

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CIVIL APPEAL NO. 11 OF 2009

(GC CAUSE NO. 365 OF 2009)

**IN THE MATTER OF THE COMPANIES LAW (2009 Revision)
AND IN THE MATTER OF CAMULOS PARTNERS OFFSHORE LIMITED**

BETWEEN:

CAMULOS PARTNERS OFFSHORE LIMITED

APPELLANT

AND:

KATHREIN & CO

RESPONDENT

**BEFORE: The Rt. Hon. Sir John Chadwick, President
 The Hon. Mr. Justice I. Forte, J.A.
 The Hon. Mr. Justice E. Mottley, J.A.**

Appearances: Mr. Francis Tregear QC instructed by Ms. Colette Wilkins and Mr. Matthew Goucke of Walkers for the appellant and Mr. Michael Crystal QC instructed by Mr. Ross McDonough and Mr. Guy Manning of Campbells for the Respondent.

Heard: 2nd December, 2009

Judgment delivered: 18th March, 2010

JUDGMENT



Sir John Chadwick, President:

1. These are appeals from orders made on 15 and 18 September 2009 by Justice Anderson, sitting as an acting judge of the Grand Court. The issue before the judge was whether to restrain the presentation of a petition to wind up a Cayman registered investment fund. The issue before this Court is whether, in the events

which have happened, the petitions which have been presented should now be struck out.

The underlying facts

2. The appellant, Camulos Partners Offshore Limited (“the Fund”), was incorporated in May 2005 as an exempted company under Part VII of the Companies Law. Its purpose was to provide an investment vehicle for those who subscribed for its shares. In carrying out that purpose the Fund acted as an offshore feeder in a fund structure of which the master fund was Camulos Master Fund LP (“the Master Fund”), an exempted limited partnership formed under the laws of the Cayman Islands. Put shortly, investors subscribed for shares in the Fund; and the Fund, in turn, applied its assets (derived from investors’ subscriptions) in subscribing for shares in the Master Fund. The investment objective – as described in a Confidential Private Offering Memorandum dated May 2008 – was to generate, through investment in the Master Fund, “superior risk-adjusted returns from a combination of capital appreciation and current income by opportunistically investing and trading in a diversified portfolio of undervalued and distressed assets”. The Articles of the Fund provided that its shares were redeemable at the option of the holder at the end of a calendar quarter upon sixty days prior written notice.

3. The respondent, Kathrein & Co (“the Investor”), is the holder of 27,276.3724 Class A Series 1 redeemable shares in the share capital of the Fund. The Investor subscribed for those shares pursuant to a subscription agreement dated 31 July 2006. On 31 July 2008 the Investor, acting through its agent Concord Management LLC (“Concord”), gave notice (“the Redemption Request”) of its wish to redeem all the shares which it held. The applicable redemption date under the Redemption Request was 30 September 2008. The Redemption Request was accepted on behalf of the Fund by its administrator, Op Hedge Fund Services (Cayman) Ltd. It is said that the redemption price payable to the Investor for its shares, pursuant to the Redemption Request, was US\$27,227,268.80.

4. On 3 September 2008 the Fund's investment manager, Camulos Capital LP (a Delaware limited partnership), sent a restructuring proposal to all shareholders. The proposal contained an "exchange offer"; under which investors (including those whose shares were the subject of a request for redemption on 30 September 2008) were offered the opportunity to exchange their existing Class A shares and Class B shares for new classes of shares in the Fund. It is unnecessary to examine the terms of that offer in detail in this judgment: it is sufficient to note that the Fund proposed that shareholders (including those whose shares were the subject of a request for redemption on 30 September 2008) who did not accept the offer would receive in satisfaction of their shares payment of 15% of the redemption price in cash and, as to the balance of 85%, a *pro-rata* distribution of unspecified assets *in specie*.
5. The Investor did not accept the exchange offer of 3 September 2008. In the events which happened, the offer was formally rejected on its behalf on 24 October 2008. No cash payment was made to the Investor – either in respect of the redemption price or in respect of 15% of that price – and no assets were transferred to it *in specie*. The Investor's position is that US\$27,227,268.80 is due to it – as a creditor – in respect of the redemption price payable on 30 September 2008; and that, until that sum is paid, it remains a shareholder in the Fund.
6. On 12 November 2008 the Fund's investment manager wrote to all investors purporting to suspend payment of the redemption price: and, in particular, of the 15% payable in cash under the terms of the exchange offer and the equivalent cash payment to those who had not accepted that offer. Article 67 of the Fund's Articles conferred power on the directors to suspend payment of the redemption price in certain circumstances; but the investment manager did not specify in its letter of 12 November 2008 on which (if any) of those circumstances the Fund sought to rely. The Investor's position is that no grounds of suspension existed on 12 November 2008 – alternatively, that if the power to suspend had arisen it was

exercised for an improper purpose – and that the purported suspension was of no effect.

7. On 22 April 2009 the Investor commenced proceedings against the Fund by the issue of an originating summons. The relief sought in those proceedings included declarations (i) that the redemption price payable by the Fund to the Investor in respect of the redemption on 30 September 2008 of the Investor's 27,276.3724 shares was US\$27,227,268.80 – that being the Net Asset Value of those shares on the redemption date – and (ii) that the Fund must settle its obligation to pay the redemption price by paying to the Investor in cash not less than 15% of that sum. Further declarations were sought as to the satisfaction of the balance of the redemption price by the distribution of assets *in specie*: in particular, the Investor sought declarations (a) that the fair market value of those assets as at the date of transfer must be equal to the redemption price (US\$27,227,268.80) less the amount of any cash payment, (b) that the assets to be transferred must be assets within the investment portfolio of the Master Fund (and not derivatives issued or created by the Fund or the Master Fund), (c) that the assets to be transferred must be assets which the Investor was itself permitted to hold and (d) that details of the assets to be transferred must be disclosed to the Investor not less than 21 days before transfer.
8. By summons issued on 8 June 2009 the Fund sought an order that the originating summons be struck out. Nevertheless - and notwithstanding that the summons to strike out (which, it seems, could not be listed for hearing in the Grand Court before 31 July 2009) remained outstanding – the Fund swore substantive evidence in response to the originating summons on 10 June and 20 July 2009.
9. On 23 July 2009, following receipt of that evidence and on discovering that the Fund proposed to make a cash payment to all other investors (but not the Investor) in respect of the redemption price of their shares, attorneys for the Investor (Campbells) wrote to attorneys for the Fund (Walkers) asserting that to do so

would be “clearly unjust and inequitable and in breach of their fiduciary duty to act fairly between different groups of investors”; and so discriminatory. It was said that “The Fund’s actions in paying the Other Investors while not paying our client have changed matters significantly since the Originating Summons was filed on 22 April 2009”; and that the evidence filed by the Fund on the originating summons now appeared to be largely irrelevant to the issues between the parties because “[it] in no way addresses the fact that your client has acted in a manner which has discriminated against and is unfairly prejudicial to our client, not least by paying all the Other Investors in cash while paying nothing to our client either in cash or in kind.”

10. The letter of 23 July 2009 went on (at paragraph 13):

“Accordingly, unless by close of business on 6 August 2009 (i) our client has been paid the Redemption Price of US\$27,227,268.80; and the parties have signed a consent order by which the Originating Summons will be discontinued on terms that your client pays our client’s costs (to be taxed if not agreed), we are instructed to present a Petition on behalf of our client seeking orders pursuant to section 95(3) of the Companies Law that:

- (a) the Fund be wound up on the just and equitable ground; or alternatively
- (b) the Fund pay our client the sum of US\$27,227,268.80 within 7 days (or such other period as the Court deems appropriate) failing which the Fund be wound up; or alternatively
- (c) the Fund refrains from making any payments to or redeeming the shares of any other investors unless and until it has paid our client the sum of US\$27,227,268.80;
- (d) such other and/or alternative and/or further relief as our client is advised to seek and which the Court deems appropriate to grant, including without limitation the relief sought, with consequential amendments, in paragraph 4 of the Originating Summons; and
- (e) costs.”

It was suggested that, “if your client does not comply with the above demands by close of business on 6 August 2009, the originating summons be stayed pending the final determination of the petition”.

Events leading to the presentation of petitions to wind up the Fund

11. Walkers responded to that letter on the following day. They sought an undertaking that the Investor would not present a petition without first giving seven days written notice. In an e-mail of the same day, they made it clear that the Fund would not be paying the Investor the sum of US\$27,277,268.80 by 6 August 2009 “as, amongst other things, the suspension of voluntary redemptions (including the right to receive redemption proceeds) remains in place”. On 27 July 2009 Campbells replied, refusing on behalf of the Investor to give the undertaking sought. It was said that a petition would be presented without further notice.

