of the company and its directorships, and to ask questions of its directors, is conduct which, inevitably, must be prejudicial to the interests of members."*

41. In that case it should be noted that the failure was not the failure to convene any annual general meetings over a seven-year period (as the general statement quoted above might imply), but that they were convened irregularly and without proper notice. The summary of facts recorded by Harman J was to the effect that there was no annual general meeting in 1981, but a double annual general meeting for 1981 and 1982 and a double annual general meeting held in 1984 for 1983 and 1984[19], an extraordinary general meeting in 1985 at which the authorised capital was purportedly increased and a further extraordinary general meeting in both 1986 and 1987 at which the majority shareholder tried to remove Mr Shooter as a director[20]. Harman J considered the steps taken to increase the authorised capital were legally ineffective, and the provisions requiring the rotation of directors meant that there were in fact no directors validly appointed[21].

42. In this case, it is accepted that there has been a failure to convene the annual general meetings for 2022, 2023 and 2024 which has the necessary consequence that neither auditors nor directors were validly appointed for those years because their terms of office from the 2021 AGM have expired. In the light of the comparison of these facts to those in ***ex parte* Shooter**, it seems to the court that it is at least arguable that these failures in the conduct of the company's affairs *could* result in the court granting relief under section 111[22]. That is all the petitioner must show at this stage.

43. The court may well not decide to make a winding up order on those grounds, and the very premise of a petition under section 111 is that the court will not make a winding up order because it would be unfairly prejudicial to the interests of the petitioner to do so, taking into account all the circumstances of the case.

Breach of the supermajority requirements for approval of Major Actions

44. The court also considers that a breach of the company's obligations to comply with super-majority approval of certain corporate actions (including the 'Major Actions' defined in the Certificate of Designation in this case) could also justify the making of a winding up order on the just and equitable ground. This is because the company, in consideration for the advance of

[19] At page 386g
[20] At page 388e
[21] At page 387a
[22] See also **In the matter of Sunrise Radio** [2009] EWHC 2893 (Ch) at paragraph 272-4 per HH Judge Purle QC

loan capital by preferred shareholders in order for the company to operate, has bound itself to the preferred shareholders to seek approval of those who hold the specified majority of the relevant preferred shares before taking specific actions. The Certificate of Designation is (at least arguably) a voluntary restriction on the exercise of the powers of the directors to take those actions without the necessary consent.

45. A breach of the Certificate of Designation not only represents a breach of contract, but is arguably conduct which is (at least arguably) unfair and oppressive, according to the *dictum* of Lord Hoffman in **O'Neill v Phillips**[23] in which he explained the operation of the principles that apply to petitions under section 459 of the English Companies Act 1985. This authoritative statement is relevant to the interpretation of the principles under section 111 because it is based on section 210 of the English Companies Act 1948 which was the predecessor to section 459.

> *"Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others ("it's not cricket") it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.*
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> *In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which he considered that this would be contrary to could faith. These principles have, with appropriate modification, being carried over into company law.*
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> *The first of these two features leads to the conclusion that a member of company will not ordinarily be entitled to complain of unfairness* ***unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted****. But the second leads to the conclusion that there will be cases in which equitable considerations unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus* ***unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith****."*

(My emphasis added)

[23] [1999] 1 WLR 1092 HL at page 1098f to 1099b.

46. Therefore, it follows that a breach of the terms upon which the shareholders and the company have agreed that the affairs of the company shall be run can constitute unfair conduct which is amenable to relief under a section 111 petition. For these purposes, in my judgment, it is arguable that there is no distinction to be drawn between conduct which is "oppressive or prejudicial" and conduct which is "unfairly prejudicial".

