IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA No 04 of 2013

BEFORE

The Rt Hon Sir John Chadwick, President
The Hon Abdulai Conteh, Justice of Appeal
The Hon Sir Richard Ground, Justice of Appeal

ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
Financial Services Division
Justice Andrew Jones QC
(FSD No 18 of 2012 – AJJ)

IN THE MATTER OF THE COMPANIES LAW (2011 REVISION) (AS AMENDED)
AND
IN THE MATTER OF TRIKONA ADVISORS LTD

BETWEEN

ASIA PACIFIC LIMITED

Respondent to Petition/Appellant

-and-

(1) ARC CAPITAL LLC
(2) HAIDA INVESTMENTS LTD

Petitioners/Respondents to Appeal

Mr Anthony Akiwumi and **Mr Paul Murphy o**f Stuarts for the Appellant, Asia Pacific Limited
Mr Ross McDonough and **Mr Guy Cowan** of Campbells for the Respondents to the Appeal, ARC Capital LLC and Haida Investments Ltd

Hearing: 9 and 10 April 2013
Judgment: 10 April 2013
Reasons for Judgment and Judgment on Costs Appeal: 22 April 2015

REASONS FOR JUDGMENT
and

JUDGMENT ON COSTS APPEAL

Sir John Chadwick, President:

1. This was an appeal from orders made by Justice Andrew Jones QC on 31 January 2013 and 14 February 2013 in proceedings brought by the respondents, ARC Capital LLC and Haida Investments Ltd (severally "ARC" and "Haida" and, together, "the Petitioners") against the appellant, Asia Pacific Limited ("Asia Pacific"). In those proceedings the Petitioners sought an order that Trikona Advisers Limited ("the Company" or "Trikona") be wound up by the Court pursuant to section 92(e) of the Companies Law (2011 Revision). On 31 January 2013 Justice Andrew Jones made the winding up order sought. On 14 February 2013 he made an order ("the costs order") that Asia Pacific pay the costs of the petition on an indemnity basis.

2. At the conclusion of the oral hearing of the appeal this Court indicated that the appeal from the winding up order would be dismissed, for reasons which it would put in writing. The Court reserved its judgment on the appeal from the costs order.

The underlying facts

3. The Company was incorporated in the Cayman Islands on 9 March 2006 for the purpose of acting as investment advisor and asset manager to a closed ended investment fund, Trikona Trinity Capital Ltd (subsequently known as Trinity Capital Plc) ("Trinity"). Trinity was incorporated in the Isle of Man on 26 March 2006. Both Trinity and Trikona were promoted by Rakshitt Chugh ("Mr Chugh") and Aashish Kalra ("Mr Kalra").

4. The shares in the Company were issued (i) as to 45% to Asia Pacific, a company then wholly owned by Mr Kalra's father, (ii) as to 5% to Mr Kalra, (iii) as to 25% to ARC, a company the shares of which were held as to 75% by a Chugh family trust (known as the RC Family Trust) and as to 25% by Mr Chugh and (iv) as to the remaining 25% to Mr Chugh's father. The effect was that Kalra and Chugh family interests each owned 50% of the Company. Subsequently, Mr Kalra became the owner of Asia Pacific and Mr Chugh's father transferred his shares in the Company to Haida (a company wholly owned by a discretionary trust of which Chugh family members were beneficiaries); but the 50:50 ownership of the Company by Kalra family interests and Chugh family interests remained unaltered.

5. The directors of the Company (from 2006 until the end of 2011) were Mr Chugh, Mr Kalra, Ravindra Chitnis (“Mr Chitnis”) and Saurabh Killa (“Mr Killa”). Mr Chitnis was nominated by the Petitioners: Mr Killa was nominated by Asia Pacific. Mr Chugh and Mr Kalra were described in various documents as “co-managing directors”; and they did, in fact, manage the Company jointly. Neither Mr Chitnis nor Mr Killa took any part in the management of the Company’s affairs.

6. Trinity was promoted to invest in real estate and infrastructure projects in India on the basis that it would be managed and advised by the Company. The initial public offering of Trinity’s shares – which were listed on the Alternative Investment Market of the London Stock Exchange - took place in April 2006, with support from Lehman Brothers and Wacovia Bank. It raised £250 million from investors.

7. On 13 April 2006 Trinity and the Company entered into a Portfolio Management Agreement under the terms of which the Company was to be paid an annual fee calculated at 2% of Trinity’s Net Asset Value (“NAV”), plus a performance fee of 20% of realised gains (or 30% if certain targets were achieved). The Company’s role under the Portfolio Management Agreement was advisory only: investment projects identified and recommended by an investment committee were put by the Company to the board of directors of Trinity for decision.

8. Trinity’s board originally comprised Mr Chugh and a number of independent directors who were well known figures in the UK property industry. Trinity invested successfully in some nineteen projects - at its peak, the amount of its gross assets under management was some US$750 million or thereabouts - but its shares habitually traded at a discount to NAV.

9. On 23 September 2008, the Company and QVT Financial (“QVT”) - a well-established alternative investment manager based in New York and having funds under management which owned some 29% of Trinity’s equity share capital; and so Trinity’s largest shareholder - entered into a Deed of Exclusivity. Under that deed QVT agreed, in consideration of a payment of £2 million by the Company, that it would not sell its shares in Trinity to any purchaser other than the Company for a period of two months. QVT

complied with that agreement; but the Company was unable to raise the funds required to purchase the shares. In those circumstances, the Company derived little or no benefit from the payment of £2 million to QVT.

10. At about the same time (on 9 September 2008) it was disclosed to the market that a limited partnership established by SachsenFonds Holdings GmbH ("SachsenFonds"), a leading German fund manager, had agreed to buy stakes in three of Trinity's existing investments for £45 million; and to co-invest a further £45 million, with Trinity, in five proposed new investments. The sale was to be closed on 30 September 2008; and it was expected that the co-investment would be closed by 31 March 2009.

11. Carrousel Capital Ltd ("Carrousel") - a hedge fund manager based in London having funds under management which owned some 14% of Trinity's equity share capital; and so Trinity's second largest shareholder - objected to the co-investment of cash into new projects pursuant to the arrangements with SachensFonds. Carrousel took the view that assets should be realised and the cash distributed. On 13 October 2008 Carrousel requisitioned an extraordinary general meeting of Trinity's shareholders for the purpose of reconstituting the board of directors and changing the investment policy. The requisition called for Mr Chugh to be removed from the board of Trinity. Faced with that requisition the Trinity board decided that Mr Chugh should resign office as a director; and he did so.

12. SachsenFonds defaulted on its obligations under the agreement made in September 2008. It commenced proceedings against Trinity and the Company and against Mr Chugh and Mr Kalra personally. In those proceedings SachsenFonds claimed damages of about €127 million on the basis that it had been induced to enter into two earlier transactions – under which it had established limited partnerships with Trinity for the purpose of buying minority interests in certain of Trinity's real estate investments - as a result of misrepresentation, deceit and fraudulent concealment. Trinity counterclaimed for damages arising out of SachsenFonds' default in respect of the third transaction.

13. The board of directors of Trinity took the view that the Company's role in the SachsenFonds transactions provided a basis upon which to contend that the Company

was in material breach of its obligations under the Portfolio Management Agreement; thereby giving rise to a right to terminate that agreement. Trinity did so with effect from December 2009. Termination of the Portfolio Management Agreement had the effect of ending the Company's business as advisor and manager.

14. The Company's response was to commence arbitration for determination of the issue what, if any, compensation it was entitled to receive from Trinity. That arbitration was eventually settled on terms contained in an Arbitration Settlement Agreement and Ancillary Settlement Agreement executed in February 2011. Those terms provided for the payment of compensation by Trinity to the Company in the form of a package (having a potential total value of about £14 million) which comprised the following elements: (i) cash (£7.5 million); (ii) the transfer of Trinity's shares in a subsidiary which owned a project in India (known as the Sankalp project and having an attributed value of £2.5 million); and (iii) a share of any profit on assets during a specified period.

15. On 28 December 2011 Asia Pacific commenced proceedings in its own name and, derivatively, in the name and on behalf of the Company (case 3:11-cv-2015-MRK) against Mr Chugh (personally and as trustee of the RC Family Trust), ARC and others in the United States District Court for the District of Connecticut. The Complaint in those proceedings alleged "wilful, material, severe, repeated and ongoing breaches of the fiduciary duty that Chugh owes to TAL [the Company]". Those breaches of fiduciary duty were said to include:

    > ". . . appropriating TAL's prospective customer lists, funds, equipment; competing directly against TAL; refusing after repeated demands to disclose his support of the actions of third parties who sought to damage TAL and who, with Chugh's substantial aid, did damage TAL; blocking TAL's defense of a corporate takeover and multiple litigations; barring TAL from developing new business; and shutting down TAL's existing businesses."

    The allegations in the Complaint were verified by Mr Kalra.

16. On 10 January 2012, some two weeks after Asia Pacific had commenced those proceedings in Connecticut, Mr Chitnis resigned as a director of the Company. On the following day Mr Kalra and Mr Killa signed a written resolution purporting to remove Mr Chugh from office as a director of the Company. Mr Chugh was informed that he had

been removed from office by a letter dated 17 January 2012 from Adler Pollock & Sheehan PC, attorneys in United States acting for Asia Pacific in the Connecticut proceedings.

17. The petition was presented on 13 February 2012 by the Petitioners, as contributories. It sought an order that the Company be wound up on the just and equitable ground. It was alleged in the petition that the Company was a quasi-partnership - formed on the legitimate expectation that the parties would participate in its management - and that there had been a breakdown in the relationship of mutual trust and confidence between the parties. In support of that contention, the Petitioners relied, principally, on the removal of Mr Chugh from office as a director of the Company.