12. By an originating notice of motion in Cause No 365 of 2009 - dated 3 August 2009 and filed on 6 August 2009 before any petition had been presented - the Fund sought an order restraining the presentation of a winding up petition. That application came before Justice Henderson, *ex parte*. The judge declined to make the order sought in the absence of the Investor; but he did order that at least seven days notice be given before the presentation of a petition to enable there to be an inter partes hearing. Notice of intention to present a petition on 24 August 2009 (with a draft petition attached) was given by Campbells in a letter dated 12 August 2009. On 18 August 2009 Walkers filed an *inter partes* summons (in Cause No 365 of 2009) seeking relief in the same terms (so far as material) as had been sought *ex parte* on 6 August 2009.

13. The summons of 18 August 2009 came before Justice Anderson on 28 August and 8 September 2009. For reasons given in a full judgment dated 15 September 2009 the judge refused to grant the relief sought. By an order dated 15 September 2009 (and filed on 18 September 2009) made in Cause No 365 of 2009 he dismissed the originating notice of motion dated 3 August 2009 and the summons of 18 August 2009; directed that the petition be not advertised without further order; and directed that the Investor apply for an order staying the originating summons proceedings.

14. On 16 September 2009, following judgment on the previous day but before the order dated 15 September 2009 had been filed, the Investor presented a petition (in Cause No 438 of 2009) for the winding up of the Fund; and filed a summons for directions that the petition should proceed as a proceeding against the Fund alone (in which other contributories would not take part). The petition was in substantially the same form as that which had been attached to Campbells' letter of 12 August 2009. Representations were made to the judge by counsel on 17 September 2009: as appears from a Note dated 18 September 2009 signed by the judge. It is clear from that Note that the judge did not treat those representations as a formal application to strike out the petition that had been presented. He indicated that, if the parties agreed, he would make an order in a form which differed from that dated 15 September 2009 (which, it seems, he had already signed; but which, as I have said, had not been perfected by filing); but that, absent agreement, he would make the order in the form which he had already signed. No agreement was reached; and the order was made in the form to which I have already referred. That that was the position is confirmed in a Note to File dated 21 September 2009 signed by the Chief Justice.

15. On 21 September 2009 the Fund filed a summons seeking an order that the petition presented on 16 September 2009 (in Cause No 438 of 2009) be struck out as an abuse of the process of the Court; alternatively pursuant to the court's inherent jurisdiction. In the alternative, the Fund sought an order for a stay of all proceedings on that petition until 29 September 2009; a further stay from that date if certain conditions were complied with; and prospective validation orders to enable it to deal with its property in the ordinary course of its business. The conditions upon which a further stay and prospective validation orders were sought included a condition that "the [Fund] has provided to the Petitioner reasonable evidence of . . . having taken steps to . . . segregate the sum of US\$27,227,268.80 in an escrow account."

16. On 22 September 2009 – for reasons that have not been explained to this Court – the Investor presented a second petition (in Cause No 454 of 2009) for the winding up of the Fund. The terms of the second petition are substantially the same as those of the first petition.

The notice of appeal

17. Notice of appeal was filed on behalf of the Fund on 24 September 2009. It purports to be notice of an appeal from both the order dated 15 September 2009 made in Cause No 365 of 2009 (the “Order”) “dismissing the Appellant’s Ex Parte Originating Motion dated 3 August 2009 and Summons dated 18 August 2009 (the ‘Applications’)” and “the subsequent order of Anderson J as set out in his Note dated 18 September 2009 dismissing the Appellant’s oral application on 17 September 2009 for certain consequential relief (‘the Consequential Order’) pending appeal. It seeks orders that paragraph 1 of the Order dated 15 September 2009 (which dismissed the Applications) and paragraph 4 of that order (which directed that the costs of the Applications be paid by the Fund) be set aside; that the Consequential Order be set aside in whole; that the appeal be allowed and the Applications granted and that the Investor be restrained from presenting any petition for the winding up of the Fund based on the matters set out in the originating summons of 22 April 2009, the letters from Campbells to which I have referred or either of the petitions presented, respectively, on 16 and 22 September 2009; and that the Investor be restrained from proceeding further with those petitions.

18. I have said that the notice of appeal purports to be in respect of an appeal from an order (the Consequential Order) made by Justice Anderson “as set out in his Note dated 18 September 2009”. I do so because it is clear that the judge intended to make only one order; and that the only order that he made was the order (the Order) dated 15 September 2009. His intention to make only one order appears from paragraph 6 of his Note:

“Finally, in response to the concern expressed by Campbells about whether there should be one (1) order or two (2), I would again say that in the absence of any formal application, it seems to me that I can properly make one order, including the consequential orders, in respect of the application to restrain the presentation of the petition.”

Nevertheless, in the events that happened, it is plainly open to the Fund to contend on appeal from the Order that the judge erred in failing to include in that order additional provisions which, on 17 September 2009 (before the Order had been perfected), counsel for the Fund had asked him to include.

19. Those additional provisions can be identified by reference to the form of order (set out in the Note) which the judge indicated he would have been willing to make if the parties had been in agreement. It is important to note that, amongst those provisions, were the following:

“(2) The Winding Up Petition presented by the [Investor] on September 16, 2009 and allocated Cause No: 435 [*quaere*, 438] of 2009 shall be sealed on the Court’s File and removed from the Register of Writs and Other Originating Process and both counsel for and on behalf of their respective clients undertake to do nothing to enhance the presentation the said petition.

- (6) The [Fund] shall, at or before 3:00 pm on Friday September 25, 2009
- (a) Provide a guarantee by a bank or other certified financial institution operating within the Cayman islands for US\$27,227,268.80 (hereinafter ‘the sum’); or
 - (b) Provide an irrevocable Letter of Credit in favour of the [Investor] in the amount of the sum; or
 - (c) Place the sum in an escrow interest bearing account in the joint names of attorneys representing both parties; or
 - (d) Pay the sum into court; or
 - (e) Otherwise provide security for the sum, satisfactory to the [Investor’s] attorneys.

(7) Provided that the [Fund] has complied with the terms of Order 5 above [*quaere* 6 – because paragraph 5 of the proposed Order contains no requirement that the Fund take any step], then the [Investor] shall:

- (a) Take no steps before 29 September, 2009, to have its summons for directions issued on September 16, 2009, in cause No 438 of 2009, heard by the Court, and
- (b) Shall not object to any application by the [Fund] for any validation order pursuant to section 99 of the Companies Law PROVIDED, however, that in respect of any such application

which (i) alters or may alter the status of any other shareholders in the Applicant, or (ii) allows or may allow the Applicant to make any payment to any such shareholder: then the Applicant shall give not less than ten (10) day's prior written notice of the intention to file such application for validation."

It can be seen, therefore, that by 17 September 2009 (if not before) the Fund was indicating a willingness to segregate and secure a sum equal to the sum which the Investor claimed was due to it as the redemption price payable pursuant to the redemption request. The Fund's willingness to segregate and secure the sum claimed was reiterated in the summons filed on 21 September 2009 to which I have already referred. And it found expression in the order which was made on that summons when it came before the Chief Justice on 6 October 2009.

The validation orders of 6 October 2009

20. On 6 October 2009 the Chief Justice had before him (i) the summons filed on behalf of the Fund on 21 September 2009 (and amended on 6 October 2009) seeking a stay of the first petition (in Cause No 438 of 2009) pending appeal and a validation order and (ii) a summons (in substantially the same terms) filed on behalf of the Fund on 24 September 2009 seeking a stay of the second petition (in Cause No 454 of 2009) and a validation order. He granted the validation orders sought; and adjourned the applications for a stay of the proceedings on the petitions to a single judge of the Court of Appeal, for hearing on 20 October 2009.

21. Paragraph 1 of each of the validation orders made on 6 October 2009 was in these terms:

"The [Fund] shall pay the total sum of US\$27,400,000 ("the Secured Amount") into the Grand Court in Cause No 438 of 2009 and Cause No 454 of 2009 by no later than 7 December 2009, such Secured Amount to be maintained and administered by the Courts Administrator pursuant to the terms of the Judicature Law (2007 Revision) in a segregated, interest-bearing account until further *inter partes* Order of this Court or written agreement between the [Investor] and the [Fund]."