47. Although the Jenkins Report recommended a change in the language of section 210 of the Companies Act 1948 (from which section 111 is drawn) in order to move away from the connotation of "harsh, burdensome and wrongful" implied by the word "oppressive" as it was interpreted by Viscount Simonds in **Meyer v Scottish Co-operative Wholesale Society Limited** cited above, it is arguable that the interpretation of "oppressive or prejudicial" in section 111 should be given the meaning attributed to "unfairly prejudicial conduct" in the modern cases, because the Jenkins Report considered that was what the term "oppressive" really means in modern usage[24].

48. Alternatively, if that analysis is wrong, it also seems to me to be arguable that the breach of the Certificate of Designation falls within the narrower interpretation of "oppressive" conduct, using Viscount Simonds' terminology. A breach of the conditions on which the company agreed to issue preferred shares is at least arguably wrongful in that it is a breach of the company's obligations, arguably burdensome because it imposes a disadvantage on the minority shareholders, and arguably harsh in that it is inequitable.

49. The court is here making no assessment of whether the conduct alleged in this case is or is not conduct which would definitively justify the making of a winding up order on the just and equitable ground. The court is simply recognising that the allegations contained in the petition are sufficient to raise an issue which is capable of giving rise to a justiciable claim under section 111. Therefore, the court would not be justified in striking the petition out as disclosing no reasonable cause of action. That is as far as it is appropriate for the court to go at this stage.

Conduct affecting all shareholders not some shareholders

50. It was argued that conduct alleged in relation to matters that affects all shareholders equally does not affect the petitioner's rights in a manner which is different to other shareholders and therefore cannot oppressive or prejudicial to the petitioner or the minority as such, based on the dictum to that effect by Harman J in **Re A Company, *ex parte* Glossop**[25].

51. However, it has also been held that the court can recognise a difference between the *rights* of a shareholder and the *interests* of the shareholder in the context of a section 111 petition. The English court has held that conduct which affects all shareholders' rights in an equal manner may yet affect the interests of those shareholders differently and may result in prejudice to one constituent part of the shareholders differently than the others. If so, this gives rise to an arguable claim of prejudice to the petitioner, even though the rights of all other shareholders

[24] A visible departure from standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely: Report of the Company Law Committee (1962) Cmnd 1749 (Jenkins Report) at paragraph 204.
[25] At page 575 f.

have been affected in the exactly same way. This situation was considered by the Court of Session in **Meyer v Scottish Textile & Manufacturing Company Ltd** [26].

> *"When the section inquires whether the affairs of the company are being conducted in a manner oppressive to some part of the members including the complainer, that question can still be answered in the affirmative, even if, qua member of the company, the oppressor has suffered the same or even a greater prejudice."*

52. This reasoning was recognised and applied in the decision of Peter Gibson J (as he then was) in **Re Weller (Sam) & Sons Ltd** in which he respectfully departed from the reasoning of Harman J in ***ex parte* Glossop**[27]. Peter Gibson J declined to follow ***ex parte* Glossop** because he considered that Harman J had failed to give an ordinary meaning to the word "interests" in the then English equivalent section to our section 111 but had construed "interests" to mean legal "rights". According to Peter Gibson J's approach, it is possible for a petitioner to allege prejudice in respect of actions which affect all shareholders' rights if he can show that his *interests* (i.e. as distinct from his legal rights) have been prejudicially affected. This point of difference became academic as a result of subsequent changes introduced the English Companies Act 1989 and has never since been resolved.

53. It must therefore be (at least) arguable that the conduct alleged by the petitioner affects his interests in a way which is different to other shareholders. Therefore, the court is not persuaded that the petition should be struck out on this ground.