18. On 21 February 2012, further proceedings were commenced in the Superior Court, Judicial District of Fairfield, Connecticut in the name of the Company (case X03-HHD-cv-12-6030347-S) against Haida and Mr Chugh. The same allegations were made in the Complaint in those proceedings as in the earlier Connecticut proceedings. In particular, it was alleged that Mr Chugh had supported QVT in a "hostile takeover" of Trinity's board; had negotiated the Deed of Exclusivity under which the Company had paid £2 million to QVT "and received essentially nothing back in return"; had required Mr Kalra to sign that deed "under duress and protest"; and "had blocked multiple efforts of Kalra to have TAL demand and prosecute its rights to a refund of the 2 million GBP exclusivity fee". Further, it was alleged that Mr Chugh "refused to cooperate and assist in defense of the TTC [Trinity] litigation, which was controlled by directors of TTC acting in the interest of QVT"; and had "eventually forced TAL into an unfavourable settlement with TTC". Those allegations, also, were verified by Mr Kalra.

These proceedings

19. The petition came before Justice Quin for directions on 8 March 2012. He ordered, pursuant to Order 3, rule 11(2) of the Companies Winding Up Rules, that the Company should be treated as the subject matter of the proceedings; that it should take no further part in the proceedings; and that the proceedings should continue *inter partes* between the Petitioners and Asia Pacific.

20. On 22 and 23 August 2012, Justice Andrew Jones heard a number of applications in the proceedings. Those included (i) an application on behalf of the Petitioners (by summons dated 28 March 2012) for the appointment of provisional liquidators in respect of the Company and (ii) an application on behalf of Asia Pacific (by summons dated 13 April 2012 and amended on 17 July 2012) for an order that the petition be struck out on the basis that it was an abuse of the process of the court, in that the Petitioners had been offered and refused an adequate alternative remedy. By an order dated 23 August 2012 and filed on 7 September 2012, the judge dismissed the application for strike out made on behalf of Asia Pacific; and made no order on the Petitioners' application for the appointment of provisional liquidators other than to restrain Asia Pacific from using the assets of the Company for the purpose of funding the various legal proceedings (including the proceedings in Connecticut to which I have referred) specified in the schedule to the order.

21. On 30 November 2012, this Court heard an application made on behalf of Asia Pacific for leave to appeal against (*inter alia*) the dismissal of the application for an order striking out the petition. The principal basis of that application (and the proposed appeal) was that the judge had erred in holding (i) that Asia Pacific's offer to purchase the shares of the Petitioners did not provide an adequate alternative remedy for the unfair conduct alleged and (ii) that, in the circumstances, it had been unreasonable for the Petitioners not to accept that offer. This Court refused leave to appeal.

22. Following this Court's refusal of leave to appeal from the order dismissing the application to strike out the petition, the attorneys acting for Asia Pacific in these proceedings – and purporting, also, to act for the Company – wrote to the attorneys acting for the Petitioners on 12 December 2012 with a further offer to purchase the Petitioners' shares in the Company. That offer was not accepted by the Petitioners.

23. The petition was heard in January 2013. On 31 January 2013, Mr Justice Jones made an order that the Company be wound up. His reasons are set out in a written judgment which bears that date.

The reasons which led the judge to conclude that it was just and equitable that the Company be wound up.

24. It was common ground at trial that the Company should be treated as a quasi-partnership; but there was an issue as to the identity of the parties to that quasi-partnership. In the re-amended petition it had been asserted that the Company should be treated as a quasi-partnership between the Chugh family and the Kalra family. By paragraph 12 of its amended defence, Asia Pacific admitted that the Company "was set up as a Quasi-Partnership between Chugh and Kalra, but not as a quasi-partnership between their respective families". The judge held (at paragraph 5 of his judgment) that he was led by the evidence "to the conclusion that, for present purposes, Trikona should be treated as a quasi-partnership between Messrs Chugh and Kalra".

25. In reaching that conclusion, the judge relied upon the findings of fact that he had made at paragraphs 2 and 3 of his judgment. Those findings included the following:
    (1) Both Mr Chugh and Mr Kalra were born in India; but had pursued their careers in the United States.
    (2) After graduating in 1991, Mr Chugh's career began as an analyst with Prudential Securities in New York. In 1996 he joined Lehman Brothers as head of its asset backed structuring group. In 2000 he started his own financial research business named Byte Consulting, Inc ("Byte"), of which Lehman Brothers was a client. Mr Chugh became a US citizen in 2004.
    (3) Mr Kalra graduated in 1993; and went on to obtain a master's degree in economics and international finance in 1996. He then became a partner at Cambridge Technology Enterprises, a venture capital company based in Cambridge, Massachusetts, which specialized in promoting companies engaged in the information technology industry. He became a US citizen in November 2012.
    (4) In 2000 Mr Kalra was introduced (or re-introduced) to Mr Chugh by Mr Chugh's brother as someone who might be able to contribute to Byte's business. In 2002 Mr Kalra was retained as a consultant to Byte.
    (5) The event which led Messrs Chugh and Kalra to go into business together was the announcement by the Government of India that foreigners would be allowed participate in real estate development in India with effect from 2004.

(6) The vehicle through which investments were to be held was Trinity. They established Trikona simultaneously, as the company through which Trinity would be managed. They treated each other as equal partners in Trikona and acted as its joint managing directors.

(7) The shares in Trikona (the Company) were issued, initially, in order to comply with the applicable regulations then in force in India, which required a degree of local participation. That was provided by the issue of shares to Mr Chugh's father and to Mr Kalra's father, both of whom were resident in India.

26. At paragraph 5 of his judgment, the judge said this:

> "They [Mr Chugh and Mr Kalra] founded the company jointly. They managed it jointly. Although Trikona group companies employed as many as 50 people at one time, its business was dependent upon the personal involvement of Messrs Chugh and Kalra. Whilst Trikona's board of directors included two so-called 'independent directors', there is no evidence that they played any real role at all in the management of the company's business and neither of them gave evidence in connection with the trial of the petition. The fact that Mr Chugh contributed most of his ownership interest in Trikona to the trustees of discretionary trusts for the benefit of his family members has no relevance to the issues which I have to decide."

He went on to hold (at paragraph 6 of his judgment) that the working relationship between Mr Chugh and Mr Kalra became increasingly strained during 2008; and had completely broken down by the end of 2009 (when Trinity terminated the Portfolio Management Agreement), by which time (as he said) "they were both setting up their own separate businesses and actively discussing how to divide what remained of the Company's business and assets".

27. The judge explained (at paragraph 14 of his judgment) that the Petitioners put their case on the basis of "a series of related grounds on which the Court should conclude that it is just and equitable to make a winding up order". In particular, it was said: (i) that it was oppressive for the Connecticut proceedings to be pursued at the expense of the Company, when the only purpose of those proceedings was to enable Mr Kalra to seize ownership of the company; (ii) that Mr Kalra had misused and misappropriated the Company's money and would continue to do so unless restrained by the Court; (iii) that there had been a complete and irreversible loss of trust between Mr Chugh and Mr Kalra, such that it had

been wholly impossible for the Company to be managed as a quasi-partnership for at least the past three years; (iv) that there was deadlock at the shareholder level; (v) that the Company had not carried on any business since 2009, apart from managing the litigation resulting from the termination of its business and there was no prospect of any new business being put into the company by either party; (vi) that Mr Kalra's seizure of managerial control was unjustifiable and contrary to the Petitioners' legitimate expectation that there would be joint control at board level; and (vii) that Mr Kalra's behaviour since seizing control demonstrated that the Company's affairs would not be wound up properly in the absence of a winding up order and the appointment of qualified insolvency practitioners.

28. At paragraph 4 of his judgment the judge had observed that it was accepted on behalf of Mr Kalra (at paragraph 13 of the amended defence) that Mr Chugh and the Petitioners would have a legitimate expectation of being involved in the management; "but only for so long as Mr Chugh was acting in good faith in the interests of the Company". At paragraph 24 of his judgment, he said this:

> "Counsel for the Respondent focused the defence almost entirely upon the proposition that Mr Chugh had acted in breach of fiduciary duty by 'sabotaging' Trikona's business and 'stealing' its assets in the manner alleged in the Connecticut proceedings. Thus, notwithstanding the admission that Trikona is properly characterized as a quasi-partnership, it was said that Mr Chugh's removal from the board of directors was a legitimate response to his egregious breaches of duty. To the extent that Mr Kalra accepts that Trikona has no business, he not only blames Mr Chugh for its loss but alleges that an additional $210 million in compensation would have been recovered from Trinity if Mr Chugh had not 'forced' him to sign the settlement agreements."

29. The judge rejected that defence. He had concluded (at paragraph 6 of his judgment) that Mr Kalra's attempt to accuse Mr Chugh of stealing Trikona's assets and destroying a lucrative business was "completely at odds with the evidence of what actually happened at the time"; he had concluded (at paragraph 13) that there was "not a shred of evidence tending to suggest that Mr Kalra was 'forced' to enter into the settlement agreement; and he had concluded (at paragraph 17) that the allegation that Mr Chugh had "sought to sabotage the business of [Trikona] and acted in egregious breach of his fiduciary duties" was "wholly unsupported by any credible evidence". At paragraph 14 of his judgment, he

observed that there was evidence to support each of the grounds upon which the Petitioners relied; and that "taken together, the case for making a winding up order is overwhelming".