This Court was informed that the sum of US\$27.4 million mentioned in paragraph 1 of the orders was in excess of the sum of US\$27,227,268.80 claimed by the Investor. Validation orders were made "Provided that the [Fund] pays the Secured Amount into the Grand Court in accordance with paragraph 1 of this Order".

22. The validation orders provided that (from the date of the presentation of the petition and until the conclusion of the hearing of the petition) (a) payments made into or out of the bank accounts held by, or on behalf of, the Fund for the purpose of paying its debts and expenses incurred in the ordinary course of business, (b) shares in the Fund sold and transferred as between existing investors in the Fund and (c) shares in the Fund sold and transferred from existing investors to third parties should not be avoided by the operation of section 99 of the Companies Law (2009 Revision).

23. It is important to have in mind that paragraph 1 of the orders made on 6 October 2009 was mandatory: that is to say, it did not give the Fund the option (as a condition of obtaining the validation orders sought) whether or not to make payment into court. And the sum was to remain in court, pending further order of the court or agreement between the parties. At the hearing of this appeal, we were informed by leading counsel for the Fund (i) that the sum of US\$27.4 million or thereabouts had been held in an escrow account with United States attorneys since the validation orders of 6 October 2009 and had been paid into court on 2 December 2009 (the day on which the appeal was heard); and (ii) that that sum would remain in court (notwithstanding a successful outcome of the appeal) until further order of the court pending resolution of the underlying dispute between the parties as to the Fund's right to suspend payments on voluntary redemption. Although, at the time the assurance was given in this Court, the Fund's assurance that the US\$27.4 million would remain in court (notwithstanding a successful outcome of the appeal) pending resolution of the underlying dispute between the parties was seen as an important development, it seems to me that it was, in any

event, open to the court (under the terms of paragraph 1 of the orders of 6 October 2009) to make an order to that effect.

24. As I have said, the applications for a stay of all proceedings in the petitions were adjourned by the Chief Justice on 6 October 2009 for hearing by a single judge of this Court. They came before Justice Foster on 20 October 2009. He granted the stay sought until the determination of the appeal.

The grounds upon which the Investor seeks to wind up the Fund

25. The appeal was argued on the basis that the relevant petition is now that presented on 22 September 2009 (in Cause No 454 of 2009). If there are differences between that petition and the petition presented on 16 September 2009 (in Cause No 438 of 2009), or between that petition and the draft petition (annexed to Campbells' letter of 12 August 2009) which would have been before the judge, it has not been suggested that those differences are of any materiality in the present context. In this judgment, therefore, I will refer only to the grounds in the petition presented on 22 September 2009.

26. The petition is a substantial document and is not easy to summarise. But the principal complaints made against the Fund fall under the following heads:

- (1) The purported suspension of redemptions on or around 12 November 2008 was invalid for one or other of the following reasons: (a) none of the grounds upon which the directors could declare a suspension (set out in article 67 of the Fund's Articles of Association) existed at the time of the suspension; alternatively (b) if grounds for suspension did exist at the time of the suspension, the directors did not exercise their powers for a proper purpose; alternatively (c) if grounds for suspension did exist at the time of the suspension and continue to exist, the directors have acted improperly in failing to exercise their power to declare the suspension to be at an end. For each of those reasons (it is said) the Investor has been treated by the Fund in a manner

which is unfairly prejudicial to him, in that he has not been paid the redemption price to which he is entitled, and has been discriminated against.

- (2) The proposal to pay the Investor (and only the Investor) by a distribution of assets *in specie* is said to be unjust, inequitable and unfairly prejudicial to the Investor and amounts to a breach of the directors' fiduciary duty to act fairly between different sections of the investors.
- (3) The Fund's contention that it can satisfy its obligation to pay the Investor by a transfer of assets *in specie* the value of which (although equivalent to the redemption price on 30 September 2008) would be, or would be likely to be, less than equivalent to the redemption price at the date of transfer (following the termination of the suspension) would mean that the Investor would be unfairly prejudiced as a result of being redeemed in kind rather than in cash: in circumstances where all other investors would benefit at the Investor's expense as a result of the Fund being able to discharge its liabilities to the investor by transferring assets with a substantially lower value.
- (4) The failure of the Fund to provide details of the assets which are said to have been earmarked (or hypothecated) for distribution to the Investor is unjust, inequitable and unfairly prejudicial to the Investor.
- (5) The fact that the Fund has made substantial cash payments to the other investors, but has made no payment to the Investor (either in cash or in kind) is discriminatory, and unfairly prejudicial treatment, of the Investor for reasons set out at some length under paragraph 49 of the petition.
- (6) Even if the directors had acted in accordance with the Fund's constitutional documents, its conduct is still unfairly prejudicial to the Investor for the reasons set out under paragraph 50 of the petition.

27. It is, I think, appropriate to set out in full the contentions advanced under paragraph 50 of the petition:

“Even if (contrary to the Petitioner's case) it was consistent with the strict legal obligations of the parties under the Company's constitutional documents, it was clearly unjust, inequitable, unfairly prejudicial to the Petitioner and in breach of the director's fiduciary duty to act fairly

between different groups of investors for the directors to have paid the Other Investors in cash while paying none of the US\$27,227,268.80 due to the Petitioner, whether in cash or in kind, in circumstances where (*inter alia*):

- (a) the Petitioner submitted the Redemption Request for redemption on 30 September 2008, as it was entitled to do in accordance with the Articles, whereas many of the Other Investors did not;
- (b) the Petitioner was under no obligation to accept the Exchange Offer which was subsequently made by the Company (the acceptance of which would have fundamentally altered the terms of its investment), and was perfectly entitled to decline to do so;
- (c) the terms of the Exchange Offer (on which the Petitioner relied when deciding whether or not to accept that offer) stated that investors would be paid the full amount due to them irrespective of whether they accepted the Exchange Offer, and did not in any way suggest that investors who accepted the Exchange Offer might be paid in priority to those who did not accept the offer (as the Company has now done), giving rise to a legitimate expectation on the part of the Petitioner that it would be paid at the same time as investors who accepted the Exchange Offer.
- (d) The 12 November letter (on which the Petitioner relied when deciding whether or not to take any action against the Company in respect of the purported suspension of the payment of redemption proceeds) stated that all investors would have their capital returned to them in cash and made no distinction between the Petitioner and the Other Investors or between voluntary and mandatory redemptions as to the timing or manner of payment; and
- (e) The Petitioner has been waiting since 30 December 2008 to receive the Redemption Price of US\$27,227,268.80 due to it in circumstances where the Company has (i) already distributed substantially more than that amount to the Other Investors in cash; (ii) has asserted that it has and will continue to have sufficient cash to pay the Redemption Price to the Petitioner in full, but chooses not to make a cash payment to the Petitioner unless ordered to do so by the Court; (iii) has asserted that it could and would take steps to segregate the sum of US\$27,227,268.80 (being the Redemption Price) in an escrow account as a condition of it being granted "Interim Injunctive Relief"; (iv) has been holding assets (which assets must have included cash to the value of approximately US\$4,084,000) which it allegedly earmarked on 30 September 2008 to distribute to the Petitioner in kind, but has refused to distribute those assets without providing any valid reason for its refusal to do so; and (v) has stated that the purported suspension may never be lifted."

I have said that it has not been suggested that differences between the petition presented on 22 September 2009 and the earlier petition and draft petition are of

any materiality in the present context. But I should mention that (iii) in paragraph 50(e) does not appear in the earlier documents. That suggests that the proposal to segregate the sum of US\$27,227,268.80 was first made when counsel were before the judge on 17 September 2009: it is, of course, made also in the summons of 21 September 2009.

28. Paragraph 51 follows, in these terms:

“In the light of all the above:

- (a) the suspension was not validly imposed; or
- (b) if the suspension was validly imposed, it has, or should be deemed to have, been lifted; and/or
- (c) the directors have breached their fiduciary duties to act in accordance with the Company’s Articles and/or to act fairly as between different sections of investors and/or to exercise their powers for a proper purpose; and/or
- (d) the Petitioner has been treated unjustly and inequitably, has been unfairly prejudiced by the Company’s conduct, and is entitled to be paid the Redemption Price of US\$27,227,268.80 due to it in cash immediately, and/or
- (e) it is just and equitable that the Company be wound up and that independent liquidators be appointed to wind up its affairs in a manner which is consistent with the rights of, and fair to, all the Company’s creditors and shareholders; and/or
- (f) on a true construction of the Company’s constitutional documents and/or in light of the Company’s unfairly prejudicial treatment of the Petitioner and/or on just and equitable grounds the Court should grant one or more of the alternate forms of relief sought below pursuant to Section 95(3) of the Companies Law (2009 Revision).