54. In addition, leaving aside the question whether "rights" are the same as "interests" for these purposes, it is at least arguable that the breach of the super-majority requirements for consent to take on debt of more than US$1 million affects the rights of the petitioner differently from the other shareholders because (i) the rights of the Preferred Series B and C Shareholders are different from the rights of the ordinary shareholders (ii) the holders of more than 33% of the Preferred Series B and C Shareholders hold an effective right of veto. In this case, the petitioner is the holder of that right, and his right has been affected in a different way than the holders of (a) the rest of the Preferred Series B and C Shares and (b) the holders of the other series of preferred shares and (c) the holders of the ordinary shares, because he has been deprived of that right which those other shareholders do not have. In my view, there is no requirement that the breach of a right must cause a financial loss to the petitioner in order for it to be actionable under section 111. That proposition finds no support in the language of the section, nor in any decided case law, so it must be at least arguable that there is no such requirement.

Petition against the company alone

55. The requirement to add a respondent other than the company in a case where the petition is in effect a shareholder dispute between those who are alleged to control the company as shareholders and/or directors or both does not in my view rule out the possibility that the affairs of the company may be carried on in a manner which is oppressive to the petitioner without naming additional respondents.

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[26] 1954 SLT 273, 277 per Lord Cooper.
[27] At p 690 b-c.

56. In this case the company does not dispute that it has breached the Certificate of Designation by taking a loan in excess of US$1 million without the necessary consent of 66% of the Series B and C Preferred Shares. In some circumstances a claim could be brought by a preferred shareholder against the company to enforce the special rights conferred in a Certificate of Designation by an ordinary civil action. But, where the right in question is the right of negative control over the company's borrowing powers, an ordinary civil claim to enforce those rights by specific performance or injunction cannot undo a loan already taken by the company in breach of the negative covenant, nor can the preferred shareholder show a quantifiable financial loss as a result of that breach.

57. It seems to me that this type of breach of a negative right of control must be capable of being (at least arguably) the subject of a complaint under section 111. To conclude otherwise would leave the preferred shareholder without any effective remedy for breach of his right of negative control, which is a conclusion the court would be normally very slow to reach: a right must have a remedy[28].

58. In addition, this issue has wide and important ramifications for the enforcement of the rights of preferred shareholders generally and should not be determined by a side wind on a strike out application.

59. This is not to suggest that a court would necessarily make a winding up order on the just and equitable ground because of a breach of the Certificate of Designation, it is simply to illustrate that there may be circumstances in which it is at least arguable that the company is or may be the only appropriate respondent. It will be for the court in every particular case to decide whether the conduct alleged is sufficient to justify a winding up order on the just and equitable ground.

60. In my judgment the principle that a company should not expend its resources in taking part in what is in reality a shareholder dispute does not preclude a petition being validly presented against the company alone in appropriate factual circumstances. The company's reliance on the cases which deal with the disapproval of expenditure of company funds in participation in cases which are in effect a dispute between shareholders to justify the submission that the company is in reality a nominal respondent are not really in point. Indeed, the authorities lay down no strict rule. Lindsay J expressly reserved the expression of any hard and fast rule in **Re A Company** (1126 of 1992)[29] where he said the general principles that can be derived from the cases on section 459 of the English Companies Act 1985 are to the effect that:

> *"... **there is no rule that necessarily and in all cases such active participation and such expenditure is improper**. Thirdly that the test of whether such active participation and expenditure is improper is **whether it is necessary or expedient in the interests of the company as a whole** (to borrow from Harman J in in ex parte Johnson). Fourthly, in considering that test the court's starting point is a sort of rebuttable distaste for such participation and expenditure, initial scepticism as to its necessity or expediency. The*

[28] *Ubi ius, ibi remedium.* See **Ashby v White** (1703) 2 Ld Raymd 938; 92 ER 126, and although this is not an absolute rule of law, the absence of a remedy for a breach of a right must ordinarily be justified by legal principle.
[29] [1994] 2 BCLC 146 at 155 h to 156 c.

chorus of disapproval in the cases puts a heavy onus on a company which has actively participated.....to satisfy the court with evidence of the necessity or expedience in the particular case. What will be necessary to discharge that onus will obviously vary greatly from case to case. Fifthly, if a company seeks approval by the court of such expenditure in advance, then, in the absence of the most compelling circumstances proven by cogent evidence, such advance approval is very unlikely."

