Republic of South Africa

REPORTABLE
(pages 1-46 only)

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT
CAPE TOWN)

CASE NO. 11125/08

IN THE MATTER BETWEEN:

BRIAN MERVIN McMILLAN N.O.	
(in his capacity as Trustee of the McMillan Family Trust (IT 513/2007)	Applicant
and	
SIMON LESLIE POTT	First Respondent
GARRY OWEN	Second Respondent
KEVIN ERROL HOSKING	Third Respondent
STEPHEN WILLIAMS	Fourth Respondent
UNIPALM INVESTMENT HOLDINGS	
(PTY) LTD	Fifth Respondent
CORPORATE BUSINESS AUTOMATION	
(PTY) LTD	Sixth Respondent
TYGERBERG MINOLTA (PTY) LTD	Seventh Respondent

JUDGMENT

Delivered on 18 June 2009

BINNS-WARD AJ:

[1] Nearly a quarter of a century ago, a judge in the Chancery Division[1] remarked as follows about applications brought under the English equivalent[2] of s 252 of the South African Companies Act No. 61 of 1973:

> 'They often bear some resemblance to divorce petitions in the days before *Wachtel v Wachtel* [1973] 1 All ER 829, [1973] Fam 72.[3] Voluminous affidavit evidence is served which tracks the breakdown of a business relationship commenced in hope and expectation of profitable collaboration. Each party blames the other but often it is impossible, even after lengthy cross-examination, to say more than the petitioner says in this case, namely that there was a "clear conflict in personalities and management style". It is almost always clear from the outset that one party will have to buy the other's shares and it is usually equally clear who that party will be. The only real issue is the price of the shares.'

Regrettably, the papers in the current matter - which ran to more than 1350 pages – and the outcome of the assessment of their content bore fulsome testimony that the characteristics that the

---

[1] Hoffmann J (as he then was) in *Re a Company (No 004377 of 1986)* [1987] BCLC 94 at p.101.
[2] Section 459 of the 1989 English Companies Act (recently reintroduced in the currently operative 2006 English Companies Act as s 994).
[3] *Wachtel v Wachtel* was the joint judgment of Lord Denning MR, Phillimore and Roskill LJJ in the Court of Appeal in which, pursuant to the reform of the divorce law in terms of the Matrimonial Proceedings and Property Act, 1970, read with the Divorce Reform Act, 1969, it was held that it was no longer appropriate for judges to hear evidence of the parties' 'mutual recriminations and to go into their petty squabbles for days on end, as [they] used to do in the old days' and that fault in the breakdown of marriages should have no impact on the determination of the patrimonial consequences of the breakdown of a marriage unless it was 'both obvious and gross'.

English judge was moved to describe can manifest, just as painfully, in our own jurisdiction.

[2] Mr Brian McMillan ('McMillan') has applied in his capacity as the sole trustee of the McMillan Family Trust for an order that the Trust's shares in Tygerberg Minolta (Pty) Ltd (the seventh respondent, hereafter referred to as either 'TBM', or 'the company') be purchased at fair value, either by the majority shareholder, Corporate Business Automation (Pty) Ltd (the sixth respondent, hereafter referred to as 'CBA'); or by the directors or shareholders in CBA,[4] to whom it was originally contemplated that the 70 percent member's interest not to be held by McMillan or the Trust would be transferred in their own names.

[3] In 2006, at a time that he was employed by Canon as head of that company's corporate sales department, McMillan identified TBM as a personal investment opportunity. He was, however, unable, by himself, to afford the purchase consideration and therefore enlisted the interest of certain business colleagues, especially the first and second respondents, who were already in

[4] The first, second and fourth respondents are shareholders in CBA and the fifth respondent holds a proprietary stake in CBA through one of its subsidiaries. The first to fourth respondents appear to be directors of CBA.

business through the vehicle of CBA. An understanding between these parties was reached pursuant to which CBA (and nominally McMillan) concluded a written agreement with one Rowan Peacock for the purchase of the latter's one hundred percent shareholding in TBM and of TBM's business as a going concern.

[4] In terms of the underlying understanding between the co-investors (to whom for convenience I shall hereafter refer as 'the joint venturers') 30 percent of the issued share capital in TBM was to be allotted to McMillan, with the remainder to be divided in smaller percentages between the other joint venturers, save that a 28 percent holding in TBM was to be allotted to a black economic empowerment partner. The understanding between the joint venturers also contemplated that McMillan would be engaged in executive control of TBM as managing director, with each of the other envisaged shareholders being entitled to a representative on the board.[5] It was also understood that McMillan would be enabled, over time, to acquire from the other participants sufficient shares to

[5] The essence of this understanding was recorded in an email sent by the first respondent to McMillan, in April 2006, some two and a half months before the formal agreement for the purchase of the shares was executed on 14 July 2006. I regard this aspect of the understanding as quite distinguishable from the subsequent attempt by McMillan to formally entrench his position as a director in terms of the proposed shareholders' agreement. Had McMillan succeeded in this attempt it would not have been competent to remove him from the board. There is no question in this case that McMillan's removal from the company's board of directors was competently effected.

give him the majority interest in the company within five years. It seems clear to me that it was understood by all those involved in the acquisition of the company that it was to provide McMillan with not only a commercial investment, but also the primary means to earn his living in employment.

[5] Having acquired the company, McMillan and his fellow joint venturers were remarkably slow to formalise their business relationship in TBM. There was some discussion about settling the terms of a shareholders' agreement and draft documents were exchanged at various stages, but despite there being no indication that consensus could not have been reached nothing was ever signed. Similarly, notwithstanding the passage of more than eighteen months from August 2006, no shares in TBM had been formally allotted in terms of the understanding referred to earlier before there was serious falling out between McMillan and his fellow joint venturers in early 2008. As it happened, the share certificates were issued only in August 2008, some time after the institution of this application.[6]

[6] The relief sought in terms of the notice of motion was twofold: under the first head directions were sought for the registration of 30 percent of the shares in TBM in the name of the McMillan Family Trust; and under second head, equitable relief in terms of s 252 of the Companies Act.

[6] McMillan appears to have indicated for the first time in or about December 2006 that he wanted the 30 percent shareholding to which he was entitled in consideration for his having advanced R645 000 towards the purchase of the company[7] to be registered in the name of his family trust. At that stage the Trust had not yet been created. Similarly, differing ideas were expressed from time to time by the other joint venturers as to in what proportions, as between themselves, the rest of the shares should be divided and as to how they should be registered. The details are not important. It is sufficient to record that when eventually the shares were registered 30 percent were shown in the register to be held by the McMillan Family Trust and the rest in the name of CBA.[8]

The formulation of relief in that manner is acceptable in circumstances where no serious dispute can be expected about the applicant's entitlement to be registered as a member, but when such registration, which is a prerequisite to relief under s 252, has not yet occurred by the time it is considered necessary by the applicant to seek a remedy under s 252(3). Cf. *Barnard v Carl Greaves Brokers (Pty) Ltd and Others, Carl Greaves Brokers (Pty) Ltd and Others v Barnard, Barnard v Bredenhann and Others* [2008] 2 All SA 272 (C); 2008 (3) SA 663 (C) at para. [41].

[7] McMillan's contribution was part of the R2,15 million that fell to paid in cash for the acquisition of the company. The balance of the purchase consideration was to be paid in instalments over 42 months. The balance of the initial amount payable was paid by CBA. The instalments that have been paid so far have been paid 'from the bank account of CBA'. There is an unresolved dispute with Peacock about a reduction in the purchase price as a consequence of alleged breaches of warranty.