29. The body of the petition (i.e that part which precedes the prayer for relief) concludes with paragraph 52, in these terms:

“The Company asserts that it has positive [net asset value] (after deduction of all liabilities, including the liability owed to the Petitioner). Accordingly, the Petitioner would have a tangible interest in the liquidation.”

The relief sought by the petition

30. The primary relief sought in the prayer for relief is for an order that the Fund be wound up in accordance with the Companies Law, with consequential orders for

the appointment of nominated liquidators and for the powers that those liquidators are to have and the functions that they are to discharge. But, in the alternative to winding up, relief is sought under four other heads (each, itself, in the alternative to the preceding head). Those are:

- (1) An order for payment to the Investor of US\$27,227,268.80 in cash within seven days.
- (2) An order restraining the Fund from making payment to any other investors unless and until it has paid the Investor US\$27,227,268.80 in cash.
- (3) An order (a) that the Fund pay to the Investor forthwith in cash such percentage of the Redemption Price as it has paid to the Other Investors in respect of amounts owing to them; and (b) that, if any amounts are still owing to the Other Investors in respect of the 15% redemption, the Fund make no further payments to those Other Investors without making a payment of an equal percentage of the Redemption Price to the Investor.
- (4) A variant (in terms not material in the present context) to the order set out under (3) above.

31. Those orders are sought under section 95(3) of the Companies Law (2009 Revision). The section is 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 in the company's capital accordingly.

Those provisions were introduced into the Companies Law by the Companies (Amendment) Law 2007, following a Report of the Law Reform Commission in 2006.

32. 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 De Marco Al Meda* [2002] CILR 77.”

A note to clause 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.”

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 section 459 of the United Kingdom Companies Act 1985. The section in the 1985 Act which corresponds to section 95(3) of the Companies Law (2009 Revision) is section 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 section 461(2) of the 1985 Act) are similar to the orders which can be made under section 95(3) of the revised Law. But the gateway to an order under section 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 Justice Vos JA explained in this Court in *Strategic Turnaround Master Partnership Limited* (unreported, 12 December 2008), at paragraph 94:

“ . . . even when the new Section 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.”

The judge's reasons for refusing to restrain presentation of a winding up petition.

33. The judge dismissed the applications of 6 and 18 August 2009 for the reasons which he gave at paragraphs 49 to 51 of a Ruling dated 15 September 2009 (the “judgment”). He said this:

“49. In the light of the foregoing, it seems to me that the argument of the [Investor] in opposition to the grant of any injunction to restrain the presentation of the petition is well grounded on at least two bases. Firstly, I am in agreement with the submission that the Reasons set out in the draft Bill make it quite clear that the legislative intention was to broaden the scope of the just and equitable remedy to include considerations of unfairness found in section 459 and 461 of the United Kingdom Companies Act of 1985 as amended. . . .

50. I also hold that the fact that there are alternative remedies contemplated under the new section 95(3) (*sic*). I accept the submission of [counsel for the Investor] that section 95(3) now gives the [Investor] additional prospective remedies which may not be available outside the presentation of the petition under Part V. This must mean that the petition contemplated by the Investor is not ‘bound to fail’. In the context of the analysis of the relationship between ‘abuse of process’ and ‘bound to fail’ by the authors of French [*French on Applications to Wind Up Companies*] (*supra*), it is clear that this petition should be allowed to go forward.

51. Like Vos JA in *Strategic Turnaround*, I have formed the decided view that the petition proposed to be filed by the [Investor] in this case is not an abuse of the court’s process and no injunction should be granted to prevent its presentation. Part V of the Cayman Islands Companies Law deals with the Winding up of Companies and Associations and it is clear that under the provisions of section 94(1)(c) a contributory is entitled in appropriate circumstances to present a petition to wind up the company. I hold both in principle and on the authority of *Strategic Turnaround* that the [Investor] whose name has not been removed from the official register of members of the fund is a contributory with a statutory right to present a petition in the circumstances alleged.”

34. Earlier in his judgment the judge had considered a number of what may be described as “abuse of process” cases: *Cadiz Waterworks Company v Barnett* (1874) LR 19 Eq 182; *Charles Forte Investments Ltd v Amanda* [1964] 1 Ch 240; *Mann and another v Goldstein and another* [1968] 2 All ER 769; *Bryanston*

Finance Ltd v De Vries (No 2) [1975] 1 Ch 63; *In re a Company (No 003096 of 1987)* [1988] 4 BCC 80; and *CVC Opportunity Equity Partners Ltd v another v Demarco Almeida* [2002] UKPC 16, [2002] 2 BCLC 108. Of those, *Cadiz Waterworks Company v Barnett* and *Mann v Goldstein* were disputed debt cases: that is to say, they were cases in which a creditor sought to wind up the company on the basis of a debt which was the subject of bona fide dispute. The others were contributory's petitions (or threatened petitions).

35. In *Charles Forte Investments Ltd v Amanda* the defendant, a minority shareholder in a private company which had been formed to acquire the shares of a public company in which it held a controlling interest, threatened to present a petition on the just and equitable ground in circumstances where the directors had refused to register a transfer of his shares. The judge found assistance (as he said at paragraph 14 of his judgment) in the qualifying words (which he emphasised) in a paragraph of the headnote:

"Held, (1) that the letter of May 1, 1963, furnished the clearest possible evidence of an attempt on the part of the defendant to put pressure on the board to reverse its decision, and as the presentation and subsequent advertisement might cause irreparable damage, not only to the private company but to the innocent shareholders of the public company, it was a case in which the court would exercise its inherent jurisdiction to strike out the petition, provided that the petition was bound to fail and therefore was an abuse of the process of the court." [emphasis added]

At paragraph 15 of his judgment, in reliance on the words which he had emphasised, the judge drew the conclusion that:

" . . . This would seem to indicate that, notwithstanding the existence of conditions, i.e. putting pressure on the board, and likely to cause irreparable damage to innocent shareholders, the decision to exercise the discretion to strike out a petition is still only to be done where the company could establish that the petition was bound to fail and was therefore an abuse of the process of the court."

The judge did not go on to cite, and may have overlooked, the third paragraph of the headnote:

"(3) That, even if the defendant's allegations against the directors could be substantiated, the petition to wind up was misconceived as there were

alternative and more suitable remedies, namely, an action for rectification of the register or a proceeding by way of motion under section 116 of the Companies Act 1948. Accordingly the company was entitled to the injunction sought.”

I shall need to return to the judgments in *Charles Forte Investments Ltd v Amanda* later in this judgment.

36. The judge cited extensively from the judgment of Justice Vos JA in *Strategic Turnaround Master Partnership Limited*. As he said, at paragraph 33 of his judgment, counsel for the Investor was content to rely on the decision in that case as a complete answer to the Fund’s submissions. The following paragraphs of that judgment (cited by the judge at paragraph 41 of his judgment) are particularly instructive:

“33. The winding up procedure is generally intended to be used in clear cases. It is not for the resolution of disputed debts or other contentious disputes that should properly be resolved by writ actions or other litigation processes. It is also not to be used to put inappropriate pressure on a company (see, for example, Parmalat Capital Finance Limited v Food Holdings Limited [2008] UKPC 23 at paragraph [9] of Lord Hoffmann’s speech).

34. All that said, what has arisen in this case is a genuine dispute as to the proper construction of the constitutional documents of an exempted limited company and a Mutual Fund. As is very common, the prospectus of the Fund contained detailed explanations of the investments in which prospective shareholders were invited to participate, and the terms on which the shareholdings were to be subscribed for would be held.

35. Once these issues of construction and law have been resolved (which can be achieved on this strike out application) what will be left is a series of issues as to validity and propriety of the exercise of the powers contained in the Articles. The ultimate question is whether, in the Cayman Islands in the circumstances of this case, those issues can properly be resolved in a winding up petition, or whether the petitioner ought rather to have brought proceedings by way of writ action to enforce its claimed rights.”

The judge did not cite from two further paragraphs in the judgment of Justice Vos JA which are of importance in the present context:

“36. The answer to questions of this kind will not be the same in relation to every dispute concerning the redemption of shares in every mutual fund. . . .

. . .

40. . . . On a strike out, the Court cannot and will not resolve disputed issues of fact. It can resolve issues of construction and law, and decide whether the procedure adopted by the Petitioner is an appropriate one, or whether it constitutes an abuse of the Court’s procedure.”