The reasons which led the judge to conclude that it was not appropriate to make a buy-out order under section 95(3)(d) of the Companies Law

30. It was common ground that, having reached the conclusion that it was just and equitable that the Company should be wound up, the judge needed to go on to consider whether, pursuant to section 95(3) of the Companies Law (2011 Revision), he should make some other order, as an alternative to a winding up order.

31. The judge addressed that question at paragraph 27 of his judgment. He did so in the context that it had been submitted on behalf of Asia Pacific that the appropriate order to make, as an alternative to a winding up order, was an order under section 95(3)(d); commonly known as a "a buy-out order". The judge rejected that submission. He said this:

> "27. Finally, I turn to Mr Kalra's revised purchase offer. On 1st August 2012 the Respondent/Mr Kalra made a written offer to the effect that Trikona itself would buy back (or redeem) the Petitioner's 50% shareholding at a 'fair value,' price to be determined by an expert assessor. The proposed mechanism for determining the 'fair value' of the shares was reproduced from that which was approved by the House of Lords in *O'Neill v Phillips* [1999] 1 WLR 1092, the factual circumstances of which were wholly different from the present case. For the reasons given in my Ruling dated 4th September 2012, I did not consider that this 'buy-out offer' constituted a reasonable alternative remedy for the Petitioners. On 12th December 2012, the respondent put forward another 'buy-out offer', also based upon the proposition that the shares would be purchased at 'fair value' to be assessed by an independent expert. I had previously concluded that this valuation methodology would be inappropriate. I am still of the same opinion. There is no business capable of being valued. Apart from the subsidiary which owns the Sankalp project in India (acquired from Trinity pursuant to the Arbitration Settlement) and whatever cash is left, Trikona's NAV depends upon the outcome of various claims which are not susceptible to a valuation exercise of the kind contemplated by the House of Lords in *O'Neill -v- Phillips.* I do not see how the Petitioners could reasonably be expected to take this offer seriously. Having listened to Mr Kalra's evidence, it is impossible to avoid the conclusion that he has no genuine intention of paying anything for the Petitioners' shares."

32. As I have said, earlier in these Reasons, in August 2012, the judge had heard a number of applications in the proceedings; including an application on behalf of Asia Pacific for an order that the petition be struck out on the basis that it was an abuse of the process of the court, in that the Petitioners had been offered and refused an adequate alternative remedy. By an order dated 23 August 2012 and filed on 7 September 2012, Justice Jones dismissed that application for strike out. He did so for the reasons which he gave in a judgment dated 4 September 2012.

33. After explaining (at paragraph 4 of his judgment dated 4 September 2012) that it was the Petitioners' case in these proceedings that the Company should be characterized as a quasi-partnership between the two Petitioners and Asia Pacific, that there was a legitimate expectation that the Petitioners and Asia Pacific that would each have equal representation on the board of directors and that Mr Kalra had wrongly seized control of the Company by purporting to remove Mr Chugh from its board of directors and excluding him from participating in any managerial decisions, the judge had gone on to say this:

> "5. On 1st August 2012 the Respondent/Mr Kalra made a written offer to the effect that the Company itself would buy back (or redeem) the Petitioners' shares at a 'fair value' price to be determined by an expert assessor (referred to by counsel as the 'buy out offer'). The proposed mechanism for determining the 'fair value' is not derived from any provisions in the Company's articles of association. It is simply reproduced from that which was approved by the House of Lords in *O'Neill v. Phillips* [1999] 1WLR 1092, the factual circumstances of which were wholly different from the present case. . . . Lord Hoffman's judgment (at page 1107-8) describes in general terms the valuation principles which should be used to value a minority interest in a business which is a going concern and also the mechanism for determination of the purchase price.
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> 6. The Respondent's offer embodies the same kind of mechanism for determining the purchase price as that approved by the House of Lords. It involves the appointment of an independent assessor whose function will be to determine the 'fair value' of the Petitioners' shares. It is proposed that the assessor will be chosen by the Petitioners from a panel of four qualified chartered accountants nominated by the Respondent; his fees and expenses will be shared equally; he will set a timetable for receiving written submissions from the parties who must also provide him with all the supporting documentation; and the assessor will act as an expert (rather than an arbitrator) and will have full and final authority to determine the price. . . ."

The judge had described a valuation mechanism of that sort as "both unnecessary and inappropriate" in the circumstances of this case. He had gone on to explain the reasons which led him to that view:

"6. . . . The evidence reflects that Company ceased to carry on its business in 2009. Apart from the proceedings listed in the schedule to the Order [of 23 August 2012], which I characterize as litigation between the shareholders in which the Company has no independent interest, its only activity is the defence of some adverse claims asserted by independent third parties and the pursuit of an insurance claim in respect of legal fees incurred in litigation which has been settled. Messrs Kalra and Chugh are accusing each other of having diverted to themselves (or companies controlled by them) business opportunities which should have belonged to their Company. In these circumstances it is plainly obvious that no new business will ever be put through the Company, or at least not unless and until it is under the sole undisputed ownership of Mr Kalra. It follows that there is no business or goodwill which needs to be valued by an independent assessor. During the course of the argument I was told by Ms Dobbyn [counsel who then appeared for Asia Pacific] (on instructions from Mr Kalra) that the Company's assets currently comprise (i) cash of US$1.4m, (ii) cash of $5m held in the Company's Indian subsidiary which is said to be 'locked up', meaning that it is subject to exchange control restrictions, (iii) a receivable of about US$2m, (iv) marketable securities worth US$1.2m and (v) an unsettled insurance claim of US$8m. I was told that the Company's liabilities and contingent liabilities are about US$0.5m. It follows, according to the Respondent, that the Company's current net asset value is about US$9m plus whatever is paid by its insurers which will be US$8m if the claim is paid in full. Having regard to the nature of these assets and the fact that there is no business capable of being valued on a going concern basis, it would serve no useful purpose to engage in a valuation exercise of the kind considered and approved by the House of Lords in *O'Neill v. Phillips*. If counsel's description of the Company's assets is complete and accurate, it does not require the certificate of an independent expert assessor to work out that 50% of the NAV is US$4.5m plus half of whatever is paid by the insurers. The proposed valuation mechanism invalidates the reasonableness of the offer because it would result in significant delay and shared expense for no useful purpose."

34. The judge had then turned to the question whether, leaving aside what he had found to be an inappropriate valuation mechanism, the terms of Asia Pacific's offer would provide the Petitioners with an adequate alternative remedy. He had found that they would not do so: for three reasons which he set out in his judgment dated 4 September 2012:

"7. . . . First, the proposal is that the Company, not the Respondent, will buy back (or redeem) the Petitioners' shares in accordance with the provisions of section 37 of the Companies Law at a price equivalent to 50% of the NAV, excluding any value attaching to its claim against Mr Chugh in the US Proceedings and any provision for the actual and prospective cost of conducting the proceedings. In other words, it is proposed that the Company will buy back the Petitioners' shares for up to US$8.5m or US$4.5m plus half of whatever is received in respect of the insurance claim. However, it is proposed that payment will be deferred until after conclusion of the Connecticut Proceedings which may not happen for some considerable time. As a matter of law, the Petitioners will be subordinated creditors and their ability to enforce a buy-back/redemption agreement concluded now will depend upon the future solvency of the

Company and in the meantime they will have no control over the expenditure of its assets if the Winding Up Petition is consequentially dismissed. During the course of argument, Ms Dobbyn suggested that this point could be met by a guarantee from the Respondent but, in the absence of evidence to the contrary, the reasonable inference must be that it was incorporated as a special purpose vehicle for holding its shares in the Company in which case its guarantee would be worthless. In summary, the 'buy back offer' is an offer by the Company to agree that it will buy back or redeem the Petitioners' shares at a price equivalent to 50% of the current NAV, on the basis that payment of the redemption proceeds will be deferred to an uncertain future date and will be contingent on the Company still being solvent. In this respect the 'buy back offer' is not an adequate alternative remedy because there is no guarantee that the Company's assets will not have been dissipated by Mr Kalra in the meantime.

8. Second, it is a term of the proposal that if the Company obtains a money judgment in the Connecticut Proceedings against Mr Chugh and/or the Peak companies which are alleged to be the beneficiaries of his breaches of fiduciary duty, the amount will be set off against the sum owed to the Petitioners. This is not necessarily what would happen if a winding up order is made. The effect of section 140 of the Companies Law is that the official liquidator will not be able to set off the debt owed by the Company to the Respondent against the judgment debt owed to the Company by Mr Chugh (or the Peak companies) unless he can establish mutuality to the satisfaction of this Court. Mr Chugh denies that the Petitioners are his *alter ego.* If a winding up order is made, the burden will be on the official liquidator to prove mutuality, whereas the Respondent's 'buy out offer' comprises an express tripartite set-off agreement which would be binding as between the Respondent and the Company in any event. In this respect, it is not an adequate alternative remedy because it deprives the Respondent of the right to require the official liquidator to prove that the statutory right of set-off applies.

9. Third, the Respondent's 'buy out offer' is conditional upon the Company failing on its claim for an order for the forfeiture of the Petitioners' shares in the Connecticut Proceedings. Ms Dobbyn submits that 'The Petitioners' status as Shareholders is sub-judice in the USA'. Even if this is right as a matter of Connecticut law (which is disputed by the Petitioners' US attorney), the Respondent would still have to commence an action in this Court for an order for rectification of the register of shareholders and it is by no means clear that this Court would be bound to recognize and give effect to an order for forfeiture. Ms Dobbyn points out that under the articles of association the Company is given lien over a member's shares in respect of unpaid debts, but the lien can only arise if the debt is owed by the Petitioners, as opposed to Mr Chugh (or the Peak companies) and the debt remains unpaid. In effect, it seems to me that the Petitioners are being asked to agree that any order for forfeiture will be given automatic effect, whether or not it would be recognized and given effect by this Court, about which there must be some scope for argument. It is not unreasonable for the Petitioners to reject this proposition."