[8] As late as 3 March 2008, the third respondent, writing in his capacity as a director of CBA, requested McMillan to obtain the registration of shareholdings in the company as follows: 30% McMillan Family Trust, 28% Unipalm Investment Holdings (Pty) Ltd (the BEE partner, and itself, indirectly a substantial interest holder in CBA); 18,2% first respondent, 18,2% second respondent and 5,6% fourth respondent. (This represented an insignificant adjustment of the proportionate division of shares between first, second and fourth respondents indicated in the discussions on a shareholders' agreement.) By 7 March 2008, as will become apparent from

[7] Despite the tardiness of the joint venturers in formalising their relationship *inter se* in regard to ownership of the newly acquired company, McMillan immediately assumed the running of its business and conducted himself in that role under the title of managing director. The company letterheads also reflected McMillan as the managing director and the other joint venturers as directors – all this notwithstanding that no formal election of directors appears ever to have occurred.[9] It is common ground that the business of TBM was conducted under McMillan's control with very little interference by the other 'directors' until late 2007. All of this appears to have happened in accordance with the underlying understanding between the joint venturers, described earlier.

[8] CBA is in the same line of business as TBM. It appears to have been part of the original understanding between the joint venturers that TBM would source the products in which it traded through CBA, thereby gaining an advantage from certain discounts that CBA enjoyed from suppliers and was willing to share with TBM. It is evident that something in the nature of a symbiotic relationship

---

the further narrative of the facts, McMillan's joint venturers would appear to have decided that CBA should hold a 70% majority shareholding in the company.

[9] McMillan claims that the letterheads were prepared on this basis at the specific request of first, second and third respondents, but if this is so, he would appear to have acquiesced therein without demur.

must have been contemplated between CBA and TBM; it apparently having been contemplated that CBA, or its shareholders, would benefit from the marketing skills and public profile of McMillan, who had a marketing track record in the business and is well-known as a long-time former player in the national cricket team. For reasons which it is not necessary to go into, McMillan informed CBA in about April 2007 of his intention to source products for the company directly. McMillan ascribes this as an important cause of the breakdown in relations between the joint venturers, although contemporaneous correspondence calls this allegation into doubt. It is however not in dispute that there were considerable problems in reconciling the trading accounts in respect of dealings between CBA and TBM and, despite the differing contentions on the effect of this, I can safely find on the papers, considered in their totality, that this raised tensions between the joint venturers. It is fortunately not incumbent on me to resolve any remaining dispute as to which entity was ultimately indebted to the other, or in what amount.

[9] The rising tensions between the joint venturers manifested towards the end of 2007 with regard to two aspects of McMillan's management of TBM's affairs in particular. The first aspect was

McMillan's failure to provide his *de facto* co-directors with management accounts; and the other concerned the payment and accounting treatment by TBM of a very large commission to McMillan's son, who, along with McMillan's wife, was employed by the company.

[10] There is no evidence of significant discontent about the absence of management accounts until late 2007, and I have little doubt that the issue became critical in the context of the aforementioned questions concerning the reconciliation of the trading account between TBM and CBA. The other 'directors' had insisted, quite early, on electronic access to TBM's banking account for monitoring purposes and, after initial unconvincingly motivated resistance by McMillan, this had been granted. The insight into the company's finances afforded to them by means of this access appears to have sufficiently satisfied the other 'directors' until, in November 2007, two of them detected the large commission payment to McMillan's son.

[11] McMillan's explanation for the non-production of management accounts was that the accounting programme taken over when the company was acquired from Peacock was inadequate, and that

replacement software purchased on the recommendation of an independent accountant had failed to live up to expectations. He also claimed that the dispute on the inter-company trading account with CBA complicated the production of management accounts. I am inclined to accept the criticisms levied by Mr *Dickerson SC* (who, together with Ms *Du Toit* appeared for the respondents) at the plausibility of these explanations.[10] However, once again – as with virtually all of the mutually accusatory and recriminatory evidence with which the papers are, as mentioned, replete – it is unnecessary on the view I take of the case to determine the issue. Suffice it for present purposes to say that there can be no doubt about the joint venturers' entitlement, *qua de facto* co-directors, to the production of management accounts for their consideration, or about the fact that it was McMillan's responsibility, in the context of the aforementioned arrangements, to produce them. I consider that the co-directors were justified in their dissatisfaction with McMillan for having failed to provide any management accounts more than a year after taking over the helm at TBM; although it must be said that until the

[10] With reference to the management accounts eventually produced by McMillan in January 2008, Mr *Dickerson* submitted that the only item about which there could have been any possible difficulty, in the context of the explanation offered by McMillan, would have been the 'cost of sales'. There should have been no difficulty reporting the company's revenue and all items of administration expenses. Mr *Dickerson* also pointed to McMillan's explanation being contradicted by the ability of TBM management to draw a trial balance in April 2007.

resolution of the inter-company trading account dispute the content of such accounts would no doubt be contentious.[11]

[12] It was common ground that McMillan's permitted personal drawings on the company were limited to his agreed remuneration package as the manager of the company's business. He was not entitled to commission on business secured for the company by dint of his marketing work. The respondents contend that the contract concluded by TBM with Rohlig Grindrod, in respect of which McMillan's son received a commission of R478 173,25, was the result of McMillan's initiative, and not that of his son. This does not seem to be seriously disputed by McMillan. McMillan has sought to justify the payment of the commission on the basis that the work done by his son to resolve certain technical problems, after delivery of the equipment in question to Rohlig Grindrod, had been essential to save the concluded contract from cancellation. The commission was not treated in the company's accounts in the usual manner. It was journalised in a suspense account. This, according to McMillan, was because it remained uncertain that the contract in

[11] Ms. Christine du Toit, a chartered accountant in the partnership appointed as the company's accountants and auditors in early 2007 made a supporting replying affidavit averring that McMillan had pressed for the production of management accounts from April 2007, but that meaningful accounts could not be produced until the reconciliation of the inter-company trading account had been completed.

question would survive. One wonders, if that was indeed the case, why the commission had been paid to McMillan's son at a time when his entitlement to keep it, even on McMillan's version, was still in doubt. I am unable on the papers to determine the merits of the issue, but I can understand why the transaction should have given rise to some disquiet on the part of McMillan's co-'directors'.

[13] The two issues just discussed - and perhaps also, to a lesser degree, other matters that it serves no purpose to describe – made McMillan's co-'directors' determine to introduce a tighter system of financial control by the 'board' over the company's affairs. They acted somewhat ineptly in seeking to achieve this.

[14] On 6 February 2008, McMillan received a notice by the first respondent calling a meeting of the company's 'directors' for Wednesday, 13 February 2008 at the offices of CBA. According to the agenda incorporated in the notice, the matters for attention at the meeting were 'Bank account administration', including 'approval of proposed changes to authorised signatories' and 'management accounts'. The meeting had clearly been determined upon in order to put in place measures to address the areas of concern that had come to the fore between McMillan and his co-'directors' towards

the end of 2007. McMillan responded to the convening of a meeting of ‘directors’ by writing to the first respondent on 12 February 2008 pointing out that no allocation of shares between the joint venturers had occurred consequent upon the purchase of the shareholding from Peacock and that there had therefore been no appointment of directors of the company. He expressed the view that any resolutions that might be adopted at the proposed board meeting would therefore be ‘null and void’. McMillan maintained that priority should be given to the registration of the respective shareholdings and the formal conclusion of a written shareholders’ agreement, pursuant whereto, he suggested, a proper appointment of directors might then occur. Considering that he had held himself out as the managing director and conducted the business of the company using stationary reflecting the first, second and third respondents as directors of the company for well over a year, McMillan’s response in the circumstances was, to say the least, opportunistic. It is apparent that McMillan’s reaction was in fact inspired by his concern about the clearly signalled intention by his co-‘directors’ to rein in the relatively unfettered control over the company’s management that he had up to then enjoyed.