It is pertinent to have in mind that, in *Strategic Turnaround*, the petitioner sought to rely both (as a creditor) on the company’s alleged inability to pay its debts as they became due (section 94(c) of the Companies Law) and (as a contributory) on the just and equitable ground (section 94(d)).

37. Justice Vos JA then went on to decide a number of issues of construction and law (which he identified in his judgment as the first to sixth issues). His decision on those issues led him to conclude that the petitioner in that case could not present a petition as a creditor in reliance on section 94(c) of the Companies Law. He then turned to the seventh of the issues which he had identified: “If the Petitioner was unable to petition on the grounds of the non-payment of the redemption proceeds, has it shown any basis for its ‘just and equitable’ ground in the Petition.” By way of introduction to his consideration of that issue he said this (in a paragraph which the judge in the present case did not cite):

“78 The Chief Justice [from whose judgment the appeal was brought] was also influenced by the Company telling the Petitioner that it was not going to pay ‘*until the market recovers*’, and by the fact that the Petitioner is now, in effect, locked in so that it is exposed to the risk of assets declining below the point at which it can be paid in full, without the upside of either an express right to interest or the ability to benefit from a increase in values.”

38. He then posed (at paragraph 83 of his judgment) two questions which (as he said) arose for consideration in this Court:

“(1) Is it an abuse of the process of the Court for the Petitioner to litigate the complaints in the amended Petition under the ‘just and equitable’ ground for winding up, rather than by a writ action?”

(2) Should the Petitioner be allowed to amend its Petition to plead out the complaints which underpin its claim to wind up on the just and equitable ground?"

But, before answering those questions, he explained why "a case of this kind is more difficult in the Cayman Islands than in England". His explanation extends over paragraphs 83 to 87 of his judgment; which the judge cited in the present case (although he elided paragraphs 86 and 87). He noted (at paragraph 88, which the judge did not cite) that, in *CVC Opportunity Equity Partners Limited v Demarco*, the Privy Council, in the opinion of the board delivered by Lord Millett, had distinguished *Charles Forte Investments Limited v Amanda* on the ground that, in that case "it would have been more appropriate for the shareholders to have brought an action to rectify the register." It was for that reason, he observed, that the petition was struck out as an abuse of process.

39. At paragraph 89 in his judgment in *Strategic Turnaround* Justice Vos JA returned to the question "whether the Petitioner's petition is a legitimate means of seeking the Court's review of the Company's exercise of what it claims to be its strict legal rights". He set out the rival contentions in paragraphs which the judge did not cite:

"90. The Company says that the Petitioner's appropriate course is to commence a writ action seeking to challenge the bona fides or propriety of the Company's decision to suspend payments. In that way, declarations and damages could be awarded to meet the causes of action established. The Company submits that a winding up petition is not appropriate since the liquidation of the Company is not what the Petitioner really wants – all it wants is its money back, and to get that it must vitiate the Company's decision.

91. The Petitioner says that the Company is carrying on with its investments, notwithstanding a disastrous economic position. It says that the Company wholly ignored its right to be redeemed, and has failed to make any provision to pay it off, despite having been perfectly capable of doing so. It submits, that if it is right, and the Company's decision to suspend was neither *bona fide* nor valid, it will be entitled to wind up either as a creditor or on the just and equitable ground. It does not mind which. The Petitioner argues that it needs none of the relief that it could obtain in a writ action. It wants the Company stopped from continuing to

retain its investments without paying the redemption proceeds that are long overdue.”

And he went on:

“92. In my judgment, it is impossible for this Court to say now that the ‘just and equitable’ petition is an abuse of the Court’s processes and procedures – or even that it is bound to fail. . . .”

40. Justice Vos JA then cited a passage from the opinion of the Privy Council in *CVC*

Opportunity Equity Partners Limited v Demarco:

“93. As Lord Millett pointed out in *CVC* supra at paragraph 16: ‘. . . The only remedy available to a minority shareholder is to have the Company wound up. This is likely to be contrary to his own interests and proportionately more so to the interests of the majority, and it is not normally what the minority shareholder really wants. But the risk that the company may be wound up tends to concentrate minds and encourages the parties to negotiate to an acceptable compromise.’”

The judge cited that paragraph. At paragraph 48 of his judgment he said this:

“48. . . . the citation of Lord Millett in paragraph 93 makes it clear that merely having a collateral purpose for filing a petition is not, ipso facto, a bar to allowing it to be presented. The purpose must be as stated in *Cadiz*, ‘collateral and sinister’ with all the pejorative connotations of those epithets.”

41. It was with those matters in mind that the judge concluded, in the passage at paragraph 49 of his judgment to which I have already referred, that: “In the light of the foregoing, it seems to me that the argument of the [Investor] in opposition to the grant of any injunction to restrain the presentation of the petition is well grounded . . .”

This appeal

42. In my view, for reasons which I have explained earlier in this judgment, the judge was wrong to hold that the note to the Law Reform Commission’s draft Bill - or in the introductory Memorandum to the Companies (Amendment) Bill 2007 itself – could lead to the conclusion that “the legislative intention was to broaden the scope of the just and equitable remedy to include considerations of unfairness

found in section 459 . . . of the United Kingdom Companies Act 1985 as amended”. The effect of the provisions now in section 95(3) of the Companies Law (2009 Revision) – and introduced by the 2007 Amendment Law - is not open to doubt: those provisions provide new remedies as an alternative to winding up in a case where, in the words of section 94(d), “the Court is of opinion that it is just and equitable that the company should be wound up.” The most that can be said is that the legislature took the view that the circumstances in which those new remedies would be needed – which, typically, might include cases in which the petitioner was complaining of unfair prejudice – were circumstances in which the court could, properly, be satisfied that it was just and equitable that the company should be wound up. If that were the view which led to the enactment of section 95(3), then the analysis in *Strategic Turnaround* shows that (in this jurisdiction at least) it was correct. When Justice Vos JA observed, at paragraph 93 of his judgment in that case, that “Where there is no unfair prejudice statute, allowing a minority to seek the relief he really wants – namely to be bought out . . . the ‘just and equitable’ ground . . . has more work to do”, he was doing no more than to point out that, in the absence of a provision equivalent to section 459 in the United Kingdom statute, it was necessary to rely on the just and equitable ground in such a case. That the just and equitable ground could be relied upon in such a case had already been established in *CVC Opportunity Equity Partners Limited v Demarco*.

43. But, for the reasons explained in *Strategic Turnaround*, the fact that the judge was wrong to think that the just and equitable ground had been broadened by the introduction of section 95(3) of the Companies Law (2009 Revision) is of no materiality in the present context. In the light of the decision in *Strategic Turnaround* it is impossible to say that allegations of the kind made in the petitions in the present case could not found relief, including relief in terms of an order under section 95(3), on the just and equitable ground. But the gateway to such relief is that the court should be satisfied that it is just and equitable that the

company be wound up. Relief under section 95(3) is an alternative to winding up: the section does not provide a free-standing remedy.

44. The judge expressed a preliminary view (at paragraph 15 of his judgment) that “notwithstanding the existence of conditions, i.e putting pressure on the board, and likely to cause irreparable damage to innocent shareholders, the decision to exercise the discretion to strike out a petition is still only to be done (sic) where the company could establish ‘that the petition was bound to fail and was therefore an abuse of process of the court’”. At paragraph 37 of his judgment he referred to the view expressed by the editors of *French on the Winding Up of Companies* that:

“It is submitted that as an application to restrain presentation of a petition involves the inherent jurisdiction of the court to prevent an abuse of its process, what must be shown in order to obtain an injunction is that the threatened petition would be an abuse of process if presented. Inevitability of failure is an indication that presenting the petition would be an abuse of process.”

The judge emphasised the words underlined. But he seems to have been of the view that those words were to be taken as suggesting that inevitability of failure was the only basis for a conclusion that the presentation of a petition would be an abuse of process. I have no doubt that, if that were his view, he misconstrued the passage; and that, in any event, that view is untenable. Alternatively, he failed to appreciate that, in the case of a contributory’s petition, the fact that the petitioner was acting unreasonably in failing to pursue an alternative remedy was, of itself, a sufficient ground for holding that the petition was bound to fail.

The correct approach

45. It is clear that inevitability of failure is not the only – or, indeed, the usual – basis for striking out a creditor’s petition on the abuse of process ground. In *Mann v Goldstein* ([1968 2 All ER 769, 771E) Mr Justice Ungood-Thomas observed that:

“It is well established that this court has jurisdiction to restrain the presentation or advertising of a winding-up petition and restrain all further proceedings on it. That jurisdiction is a facet of the court’s inherent

jurisdiction to prevent an abuse of the process of the court. It will be exercised where a winding-up petition is presented or prosecuted otherwise in accordance with the legitimate purpose of such process . . .”