35. It was for those reasons that the judge had taken the view, when he dismissed Asia Pacific's strike out application in August 2012, that its "buy out offer", contained in a letter dated 1 August 2012, did not provide an adequate alternative remedy for the Petitioners in this case. As the judge explained, at paragraph 27 of his judgment dated 31 January 2013 (to

which I have referred), Asia Pacific had made a revised purchase offer in a letter dated 12 December 2012. That letter was in these terms (so far as material):

"**Intention of Buy-Out Offer to Comply with O'Neil v. Philips**

(1) Compliance with O'Neil v. Philips. It is the intention that this buy-out offer comply in all respects with the requirements for buy-out offers set forth in **O'Neil v. Philips.**

(2) Power of and Request to Court to Modify Buy-out Offer to Ensure Compliance. The Grand Court of the Cayman Islands is hereby empowered and also requested to ensure that the terms of this buy-out offer comply in all respects with the requirements or buy-out offers set forth in **O'Neil v. Philips,** and to modify any and all terms of this buy-out offer to ensure such compliance.

Expert Assessor to Determine Price, On a Fair Value Basis, for Buy-Out

(3) Expert Assessor to Determine Price, which is to be Fair Value. Asia Pacific and/or the Company offers to agree to the appointment of a neutral third-party expert assessor (the '**Expert Assessor')** to determine the price, on a fair value basis, to be paid by Asia Pacific and/or the Company for the shares of either Petitioner ARC Capital LLC and/or Petitioner Haida Investments Ltd. in the Company (the **'Price').**

(4) Expert Assessor also to Determine Costs. The Expert Assessor is also to determine the fair and reasonable costs to be paid to Petitioners, if any, which it may have incurred in respect of the Petition Proceedings. Such costs, if any, are to be assessed on the standard basis and in accordance with the tariff of attorneys' hourly rates set out in The Grand Court's Practice Direction 1/2011 **('the Reasonable Costs').**

(5) Authority of Expert Assessor is Full and Final. The Expert Assessor shall have full and final authority to determine the Price and the Reasonable Costs.

(6) Choice of Expert Assessor is Joint. Asia Pacific shall within fourteen (14) business days of this Buy-Out Offer being accepted, nominate at least four independent, duly qualified chartered accountants, or certified public accountants, as the case may be, who are experienced in valuations of shares and who have indicated their willingness to act and provide copies of the said accountants' professional CVs to the Petitioners. Within a further ten (10) business days from the nomination, the Petitioners will select one of the accountants to be appointed. If that accountant accepts the appointment he or she shall then be engaged by the parties as the Expert Assessor. If for any reason that auditor does not accept the role, the Petitioners will be entitled to choose from the remaining nominated accountants.

(7) Remuneration of Expert Assessor. The parties will agree to reasonable remuneration with the Expert Assessor. The Expert Assessor will be paid by Asia Pacific or the Company, and Asia Pacific or the Company shall be entitled to set off 50% of that cost against payment of the Price.

(8) Timing of Performance by Expert Assessor. The Expert Assessor shall perform his or her duty to determine the Price on a fair value basis with economy and expedition.

(9) Company's Assets, Accounts, and Bank Statements. First, accompanying this buy-out offer is a list of the Company's assets as set forth in the Fourth Affidavit of Aashish Kalra and the Sixth Affidavit of Michael Gilleran. Second, also accompanying this buy-out offer are the Company's most current accounts and financial statements as provided by the Company's auditors, the international accounting firm of PSJ Alexander & Co, although these accounts are not yet final due to limitations of time and available data, nor have they yet been accepted by the Company. Third, further accompanying this buy-out offer are the Company's recent bank statements.

(10) Manner of Performance by Expert Assessor. The parties shall have equal access to the Expert Assessor and to all information about the Company which bears upon the value of the shares and Petitioners' claimed costs. The parties shall each be obliged to co-operate with the Expert Assessor and shall provide at the Expert Assessor's request, and each parties' own expense, such documentation and information as the Expert Assessor shall reasonably require. The Expert Assessor shall set a timetable for a first written submission by the parties after consulting with the parties. Any party shall have a right to respond to any submission provided to the Expert Assessor by any other party. Subsequent submissions by the parties shall also be in writing, although the Expert Assessor may also utilize telephonic conferences as its sees fit during which all parties must be present. No submissions can be *ex parte* and all communications with the Expert Assessor must be shared with the opposing party and bear a certificate of immediate service on the opposing party. No party shall have access to any information where such information is reasonably subject to a privilege, relative to the US Proceedings, the Petition Proceedings, or any other litigation in which any party is involved.

(11) Confidentiality of Documents and Information. All documents and information of any kind provided by any party to the Expert Assessor shall be held be subject to an amendment to a Confidentiality Agreement already entered into among the parties in the US Proceedings. The amended Confidentiality Agreement shall further provide that all documents submitted be numbered and returned to the opposing party at the conclusion of the Expert Assessment process and thereafter, of course, the documents are not to be used in any manner whatsoever outside the Expert Assessment process.

Preservation of Claims and Rights in US Proceedings

(12) Non-Waiver of Claims and Rights in US Proceedings. Nothing herein, or in any way connected to the buy-out of the shares of Petitioners in the Company, shall act as a waiver or estoppel with regard to any of the claims or rights of the Company and/or Asia Pacific against Petitioners, Mr Chugh, any other Defendant in the US Proceedings, or any other party against whom the Company or Asia Pacific might have claims in connection with the US Proceedings.

(13) Petitioners Must Have Full Title and a Right to Sell at Time of Sale. The Company's and/or Asia Pacific's obligation herein to pay the Price and Costs shall be nullified if the Petitioner selling its shares does not have free and clear

title to its shares in the Company on the Payment Date, as that term is defined below.

Transfer of Petitioners' Shares

(14) Timing of Payment and Transfer. Payment of the Price and Costs, as well as transfer of the shares by either or both Petitioners, shall take place thirty (30) calendar days after the Expert Assessor announces that it has determined the Price and Reasonable Costs (the '**Payment Date**')**,** unless the thirtieth day falls on a weekend or holiday in the United States or the Cayman Islands, in which case the Payment. Date shall be the next business day, or at some other Payment Date as determined by the Expert Assessor or the Court.

(15) Simultaneous Payment and Transfer. Simultaneously upon payment of the Price and Reasonable Costs each Petitioner selling its shares shall execute share transfer forms and all necessary documents transferring the entirety of their shareholding in the Company to the Company or Asia Pacific, or their nominee(s), as instructed. Simultaneous payment of the Price to the Petitioners and transfer by the Petitioners of their shares shall be of the essence.

(16) Warranties and Representations. By accepting this offer each Petitioner selling its shares warrants and represents that they are and will remain the registered legal and beneficial owners each of 25% of the shares in the Company.

Enforcement of the Terms of the Offer

(17) Governing Law. The interpretation of the terms and performance of the offer will be governed by the laws of the Cayman Islands.

(18) Exclusive Jurisdiction. The Courts of the Cayman Islands shall have exclusive jurisdiction to determine any dispute arising out of or in connection with the terms of the offer, and any application to enforce the terms of the offer or for other relief in connection with the offer shall be brought before the Courts of the Cayman Islands.

Asia Pacific and/or the Company are also willing to entertain any reasonable suggestions of Petitioners with respect to this Buy-Out Offer, and to alter this Buy-Out Offer upon the suggestion of the Court.

. . ."

That revised offer did not lead the judge to alter his view that the valuation methodology proposed would be inappropriate for the reasons that he had given in his earlier judgment: that is to say, that there was no business capable of being valued. And, he added an additional reason to those given in his earlier judgment: that, having listened to Mr Kalra's evidence, he did not see how the Petitioners could reasonably be expected to take this offer seriously. In the light of that evidence the judge found it impossible to

avoid the conclusion that Mr Kalra "has no genuine intention of paying anything for the Petitioners' shares."

The grounds of appeal

36. In its grounds of appeal from the winding up order made on 31 January 2013 Asia Pacific contended that the judge erred in failing to dismiss the Petition on the grounds (i) that the buy-out offer made in its letter dated 12 December 2012 provided an adequate alternative remedy; (ii) that the Petition was not brought *bona fide* for purpose of obtaining the relief sought but for an improper and collateral purpose; and (iii) that the Petition disclosed no grounds upon which the Court could exercise its discretion to make a winding up order. Nowhere in those grounds was it said that, if the judge were correct to take the view that the Petitioners had established that it was just and equitable that the Company be wound up, he was nevertheless wrong not to exercise the power conferred by section 95(3) of the Companies Law by making an order other than a winding up order: in particular, by making a by-out order under section 95(3)(d).

37. In addressing those grounds of appeal it is important to have to have in mind the relevant provisions of the Companies Law (2011 Revision). Section 92 of the Law provided that a company might be wound up by the court if (*inter alia*) "(e) the Court is of opinion that it is just and equitable that the company should be wound up". Section 95(3) was in these terms:

> "95(3) If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court shall have jurisdiction to make the following orders, as an alternative to a winding-up order, namely-
>
> (a) an order regulating the conduct of the company's affairs in the future;
>
> (b) an order requiring the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do;
>
> (c) an order authorising civil proceedings to be brought in the name and on behalf of the company by the petitioner on such terms as the Court may direct; or
>
> (d) an order providing for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, a reduction of the company's capital accordingly."