[15] McMillan's belated and somewhat contrived insistence on proper compliance with the statutory requirements had consequences. The first and second respondents drew the attention of the company's bankers to the fact that the company had no validly appointed directors. In this regard the respondents must have purported to act as *de facto* directors of the company or shareholder representatives. There was no other basis on which they could have intervened in the manner they did. It would appear from the tenor of the bank's reply, which was in the form of an email addressed jointly to the first respondent and the 'CBA Group', that the first and second respondents must have appreciated that the consequence of their approach to the bank would be that a hold would be placed on the operation of the account until the requisite formalities had been complied with.[12] I must accept the respondents' explanation that they acted in this manner with the regularisation of the company's corporate governance in mind. An element of hostility towards McMillan, no doubt arising from the

[12] The email, dated 18 February 2008, read:

> '*Your letter dated 15 February 2008 …refers.*
>
> *We confirm that, in the light of the information and documentation provided, the Bank will place a hold on the above-mentioned account until the matter has been resolved between all parties and the new directors appointed, and the Bank has been provided with amended company records, and new signing instructions with valid resolution* (sic) *of the newly appointed directors.*'

(The first respondent has no recollection of having written to the bank on 15 February 2008 and has not been able to find a copy of any such letter. He thinks that the bank's officials might have had in mind the conversation he had with them on that date. Nothing turns on this.)

issues described earlier, nevertheless characterised the action. This was apparent from the absence of any prior notice thereof to McMillan, who plainly had a material and practical interest in being able to operate the banking account in his capacity as the day to day manager of the company's business in terms of the founding understanding between the joint venturers. As it happened, McMillan - also without notice to his co-directors –managed, after threatening litigation against the company's bankers, to re-establish the operation of the bank account.

[16] In the meantime, having arranged for the provision of the necessary documentation to enable the registration of shares and the formal appointment of directors of the company, the first respondent gave renewed notice of a meeting of directors to be held on 27 February 2008.

[17] It bears mention that whereas the requisite documents to obtain registration of shares and confirmation as appointment as a director were forwarded by the respondents' attorney to McMillan on 20 February, the Registrar of Companies had already on the previous day confirmed receipt and acceptance of notification of the appointment of first, second and third respondents as directors of

the company. It is not clear on the papers how these appointments came about – there is no evidence of there having been any meeting of shareholders for the purpose of appointing directors. The overwhelming probability is that the formal appointment of McMillan and the first to third respondents to the board was addressed pragmatically on the basis of the original understanding between the joint venturers, described earlier, which attended the acquisition of the shares from Peacock.

[18] The agenda for the 27 February board meeting was the same as that for the aborted meeting of 13 February, save that items related to payment of ‘salaries and creditors’ and a ‘forensic audit’ had been added. In context, it seems clear that it was intended by McMillan’s co-directors under those rubrics to address the issue of inter-company trading accounts between TBM and CBA and the other joint venturers’ concerns about McMillan’s alleged mismanagement of the company’s finances for his own personal benefit and that of some of his family members. That the exclusion of McMillan from the company, albeit possibly on agreed terms, was under consideration before the 27 February meeting emerges from a letter written by the respondents’ attorneys to McMillan’s attorney

on 26 February in which McMillan was advised that he 'was at liberty to propose a strategy involving the purchase of his shareholding… subject to the findings of the proposed forensic audit'. Written confirmation was sought from McMillan that he would be 'amenable' to 'a buy-out'.[13] McMillan was also requested to take paid leave of absence from his position as managing director while the forensic audit was conducted.

[19] At the board meeting on 27 February, resolutions were adopted that had the effect of removing McMillan's wife's signing powers on the company's banking account[14] and making McMillan's signing powers subject to the co-signature of the first respondent. McMillan's dissatisfaction with these changed arrangements manifested in his failure to sign the amended bank mandates and in a letter from his attorney in which he demanded of his fellow directors that he be retained as a co-mandatory signatory to the

[13] This statement was made in a response to a letter from McMillan's attorney dated 25 February 2008, which recorded, amongst other things, that '*It is now common cause that our respective clients can no longer work together and that a parting of ways must occur sooner rather than later….Dependant upon the parties' ability to negotiate a way forward, which is going to, as a matter of necessity involve the purchase and sale of equity to the exclusion of either one of our clients, liquidation proceedings would appear to be imminent, however, we call upon all parties concerned to exercise calm so as to resolve this particular matter and allow the company to continue with its trade unhindered.*'

[14] McMillan's wife had been an authorised signatory on the bank account because of her position as the company's financial manager. The precise characterisation of Mrs McMillan's post and the authorised level of her remuneration were also in issue between the parties.

company bank account. McMillan was also aggrieved at his exclusion from any say in the appointment of a forensic auditor.

[20] On 7 March 2007, CBA gave notice to the board of TBM to call a shareholders' meeting to resolve on the immediate removal of McMillan as a director of TBM. The notice was given by CBA, *qua* shareholder, consequent upon a resolution by the board of CBA. The notice was addressed by the third respondent *qua* director of CBA to the first respondent in his capacity as a director of TBM. The notice by CBA reflected that the first to fourth respondents were directors of CBA. As mentioned, the first to third respondents had also by that stage been formally appointed as directors of TBM. These events reflected a move towards a take over by CBA and/or its directors of effective managerial control of TBM.

[21] On 18 March 2008, CBA launched proceedings in this Court, without notice to McMillan, in which interdictory relief was sought prohibiting McMillan from entering the company's premises and from accessing or removing any company information. (McMillan came to hear of the application and eventually succeeded in having it dismissed.) On 19 March 2008, the first respondent, presumably purporting to act in his capacity as one of the company's directors,

gave instructions to the company's internet service provider to disconnect all remote access to the company's network, thereby depriving McMillan, who at that time was still on any account a director of the company, from the access that he had up to that time been able to exercise from his home computer. This conduct was explained by the respondents as having been inspired by their concerns arising from information obtained by them that McMillan was sabotaging TBM internally, preparatory to the establishment by him of a new business in competition with TBM and CBA.

[22] McMillan was removed as a director of the company at a shareholders' meeting held on 31 March 2008. At the same meeting it was also decided to suspend McMillan as an employee of the company pending a disciplinary enquiry into an allegation of 'breach of trust' and to appoint Mr David Black of A&R Corporate Finance and Forensic Service Division to conduct a forensic investigation into the affairs of TBM.

[23] McMillan did not attend the shareholders' meeting of 31 March 2008. In fact it would appear that on that date he applied in the name of Brian Promotions CC for facilities to enable that close corporation to become a dealer in Konica Minolta products as part

of an office automation business that would trade in competition with TBM and CBA.

[24] Disciplinary proceedings against McMillan and his wife culminated in their dismissal as employees of the company at the end of April. The dismissal was recommended by the attorney in charge of the proceedings because he found there to have been a complete breakdown in mutual trust and confidence between employer and employee. McMillan and his wife did not appear at the disciplinary enquiry and contented themselves with putting in the affidavits filed in answer to the interdict application by CBA referred to above.[15] I do not attach any importance to the disciplinary proceedings or their result; any notion that McMillan would have continued in the employ of the company after it had become clear that he was to be removed from the board of directors was fanciful – as indeed confirmed by the steps taken by him from early March to set up a competing business. I have mentioned the proceedings merely to complete the narrative.