And he went on (*ibid*, 775F-G) to explain that it was not the legitimate purpose of the winding-up process to decide whether a petitioner claiming to be a creditor is a creditor. When a petitioning creditor’s debt is disputed on substantial grounds the court should restrain the prosecution of the petition as an abuse of the process of the court “even though it should appear to the court that the company is insolvent.”

46. For a more recent analysis of the position in England reference may be made to a decision of mine, sitting as a Judge of the High Court of England and Wales, in *In re a Company (No 006685 of 1996)* [1997] BCC 830:

“. . . The true rule, which has existed for many years, is the rule of practice that this Court would not allow a winding-up petition to be used for the purpose of deciding a substantial dispute raised on bona fide grounds.”

It is the fact that the petitioner is seeking to make improper use of the court’s winding-up jurisdiction to resolve an *inter partes* dispute which attracts the sanction of striking out. To invoke the court’s winding-up jurisdiction to resolve a dispute in circumstances where the claim is bound to fail is an example – but as the disputed debt cases show, not the only example – of improper use.

47. That the position in the Cayman Islands, in this respect, is the same was confirmed by the Privy Council in *Parmalat Capital Finance Limited v Food Holdings Limited* [2008] UKPC 23, in a passage to which Justice Vos JA referred at paragraph 33 of his judgment in *Strategic Turnaround*. The opinion of the Board in *Parmalat* was delivered by Lord Hoffmann, who said this, at paragraph [9]:

“If a petitioner’s debt is bona fide disputed on substantial grounds, the normal practice is for the court to dismiss the petition and leave the creditor first to establish his claim in an action. The main reason for this practice is the danger of abuse of the winding up procedure. A party to a

dispute should not be allowed to use the threat of a winding up petition as a means of forcing the company to pay a bona fide disputed debt. . . .”

Contributories' petitions

48. Given that the power to strike out a creditor's petition under the inherent jurisdiction of the court is plainly exercisable in order to protect the court's winding up process from abuse – and is not confined to cases where the petitioner's claim is bound to fail – it would be (at the least) surprising if the position were different where the petition is brought by a contributory under the just and equitable ground. Analysis of the authorities shows that there is no difference in principle: the difference in outcome follows from the fact that it will often be found, on the facts, that the petitioner has no alternative remedy. It cannot be said to be an abuse of process to invoke the court's winding-up process if winding-up is the only remedy available to meet the wrong of which the petitioner complains: unless, of course, the petition for a winding up order is bound to fail. Further, it may well be said that, in a case where the petitioner does have an alternative remedy which, in the court's view, it is unreasonable for him not to pursue, the petition is bound to fail because it cannot be just and equitable to make a winding-up order in circumstances where the court's winding up process is being abused; alternatively, that it cannot be just and equitable to make a winding –up order in circumstances where it is not needed in order to provide the petitioner with a sufficient remedy.

Charles Forte Investments Ltd v Amanda

49. As I have said, the judge found support for his view in the headnote to the report of the decision of the Court of Appeal of England and Wales in *Charles Forte Investments Ltd v Amanda* [1964] 1Ch 240. The petitioner's complaint, in that case, was that the directors had refused to register a transfer of his shares. That was a complaint which could have been pursued by motion to rectify the register under section 116 of the Companies Act 1948: as was pointed out in argument (*ibid*, 244) and in the judgment of Lord Justice Willmer (*ibid*, 250). After setting out the facts, Lord Justice Willmer said this (*ibid*, 252):

“In those circumstances, I do not doubt that this would be a proper case for the exercise of the inherent jurisdiction of the court, if the plaintiffs can otherwise make good their claim that this is a petition which is bound to fail and amounts in the circumstances to an abuse of the process of the court.”

It is, I think, clear that that is the passage on which the editor of the report has relied for the proviso to the first paragraph of the headnote: “. . . it was a case in which the court would exercise its inherent jurisdiction to strike out the petition, *provided that* the company could establish that the petition was bound to fail and therefore was an abuse of the process of the court.” (emphasis added). In my view that puts an unwarranted gloss on what Lord Justice Willmer had said; he did not suggest, in the passage cited, that the inherent jurisdiction to strike out would only be exercised if the petition was bound to fail. That was one factor (but not the only factor) which could lead to the conclusion that presentation of the petition was an abuse of process.

50. Lord Justice Willmer went on to hold that, in the circumstances of that case, the petition was bound to fail. He reached that conclusion because he could see “no possible chance, on the evidence which is at present before us, . . . , of the defendant making good his allegations” (*ibid*, 255). He then said this:

“But even if I am wrong about that, it seems to me that there is another ground on which it can be said that this petition is bound to fail; for it seems to me that this is a case in which a winding-up petition is not a proper remedy. I say that on the assumption that I am wrong in everything that I have said so far, and on the assumption that there is sufficient evidence before the court to justify some at least of the allegations made by the defendant. Even assuming that, I venture to think that a winding up petition is not the proper remedy.”

He referred to the decision of Mr Justice Simonds in *In re Cuthbert Cooper & Sons Ltd* [1937] Ch 392; concluded that it should be followed; and said this (*ibid*, 257-258);

“. . . here, as there, the winding up petition is misconceived even if the allegations in it could be substantiated, having regard to the existence of an alternative remedy. It is to be observed that by bringing an action, the defendant, if he has a good case, could not only more easily obtain what

he is really after, but he could do so without incurring the risk of inflicting damage, possibly irreparable damage, on the company and possibly also on innocent shareholders.

In those circumstances, it seems to me that that is an additional reason for holding that the injunction that is sought ought to be granted.”

51. Lord Justice Danckwerts also thought that the case was covered by the decision in *Cuthbert Cooper*. Having held (*ibid*, 261), that the allegations made by the petitioner were “quite insufficient to entitle [him] to a winding-up order and the case that it is just and equitable to wind up the company could not be established”, he went on to say this (*ibid*, 261):

“There is also the point . . . that alternative and more appropriate remedies are available to the defendant, that is to say, an action or summons or motion for rectification of the register of members, which would seem also to provide the defendant with more efficient methods of proving the allegations if they are well founded. Moreover, it seems incongruous to me to seek the destruction of the company. I am bound to say that my conclusion in the present case, which is reinforced by the terms of the letter from the defendant’s solicitors of May 1, 1963, is that the defendant proposes to adopt the method of a petition to wind up the company rather than the other and more appropriate remedies open to him because he hopes thereby to bring pressure on the directors to alter their attitude. This is an improper use of the process and unreasonable, and in my view the plaintiffs are justified in objecting to it, even if the company is not a trading company, for the reasons which have been already mentioned by Willmer LJ.”

52. Mr Justice Cross (the third member of the Court in *Charles Forte Investments Ltd v Amanda*) took the same view. He said this (*ibid*, 262):

“The defendant asserts that the directors of the plaintiffs did not exercise their powers to refuse to pass the transfers in good faith in what they considered, rightly or wrongly, to be the best interests of the company. . . . Now, if the defendant wishes to make out that case, the proper course for him to take, as I see it, is to bring an action in the Chancery Division asking for a declaration to that effect and consequential relief by way of rectification of the register and possibly alternatively by way of damages by way of damages in the event of the sale of the shares having gone off. But in the circumstances of this case a petition to wind up the company is not, in my judgment, a form of relief which the defendant can properly invoke.”

He went on to observe that the case before the Court in *Charles Forte Investments* was rather stronger than that in *Cuthbert Cooper*; because, in the earlier case, “there were no other shareholders interested, and the company was in effect a quasi partnership”. But, as he pointed out (*ibid* 262-263):

“Here, on the other hand, there are a number of outside shareholders who are not, so far as I know, in anyway concerned with the dispute between the defendant and the directors. They would not be affected one way or the other by the success or failure of the defendant in an ordinary action in the Chancery Division. On the other hand, they might be very much affected by a winding up order.”

And he went on to say this (*ibid*, 263):

“I am satisfied that this particular petition is bound to fail, and I have for my part, no doubt that the reason why the defendant chose to proceed by way of petition rather than by way of action was because he thought that more effective pressure could be brought to bear on the company in that way than if he sought his proper remedy.”