38. In my judgment in *Camulos Partners Offshore Limited v. Kathrein and Company* [2010] 1 CILR 303 (with which the other members of the Court agreed), I pointed out (*ibid*, 318 at paragraph 36) that the provisions enacted by section 95(3) of the Companies Law had been introduced into the Law by the Companies (Amendment) Law 2007, following a report of the Law Reform Commission in 2006. I went on to say this:

> "37 A footnote to the provisions in the draft bill proposed by the Law Reform Commission suggests that—
>
>> 'sub-sections (3) to (6) [of clause 95] are equivalent to sections 459–461 of the English Companies Act 1985. The overall effect of the amendment is to codify the decision in *CVC/Opportunity Equity Partners Ltd* v. *Demarco Almeida* 2002 CILR 77.'
>
> A note to s.95 in an introductory "Memorandum of Objects and Reasons" to the bill itself is to the same effect: "Subsections (3) to (6) are equivalent to sections 459 to 461 of the English Companies Act 1985."
>
> 38 If that were the intention or expectation of the draftsman, it was not reflected in the legislation. There is nothing in the Companies Law which corresponds to s.459 of the UK Companies Act 1985. The section in the 1985 Act which corresponds to s.95(3) of the Companies Law (2009 Revision) is s.461(2). Section 459 of the 1985 Act enables a member of a company to petition for an order under Part XVII "on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of . . . some part of its members (including at least himself)." It is, of course, correct that, if that ground is made out, the orders which the court may make (under s.461(2) of the 1985 Act) are similar to the orders which can be made under s.95(3) of the revised Law. But the gateway to an order under s.95(3) of the Law is that the court is satisfied that (but for that order) it would be "just and equitable" to wind up the company. As Vos, J.A. explained in this court in *In re Strategic Turnaround Partnership Ltd.* (2008 CILR 447, at para. 59):
>
>> '. . . [E]ven when the new s.95(3) . . . comes into force, it will allow a statutory remedy for minority shareholders by, for example, ordering the purchase of shares, but it will do so in the context of a contributories' 'just and equitable' petition; there will, even then, be no free-standing unfair prejudice petition in the Cayman Islands.'"

39. When making a buy-out order under section 95(3)(d) of the Companies Law, the court does not "dismiss" the winding up petition: for the obvious reason that, if it were to dismiss the petition, it would have no jurisdiction to make the buy-out order. The true analysis is that the court allows the petition – holding that the petitioner has established grounds upon which it would be just and equitable to wind up the company – but it goes onto hold that, in the circumstances, it would be appropriate "as an alternative to a

winding-up order" to make an order under section 95(3). It may be said that a failure to appreciate that there is no free-standing jurisdiction to make a buy-out order under the Companies Law infected the appellant's approach in the present case.

The first ground: failure to hold that the buy-out offer made in the letter dated 12 December 2012 provided an adequate alternative remedy

40. Ground 1 of the Grounds of Appeal filed on 5 February 2013 by Asia Pacific, as appellant in this Court, challenged the judge's decision not to dismiss the petition as an abuse of process in that (it was said) the offer to purchase the Petitioners' shareholding in the Company made in the letter dated 12 December 2012 provided an adequate alternative remedy. A challenge on the ground that the judge ought to have dismissed the petition as an abuse of process is the antithesis of a challenge on the ground that, in allowing the petition, the judge ought to have made an alternative order under section 95(3) of the Law. As I have explained, if the judge had dismissed the petition as an abuse of process, he would have had no jurisdiction to make an alternative order under section 95(3).

41. Properly understood, therefore, the challenge under the first ground of appeal required this Court to address the question whether, having regard to the offer contained in the letter of 12 December 2012, the judge ought to have struck out, or dismissed, the petition at the outset of the hearing in January 2013, without a trial of the underlying issue whether the Petitioners had established the just and equitable basis for a winding up order which was the gateway to an alternative order under section 95(3)(d), on the ground it was an abuse of the process of the court for the Petitioners to pursue the petition in circumstances that they had been offered and refused an adequate alternative remedy to a winding up order. It is necessary to address that question, not because there has been an appeal to this Court from the judge's order of 23 August 2012; but because (it is said) the same issue was raised before the judge at the hearing of the petition in January 2013 – but in reliance on the December 2012 revised offer rather than in reliance on the August 2012 offer - and was raised in this Court on the appeal from the order of 31 January 2013.

42. In a section of his judgment of 4 September 2012 headed "Strike Out Application - Adequate Alternative Remedy" the judge had said this:

> "3. It is well established as a matter of Cayman Islands law that when considering a contributory's petition for a winding up order presented on the just and equitable ground, the Court is required to address the questions whether there is an adequate alternative remedy available to the petitioner and whether he is acting unreasonably in not pursuing or accepting that alternative remedy. In *Camulos Partners Offshore Limited v. Kathrein and Company* [2010] 1 CILR 303 Sir John Chadwick P. said –
>
> > 'If a court is satisfied that both of those questions should be answered in the affirmative then it can be expected to take the view that the presentation of the petition is an abuse of its process or, alternatively, that the petition is bound to fail because it would not, in those circumstances, be 'just and equitable' that the Company should be wound up.'
>
> . . ."

The passage of my judgment in the *Camulos* case cited by the judge (which is found at paragraph 77 of that judgment) must be read in context. In *Camulos* there was an alternative remedy available to the petitioner. The petitioner could have sought the relief it claimed by a writ action: as I explained at paragraph 95 of that judgment. At paragraph 97, I explained why, in those circumstances, the petitioner was acting unreasonably in pursuing the relief it sought by a winding up petition rather than by the writ action (or in existing originating summons proceedings).

43. This Court did not hold, in *Camulos*¸ that a party whose objective was to procure a buy-out order had a remedy which it could pursue in the alternative to presenting a petition for winding up on the just and equitable ground. As Lord Millett had explained in *CVC Opportunity Equity Partners Ltd* v *Demarco Almeida* [2002] CILR 77 – in a passage cited by Justice Vos, Justice of Appeal, in *In re Strategic Turnaround Partnership Ltd.* [2008] CILR 447, at paragraph 58 (to which I referred at paragraph 50 of my judgment in *Camulos*) – in the absence of a free-standing remedy under the Companies Law in this jurisdiction the only course open to a party whose objective is to procure a buy-out order is to present a petition to have the company wound up. Further, of course, where the remedy which the party presenting the petition is indeed a winding up order, there is no alternative method of seeking that remedy. My observations in the passage of my judgment in *Camulos* cited by the judge are not in point in a case like the present.

44. At paragraph 3 of his judgment dated 4 September 2012 the judge had gone on (after his citation from my judgment in *Camulos*) to say this:

> " . . . In cases where the petitioner is a minority shareholder who complains about oppression on the part of the majority, it is well established that an offer to purchase his shares at a fair value will be regarded as an adequate alternative remedy, the rejection of which will lead the Court to strike out the petition. See *CVC Opportunity Equity Partners Ltd* v. *Demarco Almeida* [2002] CILR 77. . . ."

In my view the opinion of the Board, delivered by Lord Millett in *CVC v Almeida,* does not support a proposition precisely in the terms set out by the judge. But I accept, first, that a minority shareholder who seeks a buy-out order under the provisions formerly contained in sections 459 and 461(2) of the English Companies Act 1985 should expect that his petition will be struck out if he refuses an offer to purchase his shares at a fair value; and, second, that (notwithstanding the absence of a comparable free-standing jurisdiction in the Cayman Islands under the Companies Law) the outcome is likely to be the same where a minority shareholder seeks a winding up order on the just and equitable ground. The reason, I think, is not that "an offer to purchase his shares at a fair value will be regarded as an adequate alternative remedy": rather, it is that it is usually obvious that the order most favourable to the petitioner that would be made by the court on a successful petition presented by a minority shareholder who establishes unfair conduct or oppression - whether that petition seeks a buy-out order under the English legislation or a winding up petition under the Cayman Islands Law – is that his shares are to be bought out at a fair value (on whatever basis a fair value is to be determined in the circumstances), so that continued pursuit of the petition in the face of an offer which matches (or exceeds) such an outcome is a waste of the time and resources of the court and so an abuse of process. The offer is not "an alternative remedy"; but, if accepted, it leads to the same outcome without the need for further litigation. In those circumstances, a minority shareholder is acting unreasonably – and in abuse of process - if he does not accept the offer.

45. The judge continued (at paragraph 3 of his judgment dated 4 September 2012) with the following statement:

> "The same analysis is capable of being applied to cases such as the present in which the Company is characterised as a quasi-partnership between two shareholders (or two groups of shareholders) who each own 50% of the shares."

I do not think that a proposition in those terms can be supported. It seems to me impossible to say that a shareholder is necessarily acting unreasonably if he refuses an offer for the purchase of his 50% interest. Why should he not take the view that an equitable solution to the breakdown in the relationship of trust and confidence upon which the quasi partnership was established would be for him to have the opportunity to purchase the other party's 50% share; or for the company should be sold to a third party; or for the company to be wound up? And why should he not take the view that, if agreement cannot be reached as to an equitable solution, he would prefer to await the judgment of the court after a trial rather than to be forced to agree to a solution which he sees as inequitable?

46. In my view the judge was plainly correct to decline to strike out the petition at the outset of the hearing in January 2013 on the ground it was an abuse of the process of the court for the Petitioners to pursue the petition in circumstances that they had been offered and refused an adequate alternative remedy. But I reached that conclusion for reasons which differed in some respects from those which attracted the judge:

(1) It was impossible, in advance of hearing the evidence at the trial, for the judge to have taken the view that the likely outcome of the trial – and the outcome most favourable to the Petitioners – would be a buy-out order in favour of Asia Pacific; and so it was impossible for him to have taken the view that the Petitioners were acting unreasonably in refusing an offer for the purchase of their shares. The potential danger of pre-judging the outcome of the trial is illustrated – with hindsight – by the judge's conclusion, after hearing the evidence, that "he did not see how the Petitioners could reasonably be expected to take this offer seriously."