[15] At para. [21].

[25] Section 252 of the Companies Act provides insofar as relevant:

> '(1) Any member of a company who complains that any particular act or omission of a company is unfairly prejudicial, unjust or inequitable, or that the affairs of the company are being conducted in a manner unfairly prejudicial, unjust or inequitable: to him or to some part of the members of the company, may, subject to the provisions of subsection (2), make an application to the Court for an order under this section.
>
> (3) If on any such application it appears to the Court that the particular act or omission is unfairly prejudicial, unjust or inequitable, or that the company's affairs are being conducted as aforesaid and if the Court considers it just and equitable, 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 future conduct, of the company's affairs or for the purchase of the shares of any members of the company by other members thereof 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.'

[26] Mr *Dickerson* contended that McMillan had failed to make out a case for relief in terms of s 252 of the Companies Act.

[27] In the first place, argued Mr *Dickerson* – perhaps encouraged by my having taxed the applicant's counsel on the point – McMillan had failed to demonstrate that any particular act or omission of the company, or any incidence of the conduct of its affairs had been unfairly prejudicial, unjust or inequitable to the Trust (as distinct from McMillan personally). In this regard it was emphasised that it was

the Trust,[16] and not McMillan personally, that was the member of the company; and that seeking relief in terms of s 252 was a member's remedy. It was submitted that he could not treat himself effectively as the *alter ego* of the Trust for the purposes of satisfying the requirements of s 252(1) of the Act. The argument proceeded that McMillan's exclusion from the company did not prejudice the Trust's proprietary interest; there was nothing to prevent it from nominating somebody other than McMillan to represent its interests on the company's board of directors.

[28] Mr *Goodman* SC, who (with Mr *Acton*) appeared for the applicant, argued on the other hand that, having regard to the relationship between the interests of McMillan and the Trust and the circumstances in which the Trust had come to be a registered shareholder, it would be 'the height of technicality' and quite incongruous with the equity based remedial objects of the statutory provision to draw too nice a distinction between McMillan and the Trust. Mr *Goodman* submitted that it was clear that the Trust held its shares in the company only on the basis that McMillan had entered into the joint venture, namely the understanding that he

[16] More accurately, McMillan *qua* trustee on behalf of the Trust.

would have managerial control of the day to day running of the company's business and would be employed by it in a capacity ordinarily designated as that of managing director.

[29] In my judgment there is considerable cogency in the considerations urged by the applicant's counsel. It is indeed clear that McMillan participated in the joint venture and advanced his capital contribution for the purchase of the issued shareholding in the company only on the basis that this would provide him with employment and the opportunity to 'grow' the company's business, primarily for his own benefit. His later decision to establish the McMillan Family Trust and to direct that the 30 per cent interest he was entitled to in the company should be registered in the Trust's name did not affect the essential basis of his initial investment and continued participation in the joint venture. Likewise, the basis on which the Trust obtained and held its shares in the company was indistinguishable from McMillan's joint venture involvement in the company. The Trust had no commercial reason to continue to hold shares in TBM if McMillan was not to be a director of the company and in charge of the day to day running of its business.

[30] The reasoning of Robert Walker J (as he then was) in *R&H Electric Ltd v Haden Bill Electrical Ltd* [1995] 2 BCLC 280 affords support, by analogy, for the approach contended for by Mr *Goodman*. The relevant part of the judgment in *R&H Electric* was subsequently referred to with approval by five Lords of Appeal in Ordinary constituted as the Judicial Committee of the Privy Council in *Gamlestaden Fastigheter AB v. Baltic Partners Ltd & Ors (Jersey)* [2007] 4 All ER 164 (PC); [2008] 1 BCLC 468.[17] The approach is adequately illustrated by quoting their Lordships' treatment (per Lord Scott of Foscote) of the *R&H Electric* case at paras. [30] –[31] of *Gamlestaden Fastigheter*:

> '30. This was a case where the applicant for section 459 relief was, of course, a shareholder in the company but, via another company that he controlled, had also provided working capital to the company. He was removed by the majority shareholders from any management role and accordingly applied under section 459 for an order requiring the majority shareholders to purchase his shares and, alternatively, petitioned for the company to be wound up on the just and equitable ground. One of the grounds relied on by the majority shareholders for resisting any section 459 relief was that the applicant's "only real involvement was as an agent for [the other company] which was a loan creditor, not a shareholder …; therefore … there was no prejudice to [the applicant] in his capacity as a shareholder." As to this point Robert Walker J said this:

[17] The opinion of the Privy Council is accessible on the internet at http://www.bailii.org/uk/cases/UKPC/2007/26.html .

> "If [the applicant] himself had been [the company's] loan creditor, under arrangements made between him and the majority shareholders when the company was first being planned, I should have had little hesitation in coming to the conclusion that the arrangements were a reflection of, and sufficiently closely connected with, [the applicant's] membership of [the company] as to be within the scope of s.459."

Robert Walker J then addressed the question whether the fact that the loan creditor was not the shareholder applicant, but was the other company that he controlled, mattered. He concluded that it did not:

> "On the whole I have come to the conclusion that I should not treat the separateness of [the applicant] and [the other company] as excluding him from seeking relief under s.459 on the basis that [the other company's] loans to [the company] were procured by [the applicant] and formed part (and an essential part) of the arrangements entered into for the venture to be carried on by that company."

In the outcome the judge made an order for relief under section 459. He ordered that the applicant's shares be purchased by the majority shareholders at a fair value and that the loans from the applicant's other company be repaid as soon as reasonably possible.

31. Robert Walker J's approach in the *R&H Electric Ltd* case commends itself to their Lordships….'

[31] The Privy Council supported its advice with reference to the following *dicta* from other cases, some of which had been cited by Robert Walker J in *R&H Electric*:

> 'Thus, in *re a Company* (No.08477 of 1986) BCLC 376 at 378, Hoffmann J as he then was, commenting on the proposition that section 459 should be limited to conduct unfairly prejudicial to the interests of members as members and could not extend to conduct prejudicial to other interests of members, said that

> *"… the application [of the proposition] must take into account that the interests of a member are not necessarily limited to his strict legal rights under the constitution of the company. The use of the word 'unfairly' in s.459, like the use of the words 'just' and 'equitable' in s.517(1)(g) enables the court to have regard to wider considerations*."

In *re Macro (Ipswich) Ltd* [1994] 2 BCLC 354, Arden J (as she then was) said that

> *"… the jurisdiction under s.459 has an elastic quality which enables the courts to mould the concepts of unfair prejudice according to the circumstances of the case".*

In *re Little Olympian Each-Ways Ltd* [1994] 2 BCLC 420 at 429 Lindsay J said that

> *"… in point of jurisdiction the wide language of ss.459 and 461 is not to be cut down.*"

And in *O'Neill v Phillips* [1999] 1 WLR 1092[18] at 1105 Lord Hoffmann said that

> *"As cases such as R&H Electric Ltd v Haden Bill Electrical Ltd [1995] 2 BCLC 280 show, the requirement that prejudice must be suffered as a member should not be too narrowly or technically construed."*[19]

[32] Adopting the approach contended for by Mr *Goodman*, which commends itself as eminently sensible in pragmatically furthering the objects of s 252,[20] I have concluded that the exclusion of McMillan from the business is as relevant and pertinent to the Trust's position *qua* member of the company, as it would have been had McMillan himself, in his personal capacity, been the member.