53. It is, I think, pertinent to have in mind that, at the time of the decision in *Charles Forte Investments Ltd v Amanda*, the relevant United Kingdom Companies Act (the Companies Act 1948) contained a provision in these terms, at section 225(2):

“Where 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, if it is of opinion – (a) that the petitioners are entitled to relief either by winding up the company or by some other means; and (b) that in the absence of any other remedy it would be just and equitable that the company should be wound up; shall make a winding-up order, unless it is also of opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy.”

The existence of that provision would have led, necessarily, to the conclusion that if, as the Court held, there was another remedy available to the petitioner which it was unreasonable for the petitioner not to pursue the winding-up petition would fail. But, although the Court referred to that provision (*ibid*, 258, 261, 263) they did not rely upon it. Rather, they held that the petitioner could not rely upon section 225(2) to distinguish *Cuthbert Cooper*: notwithstanding that, as Mr Justice

Cross pointed out (*ibid*, 263), the section had not been in the legislation when *Cuthbert Cooper* was decided in 1937.

CVC Opportunity Equity Partners Limited v Demarco

54. The decision in *Charles Forte Investments Ltd v Amanda* was considered by the Privy Council in *CVC Opportunity Equity Partners Limited v Demarco* [UKPC 16], an appeal from this Court. In delivering the opinion of the Board, Lord Millett said this:

“52. The special nature of winding up proceedings and the loss which they may cause the company and its shareholders, however, makes it incumbent on the court to ensure that they are not brought for an improper purpose. In particular, they must not be brought simply to bring pressure on the respondents to yield to the petitioner's demands, however unreasonable, rather than suffer the losses consequent upon the presentation of a petition or the making of a winding up order.

53. Where the petitioner can achieve his object by other means, therefore, he may be restrained from bringing winding up proceedings. In *Charles Forte Investments Ltd. v Amanda* [1964] 1 Ch 240, a minority shareholder complained of the board's refusal to register transfers of his shares to a third party. He threatened to present a winding up petition unless the board registered the transfers. He was restrained from presenting a petition. The shareholder had other and more suitable remedies available to him, namely an action for rectification of the register or proceeding by way of motion under section 116 of the Companies Act 1948, and his threat to employ the machinery of winding up was an attempt to bring pressure on the board to reverse its decision and an abuse of the process of the court.”

He then went on to explain why there was no abuse in the *CVC Opportunity Equity Partners* case:

“54. There is this similarity between that case and the present: in neither case would the winding up of the company achieve what the minority shareholder wanted. But there the similarity ends. In that case the shareholder had other and more suitable remedies available to him: his choice to initiate winding up proceedings was not made in good faith. In the present case Mr Demarco has no other remedy available to him. He does not want the company wound up: but he has no choice but to initiate winding up proceedings if he is to have any hope of receiving a reasonable offer for his shares, an offer to which, if his claim is well founded, he is entitled.”

And he said this:

“57. Their Lordships would wish to emphasise that this does not mean that a minority shareholder can use the threat of winding up proceedings in order to bring pressure on the majority to yield to his demands however unreasonable. As *Re a Company (No 003843) of 1986* demonstrates, the court will be astute to prevent such conduct. In a case such as the present, it would be an abuse of the process of the court for a petitioner to commence or continue proceedings after he has plainly received a fair offer for his shares. If he holds out for more, the respondent can apply for the proceedings to be restrained or struck out. The court is fully in control and will not allow its process to be abused.”

The two questions to be addressed

55. In the light of the judgments in *Charles Forte Investments Ltd v Amanda* and the observations of the Privy Council in *CVC Opportunity Equity Partners v Demarco* there can be no doubt that it is relevant, in considering whether to restrain presentation of, or to strike out, a contributory's petition to wind up on the just and equitable ground, to address the questions (i) whether there is an alternative remedy available to the petitioner and (ii) whether the petitioner is acting unreasonably in not pursuing that alternative remedy. 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; 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.
56. In the context of a contributory's petition, the editors of *French on the Winding Up of Companies* may well be right in their view, in a part of the passage cited by the judge at paragraph 37 of his judgment which I have not already set out, that “It is very likely there is no difference between the epithets ‘abuse of process’ and ‘bound to fail’: a petition which is bound to fail is an abuse of process and a petition which is an abuse of process is bound to fail”. But it is important to appreciate, in that context, that a petition is bound to fail not only because the petitioner is unable to make good his allegations but also because, if he has an

alternative remedy which it is unreasonable for him to choose not to pursue, the court will take the view that it would not be just and equitable that the company be wound up.

57. In *Strategic Turnaround* this Court recognised the need to consider the first of the two questions which I have just set out. Justice Vos JA referred (at paragraph 90 of his judgment) to the company's submission that the petitioner could obtain all the relief that it needed by commencing a writ action; and (at paragraph 91) to the petitioner's response that it needed none of the relief that it could obtain in a writ action. It is plain that the Court accepted the petitioner was correct. The vice, in *Strategic Turnaround*, was the company's assertion that, in effect, it could continue to carry on business at the petitioner's risk: notwithstanding the petitioner's wish to bring that position to an end. The company was seeking to have the benefit of "a one way bet". If the underlying investments recovered, the petitioner did not receive the full benefit of that recovery: the value of its share in the mutual fund was capped at the redemption price. But if the investments did not recover, then (even if the petitioner were to succeed in his allegations that the exercise of the power of suspension had been invalid) there might be insufficient funds to pay him the redemption price. That vice had been identified by the Chief Justice in the Grand Court; and was recognised by Justice Vos JA at paragraph 78 of his judgment (to which I have already referred). Having reached the conclusion that the answer to the first of the two questions was that there was not an alternative remedy available to the petitioner, the Court did not need to consider the second question. If there was no alternative remedy available, the petitioner could not be said to be acting unreasonably in pursuing the only remedy that was available to it.

Did the judge exercise his discretion on a wrong basis?

58. It is important to keep in mind that the decision whether not to restrain the presentation of a winding up petition is one for the judge in the exercise of his discretion. This Court should not interfere unless satisfied that the basis on which

the judge exercised his discretion was wrong in principle; or that he took into account matters which should have been left out of account; or that he failed to take into account matters which he should have taken into account; or that, for some other reason, his decision was plainly wrong. In the present case, as it seems to me, it is clear that the judge exercised his discretion on a wrong principle; alternatively, because he failed to address the two questions which I have just set out, he failed to take into account matters which he should have taken into account.

59. The two questions which the judge needed to address were put before him in the submissions of the Fund. The judge refers to the submissions at paragraph 5 of his judgment: (1) there is a suitable alternative remedy available to the Investor; (2) the presentation of the petition is an attempt to exert pressure on the Fund and is accordingly an abuse of the Court's process. It is implicit in the second of those submissions (in so far as not made explicit) that the petitioner was acting unreasonably in seeking to present a petition rather than pursue the alternative remedy. But, although those questions were before the judge, I can find only one sentence in his judgment (at paragraph 50) in which he addresses the first; and he had already, by that point, concluded (at paragraph 15) that the second was irrelevant.

60. The reason, I think, was that the judge was persuaded that the case before him was indistinguishable from the case that had been before this Court in *Strategic Turnaround*; and that that was, of itself, enough to lead to the conclusion that the petition in the present case was not "bound to fail" and was not an "abuse of process". But in reaching that conclusion he failed to recognise that the foundation of the decision in *Strategic Turnaround* (on this point) was a finding that the petitioner had no available alternative remedy. Absent a comparable finding in the present case (which the judge did not make) *Strategic Turnaround* provides no foundation for that conclusion. The furthest he went in his judgment was to observe (at paragraph 50) – without analysing the point – that "I accept the

submission of [counsel for the Investor] that section 95(3) now gives [the Investor] additional prospective remedies which *may* not be available outside the presentation of the petition under Part V” [emphasis added].

61. It follows that I would hold that the judge’s conclusion cannot be supported on the basis of the reasons which he gave. His exercise of his discretion was flawed.

What order should this Court now make?

62. In the events which have happened it serves no purpose for this Court, now, to decide what order it would have made if it had needed to consider, on appeal, the applications to restrain presentation which were before the judge. That is because those applications have been overtaken by the presentation of the two petitions for the winding up of the Fund. The question for this Court is what order (if any) should be made in relation to the petitions.

63. The order sought in the Notice of Appeal – in so far as now material – is that the Investor be restrained from proceeding further with the two existing petitions and from presenting any further petitions for the winding up of the Fund based on the allegations in the existing petitions. In the course of the hearing, however, counsel for the Fund recognised that the effective relief sought was that the existing petitions be struck out; and sought formal leave to amend the Notice of Appeal accordingly. Although that application to amend was opposed, it seems to me sensible to address the question whether the existing petitions should be struck out: and, if satisfied that they should be struck out, to allow the application to amend. I cannot see that to restrain the Investor from proceeding further with the petitions, while leaving the petitions on the file, would be a sensible order to make. The real question is whether the petitions should be allowed to continue: if not they should be dismissed or struck out.