(2) The offer contained in the letter of 12 December 2012 provided for the shares to be sold and purchased at a "fair value" to be determined by an independent Expert Assessor. But the letter contains no direction to the valuer as to the basis – going concern value, net asset value or break-up value – on which the "fair value" of the Petitioners' shares was to be assessed. The importance of such a direction can be seen from Lord Millett's discussion of the principles in *CVC v Almeida*.

(3) That – and other – deficiencies in the letter of 12 December 2012 could not be remedied, in advance of trial, by the attempt (at paragraph 2 of that letter) to confer

power on the court "to modify any and all terms of this buy-out offer to ensure such compliance [with the principles in *O'Neil v. Philips*]". The court had no such power unless and until, on being satisfied that a just and equitable basis for a winding-up order had been established on the evidence, it was addressing the question what order it should make under section 95(3) of the Law. The court could not be asked – or empowered, unilaterally by the offeror - to revise the terms of the letter of 12 December 2012 in order to be in a position to hold (if that were otherwise possible) that the offeree would be acting unreasonably if he did not accept the offer in advance of trial.

47. It was for those reasons that I was satisfied, at the conclusion of the oral hearing of the appeal, that the appeal could not succeed on the basis of the first ground of appeal.

The second ground: that the petition was not brought bona fide for purpose of obtaining the relief sought but for an improper and collateral purpose

48. Ground 2 of the Grounds of Appeal also challenged the judge's decision not to dismiss the petition as an abuse of process. It was said that the judge ought to have found that the petition was not brought *bona tide* for purpose of obtaining the relief sought but for an improper and collateral purpose; and that, in failing to do so, he fell into error (i) by failing to apply, properly or at all, the correct legal test and/or principles concerning the circumstances in which the Court will strike out a petition for improper purpose; (ii) by failing to address, adequately or at all, the evidence relied upon by the appellant, which (it was said) demonstrated that the petition was brought for the ulterior and/or collateral purpose of undermining the Connecticut proceedings; and (iii) by failing to address, adequately or at all, the ·evidence relied upon by the appellant, which (it was said) demonstrated that the petition was brought for the further ulterior and/or collateral purposes of removing the Company, a direct competitor to the Petitioners and their affiliated companies, from the market. But that is to confuse the question "did the Petitioners, *bona fide*, want the winding up order which they sought" with the different question "what was the Petitioners' motive in wanting a winding up order". In the present case there was, as it seems to me, no reason to think that the Petitioners did not want a winding up order; indeed Asia Pacific seems to accept that that was just what they wanted

as it would achieve their alleged objectives. Their motives for wanting a winding up order were of no relevance in considering the question whether, by seeking that order, they were abusing the process of the court.

49. Ground 2 of the Grounds of Appeal contained a further challenge to the judge's decision not to dismiss or strike the petition as an abuse of process. It was said that the judge ought to have found that the Petitioners had not come to the court with clean hands and were thereby debarred from obtaining the equitable relief sought in the petition; and that, in failing to do so, the judge fell into error (i) by failing to address, adequately or at all, the correct legal test and/or principles concerning the circumstances in which the Court will strike out a petition for the winding up of a quasi-partnership company on just and equitable grounds where a petitioner has been the cause of the breakdown in the relationship of mutual trust and confidence (referred to as the "clean hands principle"); and (ii) by concluding, wrongly, (a) that there were no merits in the allegations of breach of fiduciary and other duties made by Asia Pacific against Mr Chugh (b) that Asia Pacific was aware of, and acquiesced in, the incorporation by Mr Chugh of several new companies (collectively known as "the Peak XV entities") which would be in direct competition with the Company in breach of the fiduciary duties which he owed to the Company; and (c) that the admitted use of the Company's confidential consumer database by Mr Chugh for the purposes of advancing the interests of the Peak XV entities did not amount to a misappropriation of a valuable asset of the Company in breach of the fiduciary duties owed by Mr Chugh to the Company.

50. In the alternative, it is said that the judge erred in failing to dismiss the Petition, pursuant to section 95(1)(a) of the Companies Law (2011 Revision), on the grounds that it had been brought for an improper or collateral purpose; or on the grounds that the Petitioners had not come to the court with clean hands and so were debarred from seeking equitable relief.

51. These grounds were developed on behalf of the appellant in extensive written submissions (at paragraphs 56 to 132 of a document described, inappropriately, as a "skeleton" argument). It was said, by way of "Overview" of Ground 2, to have been a

fundamental aspect of Asia Pacific's case at trial that Mr Chugh, and so the Petitioners, had committed "egregious breaches of fiduciary duties". These were enumerated as follows: (i) the formation of Peak XV (a company that is said to be in direct competition with the Company); (ii) the misappropriation of company assets, (said to be the customer relationship database, a valuable commodity that held, *inter alia,* investor details); (iii) the payment of £2 million to QVT in order to obtain a worthless Deed of Exclusivity; and (iv) the failure of Mr Chugh to pursue litigation against Trinity and SachsenFonds.

52. The judge heard evidence at trial from both Mr Kalra and Mr Chugh. He made findings of fact in relation to the allegations of breach of duty which had been made against Mr Chugh. As I have said, earlier in these Reasons, he observed (at paragraph 6 of his judgment) that the working relationship between Mr Chugh and Mr Kalra had become increasingly strained during 2008; and had completely broken down by the end of 2009, by which time (as he said) "they were both setting up their own separate businesses and actively discussing how to divide what remained of the Company's business and assets". He went on (*ibid*) to say that "Mr Kalra's subsequent attempt to accuse Mr Chugh of stealing Trikona's assets and destroying a lucrative business is completely at odds with the evidence of what actually happened at the time".

53. The judge addressed the circumstances in which Mr Chugh had established the Peak XV company at paragraph 26 of his judgment dated 31 January 2013. He said this:

> "26. Both Mr Chugh and Mr Kalra started their own separate business in October 2009. This was not done secretly. They were attempting to divide up both assets and liabilities between them. It is not in dispute that Mr Kalra wanted to close Trikona's London office whereas Mr Chugh wanted to use it for his new business. There may be some scope for argument about the allocation of costs as between Peak [XV] and Trikona, but there is no legitimate basis for converting such a dispute into an allegation that Mr Chugh 'stole' the assets."

He went on (*ibid*) to address the allegation of misappropriation of the Company's data base:

> "26. . . . Similarly, it is not in dispute that from October 2009 onwards Mr Chugh made use of Trikona' s computerized database for the purposes of

> his own business. I accept his evidence that he provided a copy of the database, as it then existed, to Mr Kalra in the expectation that Mr Kalra would use and build on his version for the purposes of his own business. The allegation, made almost two years later, that Mr Kalra "stole" a valuable asset belonging to Trikona is untrue."

54. Earlier in his judgment (at paragraph 8) the judge had described the circumstances in which Trikona and QVT had entered into the Deed of Exclusivity on 23 September 2008. At paragraph 9 he had said this:

> "9. Mr Kalra now accuses Mr Chugh of having acted in breach of fiduciary duty in connection with this transaction. His allegation is as follows [2nd Affidavit, paragraph 57(a)]:
>
>> 'During the course of 2008 and 2009, [Trinity] was subject to a hostile takeover by a London and New York based hedge fund, QVT Financial ('QVT',). . . . Despite his position as Co-Managing Director of [Trikona], Mr Chugh actively supported QVT's ultimately successful take-over of [Trinity], and otherwise worked in the interests of QVT at the expense of [Trikona]. One of the most egregious examples of this conduct, was causing [Trikona] to pay £2 million to QVT to obtain covenants from QVT of extremely limited value, and then frustrating all attempts to recover the money when QVT acted in flagrant breach of covenant."
>
> These assertions are wholly contradicted by the evidence. Mr Kalra must know full well that QVT never in fact made any take-over bid for Trinity. Mr Chugh did not 'cause' Trikona to pay £2 million to QVT. Whilst Mr Chugh took the lead on this negotiation, it is perfectly clear from the contemporaneous documentary evidence that he and Mr Kalra debated the merits of the transaction and made the decision jointly. They both signed the Deed of Exclusivity. Mr Kalra's later suggestion that he signed the deed under duress is not credible. Having observed both men in the witness box and listened to them giving evidence at some length, I find it impossible to imagine Mr Chugh being able to coerce his partner into doing anything. To the contrary, Mr Kalra came across as the domineering character. Having failed to raise the finance necessary to buy QVT's shares, Mr Kalra then wanted to sue [QVT] for the return of its £2 million, apparently on the basis of what Mr David Gold had said in the meeting immediately before the deed was executed. Mr Chugh resisted. He considered that there was no legitimate legal basis for suing QVT and that it made no commercial sense to sue their biggest shareholder. They had access to legal advice from SJ Berwin, a well known firm of London solicitors. Mr Kalra accepted his partner's point of view. It was only later that he made the allegation that Mr Chugh 'prevented' Trikona from suing QVT because he was motivated by some arrangement to the effect that QVT would invest in his new business, which did not even exist at that time. This allegation is wholly unsupported by any evidence."