---

[18] Also reported, inter alia, at [1999] 2 All ER 961 (HL) and [1999] 2 BCLC 1. (The passage in question is at p.973h of the All ER report.)
[19] See *Gamlestaden Fastigheter* at para. 35.
[20] Our courts have historically approached s 252 and its predecessor, s 111*bis* of the 1926 Companies Act on the basis of construing the provision in a manner as would advance the remedy rather than limit it. See *Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd: SA Mutual Life Assurance Society Intervening* 1979 (3) SA 713 (W) at 719H.

[33] In *O'Neill and Another v. Phillips and Others*, supra, at part 6 s.v. '*Legitimate expectations*',[21] Lord Hoffmann, referring to his earlier judgment in *In re Saul D. Harrison & Sons Plc*. [1995] 1 BCLC 14; [1994] BCC 475 reiterated that in a case in which '*shareholders have entered into association upon the understanding that each of them who has ventured his capital will also participate in the management of the company… it will usually be considered unjust, inequitable or unfair for a majority to use their voting power to exclude a member from participation in the management without giving him the opportunity to remove his capital upon reasonable terms.*'[22] In acknowledging the principle it is, however, important to distinguish its operation from the case where an unhappy member in a closely held (or as it sometimes called, 'quasi-partnership') company seeks at will to require his or her fellow shareholders to

[21] In *O'Neill v Phillips* Lord Hoffmann regretted his use of the term '*legitimate expectation*' in *Re Saul D. Harrison*, and made it clear that he did not mean thereby to connote anything more than what was already well established consistently with the import of the statement of equity based principle by Lord Wilberforce in *Re Westbourne Galleries* [1973] AC 360 in the passage quoted in para. [34] of this judgment, below. The label has nevertheless subsequently been widely adopted in judgments in 'oppression' cases.

[22] At p.970e of the All ER report. This is consistent with the statement by Galgut AJA in *Donaldson Investments (Pty) Ltd v Anglo-Transvaal Collieries Ltd* 1983 (3) SA 96 (A) at 111G that in applications in terms of s 252 of the Companies Act '..*the effect of the challenged conduct is the real issue*'. In summarising the applicable principles, the English Court of Appeal stated in *Grace v Biagioli & Ors* [2006] BCC 85, [2005] EWCA Civ 1222, [2006] 2 BCLC 70 at para. 61: '*Although it is impossible to provide an exhaustive definition of the circumstances in which the application of equitable principles would render it unjust for a party to insist on his strict legal rights, those principles are to be applied according to settled and established equitable rules and not by reference to some indefinite notion of fairness…. A useful test is always to ask whether the exercise of the power or rights in question would involve a breach of an agreement or understanding between the parties which it would be unfair to allow a member to ignore. Such agreements do not have to be contractually binding in order to found the equity.*'

purchase that member's shares simply by declaring that mutual trust and confidence between the shareholders has broken. Lord Hoffmann's observation that 'there is no support in the authorities for such a stark right of unilateral withdrawal' holds true in our own jurisprudence.[23]

[34] The applicable principle was eloquently expressed by Lord Wilberforce in *Re Westbourne Galleries* [1973] AC 360[24] at p. 379B (which was a winding up application on just and equitable grounds):

> 'The "just and equitable" provision does not… entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights or to exercise them in a particular way.'

which, in the current context, may usefully be read with the gloss thereon by Hoffmann LJ (as he then was) in *Re Saul D Harrison &*

---

[23] Cf. e.g. *Cuninghame and another v First Ready Development 249 (Association incorporated in terms of section 21)* [2008] 4 All SA 88 (C) at para. [54]; *Kanakia v Ritzshelf 1004 CC t/a Passage To India and Another* 2003 (2) SA 39 (D) at 46D-F; *Robson v Wax Works (Pty) Ltd and Others* 2001 (3) SA 1117 (C)*;* [2001] 3 All SA 546 (C) at para. [36]; and *Emphy and Another v Pacer Properties (Pty) Ltd 1979 (3) SA 363(D)* at 369A (these were all winding up applications) and *Garden Province Investment v Aleph (Pty) Ltd 1979 (2) SA 525 (D) at 535*.

[24] Also reported at [1972] 2 All ER 492 (HL).

Sons plc, supra,[25] (which was an application in terms of s 459 of the then applicable English Companies Act):

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

In *Grace v Biagioli & Ors*,[26] Patten J (sitting in the Court of Appeal, with Mummery and Mance LLJ) expressed the position thus:

> 'It is not enough merely to show that the relationship between the parties has irretrievably broken down. There is no right of unilateral withdrawal for a shareholder when trust and confidence between shareholders no longer exist. It is, however, different if that breakdown in relations then causes the majority to exclude the petitioner from the management of the company or otherwise to cause him prejudice in his capacity as a shareholder.'[27]

---

[25] At p. 490 of the BCC report.
[26] See fn.22.
[27] At para. 61(6).

In this regard I venture it may often be significant in a given case concerning a so-called quasi-partnership company whether the applicant for relief in terms of s 252 has been pushed overboard, or just seeks to abandon ship.

[35] Mr *Dickerson*, pointing to evidence that McMillan had commenced with steps to establish his own business in competition with TBM some weeks before his removal from the board and had launched that business while still officially as an employee of TBM (albeit on suspension), argued that McMillan had chosen of his own will to exclude himself from the management of the company rather than being pushed out. While the evidence affords some superficial support for that analysis, the argument does not bear close scrutiny. As mentioned, signs of an intention by the majority to materially curb McMillan's role in the management of the business and even to encourage him to leave manifested during February 2008; these were subsequently underscored by the notice given shortly thereafter of an intention to remove him as a director. Having regard to the respective shareholdings of the protagonists, the inevitability of McMillan's removal from his executive role in the company would have been evident well before the completion of the

attendant formalities late in March and into April. I therefore accept the essential validity of Mr *Goodman's* contention that McMillan had been 'constructively' excluded with effect from 7 March 2008.

[36] Relying on the manifold allegations made by the respondents in the papers of managerial misconduct against McMillan, all of which were disputed, Mr *Dickerson* submitted that the company's shareholders acted entirely within their rights in removing McMillan from his office as a director.[28] On the assumption for present purposes, mindful that I am dealing with the matter on paper, that the allegations against McMillan were not unfounded, the correctness of Mr *Dickerson's* contention in this regard must be accepted. It nevertheless does not follow that it was fair or equitable in circumstances in which the joint venturers, including McMillan, had acquired their interest in the company - namely, on the understanding that McMillan would be employed by and in day to control of the company - for the removal to happen, even if it was

[28] The respondents' written submissions placed considerable emphasis on the trite rule that the minority is bound by the decisions of the prescribed majority of shareholders if those decisions are arrived at in accordance with the law (*Sammel and Others v President Brand Gold Mining Co Ltd* 1969 (3) SA 629 (A) at 678H; *Ben-Tovim v Ben-Tovim* 2001 (3) SA 1074 (C) at 1092F). The argument begs the question however. The existence of the remedy in terms of s 252 is to allow the strict legal consequences of the member's position vis à vis the company to be circumvented in the circumstances described in s 252(1) of the Companies Act.

done on good cause, without an attendant offer by the majority to allow McMillan to remove his capital on reasonable terms.