64. As I have said, in considering whether to strike out a contributory’s petition to wind up on the just and equitable ground, questions to be addressed include (i) whether there is an alternative remedy available to the petitioner and (ii) whether

the petitioner is acting unreasonably in not pursuing that alternative remedy. On the facts of this case, I have no doubt that each of those questions should now be answered in the affirmative.

65. I take, as a starting point, the fact that, until Campbells' letter of 23 July 2009, the Investor itself plainly took the view that the appropriate remedy for the matters of which it, up to that date, had complained was by proceedings commenced by originating summons. I have referred, earlier in this judgment to the originating summons issued on 22 April 2009. Evidence in support of the summons was sworn on 19 May 2009: as appears from Walkers' letter dated 4 June 2009. Notwithstanding Walkers' objection that the originating summons procedure was not suitable for resolving disputed questions of fact (which had emerged from the correspondence and from the evidence sworn on 19 May 2009), the Investor indicated a determination to pursue that route: as appears from Campbells' letter of 5 June 2009. At the Investor's insistence, evidence in answer to the originating summons was sworn on 10 June 2009. On receipt of that evidence – as appears from Campbells' letter of 11 June 2009 - the Investor was aware that payments had been made to other investors in respect of the redemption price of their shares, notwithstanding that the suspension (or purported suspension) imposed on 12 November 2008 had not been lifted.

66. The Investor's change of direction occurred on or about 23 July 2009; and was, I think, first communicated to the Fund in Campbells' letter of that date. The explanation for the change is given in the first sentence of paragraph 12 of that letter:

“The Funds' actions in paying the Other Investors while not paying our client have changed matters significantly since the Originating Summons was filed on 22 April 2009.”

It may be said that the significance of that change – in the context of the originating summons proceedings - had not struck Campbells some six weeks earlier, when they received the Fund's evidence: there was no suggestion in their

letter of 11 June 2009 that those proceedings were not a suitable vehicle for determining the matters in dispute.

67. Given that the trigger for the change in direction cannot be said to have been the Fund's evidence sworn on 10 June 2009, or the additional evidence sworn on 20 July 2009 (which Campbells described as irrelevant), the effective cause was an article published on Bloomberg on 3 July 2009. The thrust of the article is summarised in the paragraph 2 of the letter of 23 July 2009:

“This suggests, based on a letter apparently sent by the Fund to all investors other than our client (the **Other Investors**), that the Fund expected to make a further redemption payment to the Other Investors by 30 June 2009, following which (after the initial payment made to them in May 2009) the Other Investors would have been paid the full Redemption Price, in cash, in respect of the alleged compulsory redemption of 15% of their shares on 30 September 2008.”

Campbells asked for confirmation whether the additional payment had been made to the Other Investors; and, if it had not been made, whether the Fund intended to make such payment in the near future.

68. Without waiting for that confirmation, the letter of 23 July 2009 went on to demand payment of the Redemption Price (US\$27,227,268.80) within fourteen days, in the terms which I have set out earlier in this judgment; and to indicate that, if payment were not made, a petition to wind up the Fund would be presented.

69. The Investor's concern, expressed at paragraph 9 of the letter of 23 July 2009, was that the Investor should have been paid before or at the same time as the Other Investors; and that the Fund was “preferring the interests of the Other Investors at our client's expense”. But there was no allegation in the draft petition, sent to the Fund under cover of Campbells' letter of 12 August 2009, that the Fund was insolvent. Indeed, the draft petition contained the allegation (at paragraph 49) that “The [Fund] asserts that it has a positive NAV (after deduction of all liabilities, including the liability owed to the [Investor]). Accordingly the

[Investor] would have a tangible interest in the liquidation”. If there were any real concern that the other investors would be preferred (in the sense of being paid in full) at the expense of the Investor (who, on that hypothesis, would not be paid in full), that has been met by the payment into Court of US\$27.4 million to meet the Investor’s claim.

70. At paragraph 3(c) of the letter of 12 August 2009, Campbells addressed the question whether there was an alternative remedy available to the Investor:

“There is no alternative and more appropriate remedy available to our client. In circumstances where (among other things) the Fund has announced that it has suspended all redemptions and the payment of redemption proceeds and will liquidate its entire portfolio and return the cash to its investors, but has now paid every investor other than our client (while purporting to maintain the suspension indefinitely), it is difficult to imagine a more obvious case of unfairly prejudicial treatment of our client. Further, those other investors have been paid in cash based on the 30 September redemption price, whereas the Fund maintains that, if it ever lifts the suspension, it can satisfy its obligation to pay the Redemption Price to our client by transferring assets with a substantially lower value. In those circumstances our client is entitled to bring a winding up petition on the just and equitable ground, and indeed must do so to obtain any of the alternative forms of relief sought in the petition pursuant to section 95(3) of the Companies Law, all of which are clearly appropriate for our client to seek in the alternative given the Fund’s wholly unreasonable stance towards it. Such relief would not be available in a writ action, and can only be sought pursuant to section 95(3) as an alternative to a winding up order . . .”

It is necessary, therefore, to return to the relief that was sought in the draft petition (and in the two petitions now before the Court) as an alternative to a winding up order, in order to see whether the claim that that relief would not be available in a writ action can be made good.

71. I have summarised the alternative relief sought in the petitions earlier in this judgment. First, the Investor seeks an order for payment of US\$27,227,268.80 in cash within seven days. Plainly, that relief would be available in a writ action (or in the existing originating summons proceedings). In the alternative, the Investor seeks an order restraining payment to any other investors unless and until it has

been paid US\$27,227,268.80 in cash. That relief could be obtained in a writ action (or in the existing originating summons proceedings): joining, if necessary, the other investors (whose rights would be thereby affected) as parties to those proceedings. It could not, in my view, be obtained on the petition unless the petition were advertised (which was, and is, not the Investor's intention): absent advertisement, other investors would have no opportunity to object to what would be an interference with their rights. In the further alternative, the Investor seeks an order (a) that the Fund pay to the Investor forthwith in cash such percentage of the Redemption Price as it has paid to the Other Investors in respect of amounts owing to them; and (b) that, if any amounts are still owing to the Other Investors in respect of the 15% redemption, the Fund make no further payments to those Other Investors without making a payment of an equal percentage of the Redemption Price to the Investor. Plainly, the first element of that relief could be sought in a writ action (or in the existing originating summons proceedings): so also could the second element, subject to the joinder of other investors whose rights would be affected. And, in the yet further alternative, the Investor seeks a variant to the order just described: to which the same considerations apply.

72. In those circumstances, it is impossible for the Investor to sustain its assertion that there is no remedy available to it, other than a petition on the just and equitable ground, which could lead to the relief which it seeks.

73. I turn, therefore, to consider whether the Investor is acting unreasonably in not pursuing the alternative remedy. It seems to me unnecessary to distinguish, in this context, between the existing originating summons proceedings - which could, in the circumstances that there are disputed questions of fact to be resolved, be the subject of a direction that the proceedings be continued as if begun by writ - and a fresh writ action. On the basis of Campbells' letter of 12 August 2009 and the Investor's subsequent conduct in (i) refusing to give an undertaking that no petition would be presented without notice, (ii) presenting the first petition before the Judge's order had been filed and (iii) then presenting a second petition, I have

no doubt that the Investor's objective was to put the maximum pressure on the Fund to accede to its demands. That is not a proper reason for choosing to proceed by way of petition rather than by writ: *a fortiori* in the present case where there were existing originating summons proceedings in which the issues could and should be resolved.

Conclusion

74. I am satisfied that the Investor's pursuit of winding up proceedings in the present case is an abuse of the process of the Court. Accordingly, I would give the Fund permission to amend its Notice of Appeal, allow the appeal and order that the two petitions be struck out. I would remit the originating summons to the Grand Court for further directions; and I would make no order for the payment out of the US\$27.4 million now in court. That sum, as it seems to me, should remain in court until further order.

Forte JA:

75. I have read in draft the judgment of Chadwick P, which deals comprehensively with all the issues raised in this appeal. I agree with both the conclusions and the reasons set out therein and have nothing further to add.

Mottley JA:

76. I agree with the conclusion which the President has reached; and with the reasons which have led him to that conclusion.

Chadwick P

Forte JA

Mottley JA