The judge had described the circumstances in which the Company settled its claims

against Trinity (arising out of the SaschenFonds transactions) at paragraphs 12 and 13 of his judgment by the entry into an Arbitration Settlement Agreement and an Ancillary Settlement Agreement in February 2011. At paragraph 13 he had said this:

> "13. . . . The Ancillary Settlement Agreement recognizes that the parties (including Messrs Chugh and Kalra personally) have a common interest in defending the claims made against them by SachsenFonds. It therefore comprises a mutual defence agreement whereby the parties agree to co-operate and assist each other in putting forward a common defence. Trinity agreed to indemnify Messrs Chugh and Kalra against all liabilities etc (including legal fees) arising in connection with the performance by Trikona of its services relating to the SachsenFonds' transactions. Most importantly, by Clause 2.1 all the parties, including Mr Chugh and Mr Kalra, unconditionally and irrevocably waived and settled all claims of whatsoever nature which they had against any other party arising out of or in connection with the arbitration proceedings. Notwithstanding that Mr Kalra signed the Arbitration Settlement Agreement on behalf of Trikona and signed the Ancillary Settlement Agreement, both personally and on behalf Trikona, he is now suing Mr Chugh (originally derivatively, but now in the name of Trikona) for US$210 million in connection with the arbitration proceeding. He contends that, if he had not been 'forced' to execute these settlement agreements by Mr Chugh, Trikona would have succeeded in the arbitration on all points and would have obtained an award worth US$210 million more than the amount for which they settled. The remedy sought is the forfeiture of all the Petitioners' shares in Trikona on the basis Mr Chugh should be treated as the true beneficial owner of the shares and that his family trusts are a sham. There is not a shred of evidence tending to suggest that Mr Kalra was 'forced' to enter into the settlement agreements. Having listened to his explanation for pursuing this claim in the Connecticut proceedings, I conclude that it is a thoroughly dishonest abuse of process."

He reiterated those views at paragraph 26 of his judgment, where he said this:

> "26. The allegation that he 'forced' Mr Kalra to sign the Deed of Exclusivity and the subsequent settlement agreements is simply a fabrication."

55. As I have said, the judge made those findings of fact after hearing the evidence of both Mr Kalra and Mr Chugh. He found Mr Kalra's evidence to be wholly unreliable; as he said at paragraph 25 of his judgment:

> "25. . . . On the basis of the affidavit evidence then before the Court [in August 2012], I felt unable to express even a tentative conclusion about the relative merits of the claims and counterclaims which Messrs Chugh and Kalra are making against each other. Having now considered the underlying documentary evidence and listened to them being cross-examined over a period of four days, I have come to the firm conclusion that there is no merit whatsoever in the allegations made against Mr Chugh in both this proceeding and the Connecticut proceedings. I

> consider Mr Kalra's evidence to be wholly unreliable. He gave evidence in the manner of an advocate - apparently convinced of the merits of his case, but wholly blind to the realities of what actually happened. . . . The allegations made in the Connecticut proceedings have been contrived to pressurize Mr Chugh (and through him the Petitioners) to abandon their interest in Trikona."

56. In my view it was plain that Asia Pacific could not hope to succeed on ground 2 of its Grounds of Appeal unless it could persuade this Court that the judge was wrong to make the findings of fact to which I have referred in the preceding paragraphs. It was, I think, accepted by counsel for the appellant that that would be a difficult hurdle to surmount. At paragraph 60 of the written submissions filed on behalf of the appellant it is acknowledged that "as a general principle an appellate court will be reluctant to overturn a primary finding of fact by a trial judge, especially when the trial judge has had the benefit of assessing that evidence first hand". Nevertheless, it was said (*ibid*) that the judge "did not consider the evidence in a balanced and fair manner, nor did he deal with major issues that were raised by the Appellant . . ."; and (at paragraph 65 of those submissions) that "the findings made by [the judge] were contrary to the evidence and without consideration of material factors". But, despite those criticisms of the judge's approach to his fact-finding task, counsel for the appellant made little or no reference in oral argument to the numerous passages in the transcript of evidence which he had cited in his written submissions by way of support for those criticisms.

57. At the conclusion of oral argument, I was not persuaded that there was any basis upon which this Court could be invited to set aside the findings of fact which the judge had made in respect of the allegations upon which the appellant relied in its challenge under ground 2 of the Grounds of Appeal; and I was satisfied that the appeal could not succeed on the basis of that second ground of appeal.

The third ground: that the Petition disclosed no grounds upon which the Court could exercise its discretion to make a winding up order

58. Ground 3 of the Grounds of Appeal challenged the judge's decision that the Petitioners had established grounds upon which he could conclude that it was just and equitable to make an order that the Company be wound up. It was said that the judge was wrong in holding (i) that the Company should be characterised as a quasi-

partnership between Mr Chugh and Mr Kalra, (ii) that there had been a failure on the part of Asia Pacific to give effect to the Petitioners' legitimate expectation of being involved in the Company's management, (iii) that, in the events which had happened, the Company's sub-stratum had been lost, and (iv) that circumstances existed which required the appointment of liquidators to investigate the Company's affairs – and, in particular, that Mr Kalra, misused and/or misappropriated monies belonging to the Company. Those contentions were developed on behalf of the appellant at paragraphs 133 to 197 of the "skeleton argument" filed on behalf of the appellant.

59. It was accepted, in the appellant's written argument, that the winding up order had been made on the ground (amongst other grounds) that the Company was a quasi-partnership and that there was therefore a legitimate expectation that Mr Chugh would be involved in its management. The appellant sought to challenge the judge's characterisation of the Company as a quasi-partnership between Mr Chugh and Mr Kalra; but, given that that it had been admitted in its amended defence (at paragraph 12) that was how the Company should be characterised, there were obvious difficulties in sustaining that challenge. More pertinently, as it seemed to me, the issue whether it was correct to treat the Company as a quasi-partnership was of little (if any) importance, given that it had been admitted (at paragraph 13 of the amended defence) – as the judge noted at paragraph 17 of his judgment of 31 January 2013 - that Mr Chugh (and the Petitioners whom he represents) had a "legitimate expectation of being involved in [Trikona's] management". On the basis of that admission, it was, as it seemed to me at the oral hearing of the appeal, unnecessary for this Court to decide the question whether the judge was correct to characterise the Company as he did (although I should not be taken to have dissented from his view); he was plainly entitled to approach the case before him on the basis that the Petitioners had a legitimate expectation that Mr Chugh would be involved in the management of the Company; and, in approaching the case on that basis, he needed to ask himself whether – given the circumstances in which Mr Chugh was removed from his office as a director of the Company - it was just and equitable that the Company be wound up.

60. The judge addressed that issue at paragraphs 17, 18 and 25 of his judgment dated 31

January 2013. At paragraph 17, after referring to the admission in the amended defence that Mr Chugh (and the Petitioners whom he represented) had a legitimate expectation of being involved in [Trikona's] management, he went on to say this:

> "17 . . . Mr Kalra's case is that, from 2009 onwards) there could be no such expectation that Mr Chugh would continue to be involved in the management as a director of the company because 'he sought to sabotage the business of [Trikona] and acted in egregious breach of his fiduciary duties.' This allegation is wholly unsupported by any credible evidence."

I have already explained (when addressing ground 2 of the Grounds of Appeal) the basis for the judge's view that the allegation that Mr Chugh had sought to sabotage the Company's business and had acted in egregious breach of his fiduciary duties was not supported by the evidence. At paragraph 18 of his judgment the judge described the circumstances in which Mr Chugh was removed from office. He said this:

> "18. From its inception Trikona's board of directors comprised Mr Chugh and Mr Kalra and two so-called independent directors, namely Mr Ravindra Chitnis (nominated by the Petitioners) and Mr Saurabh Killa (nominated by the Respondent). Messrs Chugh and Kalra are described in various documents as 'co-managing directors' and the evidence is that they did in fact manage Trikona jointly. The two independent directors appear to have played no role in Trikona's affairs at all. This situation changed following the commencement of the Connecticut proceedings on 28th December 2011. Two weeks later, on 10th January 2012 Mr Chitnis resigned as a director. He has not given evidence and I do not know why he resigned at this time or whether Mr Chugh had any advance warning of his intended resignation. In any event, on the following day Mr Kalra seized the opportunity to sign a 'unanimous' written resolution by which Mr Chugh was removed as a director. Mr Killa signed it on the same day. Mr Kalra's US attorneys wrote to Mr Chugh on 17th January informing him that he had been removed from the board of directors. I do not think that it is necessary for me to decide whether or not this written resolution was legally effective or, if not, whether it is capable of being ratified at a meeting of which Mr Chugh is given notice. For present purposes, what is relevant is that Mr Kalra did in fact succeed in taking control of Trikona and proceeded to treat the company and its remaining assets as his own. Notwithstanding the admission that Trikona should be treated as a quasi-partnership in which the Petitioners had a legitimate expectation of being involved in the management - which must mean having equal representation on the board of directors - Mr Kalra seeks to justify his seizure of control by reference to the baseless allegations asserted against Mr Chugh in the Connecticut proceedings. Mr Kalra's seizure of control had serious adverse consequences for Mr Chugh and the Petitioners because it enabled him to misuse the company's money for his own benefit."

And, at paragraph 25 of his judgment, the judge observed that "in the circumstances" – which included the circumstances in which Mr Chugh was removed from office as a director of the Company - the Petitioners were entitled to a winding up order.

61. As the judge pointed out, in the paragraph of his judgment which I have just set out, Mr Kalra had sought to justify his seizure of control of the Company by relying on the allegations (described there by the judge as "baseless") which had been asserted against Mr Chugh in the Connecticut proceedings. Having rejected those allegations – in the passages of his judgment which I have set out when addressing ground 2 of the Grounds of Appeal – the judge was bound to take the view that there was no proper reason for the failure of Mr Kalra (and Asia Pacific, whom he represented) to act in a manner which was inconsistent with the Petitioners' (admittedly) legitimate expectation that they would continue to be represented on the board of directors through Mr Chugh; and that there was no answer to their claim that it would be just and equitable to make an order for the winding up of the Company.