[37] In the current case there were indications at various times by the majority interest holders that they were prepared to buy out the Trust's interest in the company at market value as soon as a forensic investigation had confirmed the status of the company's affairs, including the substance or otherwise of the allegations that McMillan and his family had benefited from certain allegedly unauthorised payments by the company. However, notwithstanding the completion of the forensic audit by Black that was commissioned by the directors after McMillan's removal from office, nothing has been done by the majority shareholder to acquire McMillan's shareholding. In addition, when the shares in the company were eventually formally allotted in or about August 2008, they were not divided amongst the individual joint venturers and the BEE investor, as originally contemplated, but instead all the shares not allotted to the Trust were registered in the name of CBA. This had the result of making TBM a subsidiary company of CBA, thereby bringing about a situation more removed than ever from the basis of understanding

on which McMillan and his fellow joint venturers had entered into their business relationship through the acquisition of the company.[29]

[38] If there were merit in the allegations against McMillan, this might, depending on their effect on the company's value, have entitled the majority shareholder(s) to take the factors involved into account in reasonably determining the terms on which they would give the Trust the opportunity to redeem its shares. What has happened, however, in the context of the manifestly terminal fracture of the mutual understanding on which the shareholders placed their investments in the company, is that the majority interest has done nothing to advance the withdrawal of the McMillan interest, and has even argued at the hearing that there is nothing unfair about the Trust being made no offer at all on the grounds that McMillan, *qua* trustee, should be content to nominate a replacement director to represent the Trust on the board of directors.[30]

---

[29] Mr *Dickerson* submitted that it was not a matter of great moment who the actual shareholders turned out to be. I do not accept that is entirely correct. The understanding between the joint venturers contemplated that McMillan would control the single largest block of shares and that the other non-BEE shareholders would between them hold a minority of the shares. The registration of all the shares not held by McMillan interests in CBA brought about a materially different corporate structure, placing TBM directly under the former's control.

[30] It is unarguable that the practical consequences of the removal of McMillan from the board are not significant, if regard is had to the underlying understanding in terms of which the Trust came to hold its shares in the company. A shareholder is not entitled to sight of the minutes of directors' and managers' meetings maintained in terms of s 242; nor, unless the articles of association otherwise provide, is he or she entitled to inspect the accounting records of first

[39] In my judgment the respondents' attitude in failing, within a reasonable time[31] of McMillan's exclusion from the management of the company, to afford the Trust the opportunity to remove its capital constitutes an act or omission by the company that, in the circumstances described, is unfairly prejudicial, unjust or inequitable to the Trust within the meaning of s 252(1) of the Companies Act.

[40] A basis to claim relief in terms of s 252 inured in the circumstances even if it is accepted that McMillan had been wholly or in part to blame for his removal from the board and dismissal from employment. The prejudicial unfairness or inequity lies not in the legally justifiable exclusion of the affected member from the company's management, but in the effect of the exclusion on any such member - who had become a member only on the understanding that he or she would have an actively participative

---

entry maintained by the company in terms of s 284 of the Companies Act (*Clutchco (Pty) Ltd v Davis* [2005] 2 All SA 225 (SCA) at para.14).

[31] It would have been arguable in this case that a 'reasonable time' would have allowed for a sufficient interval for the majority member, or the board of the company to receive and consider the forensic report that had been commissioned. I do not consider that it is necessary to determine whether a reasonable time had elapsed by the time the application was launched on 10 July 2008. There is much to be said for the approach preferred by Hamilton J (in regard to the Australian equivalent of s 252 – i.e. ss 232-3 of the Corporations Act, 2001) in *Bessounian v Australian Wholesale Mortgages Pty Ltd* [2007] NSWSC 35 at para. [7]: *'…it would make little sense if an order could be made if the oppression were established to exist at the time of the commencement of proceedings, but had ceased to exist when the order came to be made. The logicality of this view was commented on by Heath J in* [*Jenkins v Supscaf Pty Ltd* (2006) 3 NZLR 264] at [103]. *It is not necessary to decide in this case whether the oppression must be established to have existed also at the commencement of the proceedings, although I rather incline to the view that that is not necessary, if oppression at the time of order is established.*'

role amounting to employment by the company - if a reasonable basis is not offered in the circumstances for a withdrawal by the member of his or her capital.[32] The issue of fault should, in general, not negate the right of a so-called quasi-partner member to relief under s 252 when such member has been excluded by the other members from the direct participation in the management of the company contemplated when the member's investment in the company was made.[33] Having regard to the equitable nature of the remedy, and the attendant wide ambit of the judicial discretion to grant or withhold it on terms appropriate to the peculiar characteristics of the given case[34] there is no compelling reason

---

[32] In *O'Neill and Another v. Phillips and Others*, supra, at p.975c-d of the All ER report, Lord Hoffmann noted that '*The Law Commission (Shareholder Remedies (Law Com. No. 246) (1997) (Cm. 3769), paras. 3.26-56) has recommended that in a private company limited by shares in which substantially all the members are directors, there should be a statutory presumption that the removal of a shareholder as a director, or from substantially all his functions as a director, is unfairly prejudicial conduct. This does not seem to me very different in practice from the present law*.' The correctness of Lord Hoffmann's observation that the Law Commission's recommendation in essence represented no advance on the law as administered is perhaps borne out by the fact that s 459 of the 1989 English Companies Act remains essentially unaltered in s 994 of the currently operative 2006 Companies Act. (The object of the Law Commission established under the Law Commissions Act, 1965, is to promote the reform of the law of England and Wales.) Section 994(1) provides:

> '*(1) A member of a company may apply to the court by petition for an order under this Part on the ground—*
> *(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or*
> *(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.*'

[33] Cf. the observation by Nourse J (as he then was) in *Re London School of Electronics Ltd* [1986] Ch 211 at 221-2 (and at [1985] 1 BCC 99,394 at 99,400] that '*there is no independent or overriding requirement that … the petitioner should come to court with clean hands*'. See also *Grace v Biagioli & Ors* supra (fn. 22) at para. 77.

[34] See *Robson v Wax Works (Pty) Ltd, supra* (fn.23) at para. [53] and *Bader and Another v Weston and Another 1967 (1) SA 134 (C)* at 147E-148F (the latter with reference to s111*bis* of the 1926 Companies Act).

why fault on the part of the applicant should as a rule preclude the grant of relief in terms of s 252. There may of course be cases in which the excluded member's fault might be so gross, in the context of its effect on the company or its other members, as to render the member's exclusion without an offer of redemption neither prejudicial, nor unjust nor inequitable; or may lead the court to conclude that it is not just and equitable to afford a remedy,[35] but those instances will, I would imagine, be exceptional.

[41] The reasons for the application of the 'clean hands' principle in winding up applications on just and equitable grounds do not, in my view, find foundation in s 252 applications. The difference lies in the fact that in the former type of case the court is 'faced with a death sentence decision dependent on establishing just and equitable grounds for such a decision', whereas in the latter the 'court is more in the position of a medical practitioner presented with a patient who is alleged to be suffering from one or more ailments which can be treated by an appropriate remedy applied during the course of the continuing life of the company'.[36] Clearly a party which is itself to blame for the unsatisfactory situation of the company should not

[35] Cf. *Re London School of Electronics Ltd*, supra (fn.33) loc cit.
[36] Per Mummery J (as he then was) in *Ex parte Estate Acquisition and Development Ltd.* [1991] BCLC 154 at 161.

readily be allowed to obtain its winding up in circumstances in which the majority of members wish to continue with it; *non constat*, however, that a member who might have misbehaved in a relevant sense should on that account be excluded from the actively participative role that it was initially understood would attach to that member's holding of the shares without being given an opportunity to withdraw its capital on reasonable terms.