(My emphasis added)

61. The import of these principles is a far cry from saying that a petition that is brought against the company alone is demurrable on the ground that there is no proper claim to be determined by the court because the company is the only respondent. It must follow on the logic of the company's argument that if there is no hard and fast rule that a company can *never* participate actively in a petition, there can be no hard and fast rule that a petition can *never* be brought against a company as the sole respondent[30]. The analysis is heavily fact dependent in each case.

62. A Certificate of Designation is a contractual undertaking by the company with the preferred shareholder to conduct its affairs in accordance with the terms on which the investor has invested its money with the company. In my judgment, the breach of the Certificate of Designation *by the company* in this case could (at least arguably) amount to conduct which is oppressive of the interests of the petitioner in this case for the following reasons. The petitioner cannot undo the loan, nor can the petitioner set it aside, and the petitioner has no remedy in damages, but his right to withhold his consent to the indebtedness being incurred has been breached. In my view, this could (arguably) amount to conduct of the affairs of the company by the company (acting of course by its board). Therefore, in my view, the petition is not demurrable in this case on the basis that the company is the only respondent.

Amendment

63. The petitioner has in any event indicated that he will seek leave to amend the petition to add Mr Serg Bell as a second respondent because it is alleged that Mr Bell is the shareholder and director under whose direction and effective control the board has acted in breaching the Certificate of Designation and failing to comply with the requirements of sections 84 and 89 of the Companies Act 1981. The company criticised the draft amendment as failing to specify the particulars necessary to amount to a proper pleading because it is not said how or in what respects Mr Bell is alleged to have caused the company to breach the Certificate of Designation or caused the board to fail to comply with the statutory obligation to convene annual general meetings.

64. The court has not granted leave at this stage, and it will be a matter for a separate occasion to debate whether the proposed amendments are objectionable. It would be wrong to strike out the petition while that application is outstanding. However, as a general observation, the court would not normally strike out a plea for want of particularity unless it was also abusive or vexatious. The court would normally order the giving of further and better particulars before disallowing the amendment or striking out the petition.

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[30] See eg **Re Ravenhart Service (Holdings) Ltd** [2004] 2 BCLC 376 where Etherton J held *"I do not consider that the petition is wrongly constituted or bound to fail because [a shareholder] is not a party."*

Section 161 (b) petition

65. It would be odd for the statute to confer a right on a shareholder to petition for a winding up order under section 161 (b) for a winding up order where the company fails to convene a statutory general meeting or lay its financial statements at the annual general meeting if the court was not intended to be able to make such an order. There are no additional requirements in the language of the statute, and no additional requirements have been superimposed on the ordinary interpretation of the section by decided case law. Therefore, the petition must also be (at least) arguable on that ground alone.

Striking out an oppression petition

66. In **Chiang and Pacific Holdings Ltd v Kistefos Investment AS** (cited above) the Bermuda Court of Appeal quoted with approval the summary of the learned assistant judge at first instance who said:

> *"I have heard the submissions of counsel over a period of some five and a half days. I have considered the Petition in detail and the Affidavits and 22 files of documents which accompany them. I have effectively been called upon to carry out a minute and protracted examination of the documents and alleged facts of the case in order to see if the Plaintiff has a real cause of action. This I am not prepared to do. I am not prepared to usurp the position of the trial judge who must have the benefit of oral evidence tested by cross examination in order to decide the issues between the parties.*
>
> *I have come to the conclusion that the Petition discloses a prima facie allegation of complaint that the affairs of [the company] are being conducted or have been conducted in a manner prejudicial to the interests of some part of the members including [the petitioner]"*

67. The Court of Appeal then said at page 11:

> *"We agree with the judge's approach to the strike out application.....In our view, sufficient facts are pleaded in the petition to indicate to the company and Chiang what the allegations are which are asserted against them. In our opinion, if these allegations are established, the judge could infer that the conduct complained of has been proved."*

68. It is clear from these statements that the Court of Appeal considers that the court is to take a high-level view of the allegations made in a section 111 petition when considering a strike out application. In order to be sustainable a petition under section 111 must contain allegations that are clearly enough pleaded that the respondent(s) can understand the case they have to meet, and that those allegations if proven would be sufficient to justify the court making the orders prayed, even if it is only by inference from the facts proved at the trial.