62. As I have said, at the conclusion of oral argument, I was not persuaded that there was any basis upon which this Court could be invited to set aside the findings of fact which the judge had made in respect of the allegations upon which the appellant relied in its challenge under ground 2 of the Grounds of Appeal. It followed that I was not persuaded that there was any basis upon which this Court could be invited to set aside the same findings of fact in respect of the same allegations upon which the appellant relied under the second head of its challenge under ground 3 of the Grounds of Appeal; and so no basis upon which the Court could hold that the judge was wrong to take the view that, given the circumstances in which Mr Chugh was removed from his office as a director of the Company, it was just and equitable that the Company be wound up. In those circumstances I was satisfied that the appeal could not succeed on the basis of the third ground of appeal.

63. Having reached that conclusion, it was unnecessary to address the third and fourth heads of the appellant's challenge under ground 3 of the Grounds of Appeal.

The Court's decision to dismiss of the appeal from the winding order

64. For the reasons which I have set out I was satisfied, at the conclusion of the oral argument on the appeal, that the appellant was not entitled to succeed on any of the three grounds set out in its Grounds of Appeal; and that, accordingly, its appeal should be dismissed. As I have said, the appellant did not include, as one of its grounds of appeal, a challenge on the basis that, if the judge were correct to take the view that the Petitioners had established that it was just and equitable that the Company be wound up, he was nevertheless wrong not to exercise the power conferred by section 95(3) of the Companies Law by making an order other than a winding up order: in particular, to make a buy-out order under section 95(3)(d). Accordingly, it was unnecessary to address a challenge on that basis.

65. This was the last appeal which came before a constitution of the Court of which Justice Sir Richard Ground was a member. Shortly after the oral hearing of the appeal, he was admitted to hospital for treatment of a condition from which, sadly, he did not recover. But we had, of course, discussed the reasons why the appeal should be dismissed before indicating to the parties that that would be our judgment; and we had discussed, thereafter, the order to be made on the appeal against the costs order. The reasons which I have set out reflect those discussions; and should be taken as his reasons for reaching the conclusions of the Court as well as my own.

The appeal from the costs order

66. In the final paragraph of his judgment of 31 January 2013 the judge ordered that the Petitioners' costs should be paid by Asia Pacific, such costs to be taxed if not agreed. On 14 February 2013 he addressed the basis upon which such costs should be taxed; and he made an order in respect of the costs of the applications which he had heard in August 2012 (which had been reserved). He ordered that the Petitioners' costs of the proceedings (including the costs reserved on 18 September 2012) should be paid by Asia Pacific on the indemnity basis. Asia Pacific appealed from that order.

67. The appeal from the costs order is advanced on grounds set out in Grounds of Appeal which are undated but which were filed on 7 March 2013. It is said that the judge erred in law and in fact in awarding costs on an indemnity basis in that he was wrong to hold: (i) that Asia Pacific's defence to the petition was conducted improperly or unreasonably

within the meaning of Order 62, rule 4(11), of the Grand Court Rules; (ii) that he should follow his own decision in *Riad Tawfiq Al Sadik v Investcorp Bank BSC and others* (FSD 47 of 2009; unreported, 16 July 2012); (iii) that, as a matter of law, the principles which he had enunciated in the *Sadik* case were applicable in a case where the paying party had asserted a positive defence; (iv) that Asia Pacific had asserted a positive defence when it had no basis for doing so; (v) that the court was exercising its discretion to award costs on an indemnity basis in a lawful, proper and/or equitable manner; and (vi) that it was appropriate for the court to express its disapproval of Asia Pacific's defence.

68. The power of the Grand Court to order costs on an indemnity basis is restricted by GCR O.62, r.4(11). The rule is in these terms:

> "4(11) The Court may make an *inter partes* order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently."

Justice Andrew Jones had considered the application of that rule when addressing an application for indemnity costs in the *Sadik* case. In his judgment of 16 July 2012 (at paragraph 11) he had said this:

> "11. In my judgment a proceeding, or some identifiable part of it, can only be said to have been conducted 'improperly' within the meaning of r.4(11) if the Court is satisfied, in all the circumstances of the case, that a party has invoked the Court's jurisdiction illegitimately or abused the process in a way which attracts moral condemnation. A party who asserts a cause of action when he knows that he has no legitimate basis for doing so is acting improperly. . . ."

At paragraphs 12 and 13 of that judgment the judge said this (in relation to the facts of the case then before him):

> "12 . . . [Counsel] complains that Mr Al Sadik made wide-ranging and obviously flawed allegations of fraud and conducted the preparation in a manner which generated unnecessary work. The outcome of litigation frequently turns upon the Court's findings of fact and it is not unusual for such findings to depend upon the Court's assessment of the credibility and truthfulness of the witnesses. By itself, this outcome does not lead to the conclusion that the losing party had no legitimate case and was abusing the Court's process in some way. It can only be said that Mr Al Sadik is guilty of substantive misconduct to the extent that he advanced a case which he knew to be false.
>
> 13. I have come to the conclusion that the conduct of Mr Al Sadik's case was 'improper and unreasonable' only in one respect. His claim to have the benefit of a guaranteed return was raised after the market crash triggered by the Lehman

> Brothers bankruptcy and pursued relentlessly to the bitter end, notwithstanding that he knew n his own mind that he had not been given any enforceable guarantee. In this respect, I conclude that Mr Al Sadik's case was conducted improperly and unreasonably within the meaning of r.4(11). Since this claim constituted a significant part of the case, to which a large amount of time, effort and money was devoted, I have come to the conclusion that I should express the Court's disapproval by making an order for indemnity costs in respect of the first Claim (Breach of Collateral Contract)."

69. In my view Justice Andrew Jones was correct to take the view, in the *Sadik* case, that "a party who asserts a cause of action when he knows that he has no legitimate basis for doing so is acting improperly" within the meaning of O.62, r.4(11). He was correct to draw the distinction between a party who is advancing an honest case – but who fails because the court finds the evidence which he has adduced in support of that case to be incredible or untruthful – and a party who is advancing a case which he knows to be false. And he was correct to follow and apply those principles to the facts in the present case. I reject heads (i), (ii) and (iii) in the Grounds of Appeal filed on 7 March 2013. There is no basis upon which it can be held that the judge erred in principle in holding that he had power to make an order the Asia Pacific pay the Petitioners' costs of the trial on an indemnity basis.

70. In the present case, the judge made the following findings of fact in relation to the case which Asia Pacific advanced at trial in response to the allegation that the Petitioners had a legitimate expectation that they would continue to be represented by Mr Chugh on the board of directors of the Company. As I have said, its case was that there could be no such legitimate expectation in the circumstances that he (Mr Chugh) had committed "egregious breaches of fiduciary duties". The judge found:

    (1) at paragraph 9 of his judgment dated 31 January 2013, that:

    > "Mr Kalra must know full well that QVT never in fact made any take-over bid for Trinity."

    (2) at paragraph 13 of his judgment, that:

    > "There is not a shred of evidence tending to suggest that Mr Kalra was 'forced' to enter into the settlement agreements. Having listened to his explanation for pursuing this claim in the Connecticut proceedings, I conclude that it is a thoroughly dishonest abuse of process."

    and, at paragraph 26, that:

> "The allegation that he [Mr Chugh] 'forced' Mr Kalra to sign the Deed of Exclusivity and the subsequent settlement agreements is simply a fabrication."

(3) at paragraph 25 of his judgment, that:

> "The allegations made in the Connecticut proceedings have been contrived to pressurize Mr Chugh (and through him the Petitioners) to abandon their interest in Trikona."

71. On the basis of those findings of fact – which, as I have said, this Court has accepted – there was plainly material upon which the judge could take the view that Asia Pacific was advancing a case (through Mr Kalra) which it knew to be dishonest. I reject heads (iv), (v) and (vi) in the Grounds of Appeal filed on 7 March 2013. It was open to the judge to hold that, in the exercise of his discretion, this was a case in which an order for payment of the costs of the trial on an indemnity basis. There is no basis upon which this Court can be asked to set aside that order.

72. I differ from the judge in relation to the costs of the application for strike out which he had heard in August 2012. He was plainly entitled to conclude that – the application having failed - those costs should be paid by the applicant, Asia Pacific; but I am not persuaded that, given his observations at paragraph 3 of his judgment dated 4 September 2012, he was entitled to hold that the application was conducted improperly or unreasonably. It may be that, in the light of the analysis contained in the judgment of this Court as to the proper approach to an application to strike out a contributory's winding up petition in circumstances where the petitioner is a 50% shareholder, future strike out applications in such cases will be regarded as made unreasonably; but that was not the judge's approach in this case.

73. For those reasons, I would allow the appeal from the costs order to the extent indicated: that is to say, I would substitute for the paragraph 1 of the order made on 14 February 2013 an order in these terms:

> "1. The Petitioners' costs of the proceedings (including the costs reserved on 18 September 2012) should be paid by Asia Pacific. Such costs (other than the costs reserved on 18 September 2012 which are to be taxed on the standard basis) are to be taxed on the indemnity basis."

Abdulai Conteh, Justice of Appeal

74. For reasons more comprehensively set out in the judgment by Chadwick P, which I have

had the opportunity to read in draft form, I also concurred at the conclusions of the oral hearing of the instant appeal that the appeal should be dismissed.

75. I also agree with the disposal of the appeal against the judge's costs order as proposed in the judgment by Chadwick P.

Chadwick P

Conteh JA

Ground JA