[42] Mr *Dickerson* also sought to make much of the lack of clarity in the founding papers as to whether the conduct relied upon by the applicant arose out of the conduct of the company's affairs or those of CBA. Mr *Goodman* did argue in this regard that part of the prejudicial conduct of the company's affairs manifested in the majority of the company's directors –who, it will be recalled, were also directors of CBA - acting with the interests of CBA rather than those of TBM in mind. In view of the narrow basis upon which I am inclined to determine the matter, namely the exclusion of McMillan - which clearly was the consequence of a determination, initially, by a majority of the company's directors and, in relation to his removal from the board, latterly, by the company in general meeting - it has not been necessary to deal with the contentions advanced in this

respect. In considering the argument, however, I found it instructive to discover that there is a body of authority that the expression 'the affairs of a company' in the relevant context is 'extremely wide and should be construed liberally'. See *Gross v Rackind* [2005] 1 WLR 3505[37] at paras. [21]-[32] (per Sir Martin Nourse sitting in the Court of Appeal[38]) and *Re Grandactual Ltd,* [2006] BCC 73[39] at paras. 23 - 29. These and certain other cases in point were considered by Lewison J in *Hawkes v Cuddy & Ors* [2007] EWHC 2999 (Ch)[40] at paras. 207 – 214. Summarising the effect of the discussion of the relevant law by Sir Donald Rattee in *Re Grandactual*, the learned judge said '*If company A controls company B then the affairs of company B can count as the affairs of company A, and vice versa. This has the merit of a simple and straightforward test. Commonality of directors is also an important feature.*' This observation was qualified by an emphasis that '*There is no absolute rule that the affairs of one company cannot count as the affairs of another; but the question is fact-sensitive. In looking at the facts,*

[37] Reported sub nom *Re Citybranch Group Ltd, Gross and others v Rackind and others* in 2004 4 All ER 735 (CA), and at [2005] BCC 11.
[38] Approving the observations to that effect of Powell J in the New South Wales Supreme Court in *Re Dernacourt Investments Pty Ltd, Baker Davis Supply Co Pty Ltd v Dernacourt Investments Pty Ltd* (1990) 2 ACSR* 553 at 556; (1990) 20 NSWLR 588, following the judgment of the Queensland Supreme Court in *Re Norvabron Pty Ltd (No 2)* (1986) 11 ACLR 279. (*Australian Corporations and Securities Reports)
[39] Sometimes cited as *Hough & Ors v Hardcastle & Ors* [2005] EWHC 1415 (Comm).
[40] The judgment is reported on the BAILII website at http://www.bailii.org/ew/cases/EWHC/Ch/2007/2999.html .

the court must look at the business realities and must not adopt a narrow, legalistic view.' The soundness in principle of such an approach was very recently again endorsed by the Court of Appeal in *Hawkes v Cuddy & Ors* [2009] EWCA Civ 291[41] at para. 50. I should mention that the reasoning of Corbett J (as he then was) in *Bader and Another v Weston and Another* 1967 (1) SA 134 (C) at 147 – 148F appears to me to reflect a very similar philosophy to that illustrated in the English authorities to which I have referred in this paragraph.

[43] In regard to the requirements of s 252(1), it remains only to consider one additional submission by Mr *Dickerson* as to why the Trust should be refused a remedy under s 252. Relying on *Re a company (No 006834 of 1988), ex parte Kremer* [1989] BCLC 365, counsel contended that it was incumbent on the applicant to prove that the provisions of the articles of association did not afford an adequate basis for the applicant to withdraw its capital without any necessity for the court's intervention. In *ex p. Kremer* Hoffmann J

[41] The judgment is reported on the BAILII website at http://www.bailii.org/ew/cases/EWCA/Civ/2009/291.html .

stated (at p.367e):

> 'The principle to be derived from the cases is that when it is plain that the appropriate solution to a breakdown in relations is for the petitioner to be able to sell his shares at a fair price and the articles contain provisions for determining a price which the respondent is willing to pay or the respondent has offered to submit to an independent determination of a fair price, the presentation or maintenance of a petition under s 459…will ordinarily be an abuse of the process: see *Re a company (No 003096 of 1987)* 4 BCC 80, and the earlier cases referred to.'

[44] In the absence of any evidence by either side as to the relevant content of the company's articles of association, it is difficult to find any substance in the point. Assuming, however, in favour of the respondent, that the articles are in accordance with the *pro forma* articles for private companies in Table B of schedule I to the Companies Act,[42] the indications on the papers are that the majority would not have been co-operative in facilitating the disposal of the Trust's shares on this basis. This much may be inferred from their reluctant disclosure, only under pressure, of the forensic report prepared by Black[43] and their failure to follow through on early tokens of a willingness to acquire the Trust's shares at fair value determined with regard to the results of the forensic investigation by

[42] Mr *Dickerson* referred me to articles 21-24 in Table B.
[43] Black's forensic report was not put in evidence, but it would appear from what was said about it in the replying papers that it was subject to numerous qualifications.

Black. It also transpired that Black did not undertake a valuation of the Trust's shareholding, despite assurances to McMillan that this was part of his mandate. As mentioned, the majority's current position, articulated in argument by the respondent's counsel, is that the Trust is not prejudiced by having to continue to hold the shares and nominating someone else to replace McMillan as its representative on the board of directors. In the circumstances I have not found this argument persuasive.

[45] Following on the conclusion to which I have come on 'standard case'[44] principles that the Trust has established an entitlement to a remedy in terms of s 252(3), it falls to be considered precisely how the remedial relief should be formulated. Mr *Goodman* sought an order along the lines of that made in *Barnard v Carl Greaves Brokers*, supra. [45]

[46] The facts in *Barnard* were materially distinguishable from the current case. Most significantly it was not necessary in that case, as it is in this matter, to consider whether effect, if any, should be given in the formulation of the relief granted to causal fault by the

[44] See *O'Neill and Another v. Phillips and Others*, supra, at p. 970e of the All ER report; *Barnard v Carl Greaves Brokers,* supra, at para. [46].
[45] See fn. 6.

applicant in his exclusion from the management of the company. If I were constrained to find that the fault on the part of McMillan alleged in the respondents' papers is a factor that probably should affect the determination of just and equitable relief, I would be bound to refer those disputed allegations for trial because I am unable to decide them on the papers. In the event, accepting for present purposes the allegations against McMillan in the answering papers, I have concluded that it is possible to formulate a buy out order that will not be unfair to any of the parties involved. I have come to this conclusion because it is not disputed that McMillan's efforts while he was in control of the company were successful in expanding its customer base and apparently increasing the value of its shares. The most material allegations against him entailed what the respondents claimed were unauthorised drawings on the revenue of the company – for example, the payment of the commission to his son, the payment of a salary to his wife beyond the level allegedly agreed to by his fellow joint venturers and the payment of domestic expenses such as swimming pool maintenance costs on the company's account.[46] Inasmuch as it is

[46] Ms Du Toit, the company's accountant and auditor, averred that company expenditure on McMillan family domestic accounts would in the ordinary course be charged to McMillan's loan account at the end of the financial year.

also alleged that McMillan sought to sabotage the company's business by removing information and seeking to recruit its staff to leave with him, there is little in the respondents' papers to suggest that any such measures were substantially successful or had a material effect.

[47] If one assumes that the allegations about unauthorised payments on the company's account are well-founded, it must be accepted that the company's profits would have been adversely affected *pro tanto*. A valuation of the company's shares on the basis of an acceptance of the profits as McMillan would have had them (i.e. on the basis that the aforementioned payments were legitimate company expenses) would therefore tend to depress the value of the shares if the valuation is undertaken on any of the well known and most commonly used methods to value the shares in a private company with a going concern. McMillan could not complain about this because it would be an incidence of an acceptance of his version of the facts. On the other hand there would be nothing in the terms of the buy-out order disabling the company from instituting proceedings to recover from McMillan or any other party the proceeds of any defalcations from the company's purse. Those

domestic expenses which, according to Ms du Toit, the company's accountants and auditors would have debited against McMillan's loan account can for accounting purposes in respect of the order to be made be deemed to have been so debited.