69. That is not to say or imply that the court will never strike out a petition alleging oppressive or prejudicial conduct. The court will exercise its exceptional jurisdiction to strike out a petition if it is plain and obvious that even if the grounds alleged in the petition are proved the petition *must* fail[31].

[31] **Re A Company (No 007936 of 1994)** (1995) BCC 705 Ch D.

70. Where material particulars are omitted from the petition, the court will normally grant the petitioner the opportunity to amend the petition. It is only where the petition cannot be amended to justify the relief that the court will strike it out[32].

71. In this context it is also instructive to reflect on the observation made by Harman J in **Re Unisoft Group Ltd No 3**[33] in relation to the court's approach to the allegations pleaded in a petition under the then English equivalent of section 111.

> *"From that [RSC Ord 18 rule 19 (3)] Mr Davies derived the proposition, which is unanswerable and which I entirely accept, that a petition is not a pleading. One cannot get further and better particulars of a petition and a petition by itself cannot be dealt with under the ordinary rules of pleading and is not intended to be in the ordinary form of a pleading. It is intended to be and regularly is a more discursive and free-running document—in more ordinary daily language than the precise dry averments of bare facts which a pleading proper ought to contain."*

72. Harman J went on to reject emphatically the submission that because a petition is not a pleading the court could not order further and better particulars of the allegations made in the petition. The court can (obviously) order further and better particulars to be given, or require the petitioner to provide an amended petition of points of claim in order to define the issues to be tried and put the respondents on notice of specific facts relied upon, or to frame the proper scope of disclosure.

73. But Harman J's observation that a pleading is not susceptible to the same forensic analysis as a statement of claim in an ordinary writ action is broadly consistent with the approach taken by the Court of Appeal in **Chaing**. What can be drawn from these statements is that, ordinarily, the court should not strike out a petition on the grounds that it does not comply with the ordinary pleading rules, but should (at least in the first instance) order further particulars to be given so that the respondents have a proper and fair opportunity to answer the detailed allegations and prepare to meet the case that is being put against them.

Conclusion

74. Therefore, and for the detailed reasons explained above, the court is satisfied that there are sufficient grounds alleged in the petition to engage the court's jurisdiction under section 111 and that there is on the face of the petition an arguable claim that the company's affairs have been conducted in a manner which is oppressive or prejudicial to the interests of the petitioner and that the court could make a winding up order on the just and equitable ground, and therefore could decide to grant the alternative relief sought, namely a 'buy out' order of the petitioner's shares at fair value.

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[32] See eg **Full Apex (Holdings) Ltd** (supra) where the petition by a party who was not a shareholder was struck out.

[33] [1994] 1 BCLC 609 at 613 c.

75. Separately, the court is also satisfied that the court has jurisdiction to make a winding up order under section 161 (b) of the Companies Act 1981 as a result of the alleged failures of the company to comply with its statutory obligations to convene an annual general meeting of shareholders and failures to appoint (or waive appointment of) auditors and officers (including directors) under sections 84 and 89 of the Companies Act 1981.

76. The court is not indicating that it would make any of the orders sought in the petition. The court will exercise its powers and discretions under the relevant provisions of the Companies Act after the trial of the petition and after hearing all the evidence and legal argument.

77. For now, the court must therefore dismiss the company's application to strike out the petition. The court will hear the parties on costs.

Dated this 29th day of June 2026

HON. MR. ANDREW MARTIN
PUISNE JUSTICE