[48] It is also necessary to provide in any order to be made in the current case for the fact that the balance of the purchase price of the shares in the transaction with Peacock is not yet fully paid and that the balance outstanding is to some extent subject to an unresolved dispute. Recognition must also be given to the fact that the monthly payments in reduction of the balance of the purchase price have, according to the uncontested evidence, been effected wholly by CBA.

[49] As I did not hear any argument on the detailed formulation of a buy-out order, the provisions of annexure A to the order to be made, in which detailed directions for the valuation of the shares are set out, shall be provisional and subject to revision upon consideration of additional written argument received in terms of the leave to be granted in paragraph 2 of the order to be made.

[50] I consider that it would be fair to both sides to determine that the shares should be valued with regard to the financial condition of the company as at 29 February 2008. Apart from its convenience as a date corresponding to the company's financial year-end, it is also a date close to the date on which the respondents' attorney asked for confirmation that McMillan would be amenable to a buy out.

[51] Another issue that falls for determination in this judgment is the costs of the first stage hearing in respect of the registration of the Trust's shares. The merits of this aspect of the application were settled in terms of an order made by consent on 24 July 2008. In my view all the parties were at fault in the inordinate delay that attended the registration of the shares acquired from Peacock. I therefore propose to make no costs order in respect of the first stage hearing. The applicant has otherwise been substantially successful in the application and costs will otherwise follow the result.

[52] In the result an order providing for the purchase by the sixth respondent of the applicant's shares in the seventh respondent, together with ancillary relief will issue in the following terms:

1. In terms of s 252(3) of the Companies Act 61 of 1973 the sixth respondent is directed to purchase the applicant's thirty per cent holding in the seventh respondent on the basis provided in **annexure A** to this order (subject to any amendment as might be effected by the court pursuant to a consideration of any written submissions invited in terms of paragraph 2 hereof).

2. The parties are granted leave to make written submissions within 10 days of the date of this judgment in respect of the variation or supplementation of the directions set out in **annexure A** to this order in respect of the valuation of the applicant's shares, failing which the terms thereof shall be regarded as final.

3. No order as to costs shall issue in respect of the attendances directly related to obtaining the order obtained by consent on 24 July 2008 concerning the registration of the applicant's shares in the seventh respondent.

4. Save as aforesaid the applicant's costs of suit, including the costs of two counsel, shall be paid by the sixth respondent.

A.G BINNS-WARD

Acting Judge of the High Court

ANNEXURE A

The sixth respondent shall purchase the applicant's 30 per cent holding in the seventh respondent on the basis set out hereunder:

(i) The sixth respondent is directed to purchase the applicant's shares in the seventh respondent at fair value calculated *pro rata* the total issued share capital of the company, that is, without any discount for the shares representing a minority holding and without any discount on account of any contractual restrictions that might have been agreed upon between the shareholders, or provided in the seventh respondent's articles of association on the disposal of the shares other than as between existing shareholders.

(ii) For the purpose of the said purchase of the applicant's shares by the sixth respondent, the fair value of the shares shall be determined with regard to the financial condition of the first respondent as at 29 February 2008.

(iii) The total purchase consideration payable to the applicant for the Trust's shares shall be adjusted downwards-

a. in an amount equivalent to the sum, if any, in which the applicant might be indebted to the seventh respondent in respect of any loan account. In consideration for this the applicant's indebtedness, if any, to the company will be assumed by the sixth respondent, and the applicant's indebtedness, if any, to the seventh respondent shall thereupon be extinguished;

b. in an amount equivalent to the sum, if any, in which the applicant, or McMillan personally, might be indebted to the sixth respondent in respect of any loan account arising out of the monthly payments by the sixth respondent in respect of the purchase of the one hundred percent shareholding in the seventh respondent from Peacock in terms of the agreement dated 14 July 2006;

c. in any further amount necessary to adjust for the shortfall between the amount of approximately R645 000 paid by McMillan towards the purchase price of the shares from Mr Rowan Peacock and the amount representing thirty percent of the full purchase consideration owed to Peacock by the purchasers in terms of the agreement dated 14 July 2006; which purchase consideration shall for the purpose of the calculation required in terms of this order be adjusted downwards in accordance with the sixth respondent's contentions as to what the adjusted price should be in the unresolved price dispute with Peacock.

(iv) The financial condition of the company on 29 February 2008 shall be determined on the basis that any company expenses contended by McMillan to have been legitimately incurred, for example in respect of the remuneration of Mrs Denise McMillan or the commission paid to Mr Ryan McMillan shall be deemed to have been legitimately incurred - without prejudice to the right of the

seventh respondent, if so advised, to recover in separate proceedings any of such amounts as it might contend were unauthorised payments.

(v) The sixth respondent shall be liable to pay *mora* interest at 15.5% per annum on the purchase consideration determined in respect the applicant's shares-

a. with effect from the date upon which the purchase consideration of the said shares is independently determined as directed in this order, provided that such interest shall be payable only in the event of the applicant having tendered transfer of the shares to the sixth respondent at a consideration equivalent to the said determination within seven days of the publication to the applicant and the sixth respondent of the determination, or

b. in the event of such determination being successfully challenged, as further provided below, *mutatis mutandis* with effect from the date of the determination of the relevant litigation.

(vi) The applicant and the sixth respondent are directed to endeavour to agree upon the appointment of a practising chartered accountant of not less than 10 years' standing, who shall not be the auditor of either the sixth or the seventh respondent, nor have been previously professionally engaged in any capacity by either of those companies or by any of the other respondents, to undertake the valuation of the shares in accordance with the directions in sub-paragraphs (i) - (iv), above and to determine the purchase consideration payable by the sixth respondent for the applicant's shares. In the event of the parties being unable so to agree within 15 days of the date of this order (as finally settled, if written submissions are made in terms of paragraph 2), the valuation and determination shall be undertaken by a Cape Town based practising chartered accountant of not less than 10 years' standing to be nominated by the President of the South African Institute of Chartered Accountants.

(vii) The costs of the said valuation and determination shall be borne as to one half by the applicant and one half by the sixth respondent; and in the event of either party paying more than its share of the costs that party shall be entitled to recover the excess from the other party.

(viii) The applicant and the respondents are directed to furnish the person appointed in terms of sub-paragraph (vi) with all such information, appropriately vouched, as he or she might reasonably require in order to undertake the valuation and determination, failing which the said person is authorised to make application through the chamber book to a judge for such further directions and relief as might be appropriate.

(ix) The person appointed in terms of sub-paragraph (vi) shall complete the valuation and determination and furnish the applicant and the sixth respondent with a reasoned report thereon in writing within six weeks of his or her appointment, or such extended period as the parties may agree to in writing, failing which he or she shall file a written statement with the Registrar, a copy of

which shall be furnished to each of the parties, setting out the reasons for the failure to complete the valuation and setting out the period within which and the conditions subject to which he or she then expects to be able to complete the work. Without limitation of rights, the applicant or the sixth respondent shall be entitled in the context of such statement to apply through the chamber book to a judge for such further directions or relief as might be appropriate.

(x) In the event of the applicant or the sixth respondent being unwilling to accept the determination of the person appointed in terms of sub-paragraph (vi), proceedings to obtain a judicially determined substitute valuation shall be instituted by the dissatisfied party or parties within 20 days of the publication of the valuation, failing which the independent determination made in terms of this order shall be final and binding on the parties.