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IN THE GRAND COURT OF THE CAYMAN ISLANDS
CAUSE NO. 226 of 2002

THE HONOURABLE MR. JUSTICE KELLOCK

BETWEEN:

CVC/OPPORTUNITY EQUITY PARTNERS LIMITED

PLAINTIFFS

AND

LUIS DEMARCO

DEFENDANT

APPEARANCES:

Anthony Trace, Q.C. for the Plaintiffs

Seamus Andrew for the Defendant

Ross McDonogh for Citibank NA
and International Equity Investments Inc.

REASONS FOR JUDGMENT

Kellock, J.

On Friday June 21, 2002 the following applications were argued before me.

1. Applications by CVC for orders:

   (a) striking out the petition presented by Demarco for the winding up of CVC or in the alternative staying such petition.

   (b) Setting aside the injunction granted by the Honourable Chief Justice on March 28, 2002, *inter alia* restraining CVC from causing or acquiescing in its replacement as the general partner of CVC Opportunity/Equity Partners (the "L.P.") an

exempted Cayman Islands Limited Partnership. This order also restrained Daniel Dantas from assisting CVC in CVC's removal as general partner.

(c) Restraining Demarco from publishing the facts related to these proceedings.

(d) Providing for an inquiry as to the damages sustained by CVC as a result of the injunction granted by the Chief Justice.

(e) Restraining Demarco from presenting any petition to wind up CVC or alternatively staying the presentation of such a petition until the final determination of the cause number 389 of 1999 proceedings in which CVC plaintiff is and Demarco is defendant. (This cause has now been tried and judgment delivered).

2. Applications by Demarco

(a) To restrain CVC and Dantas generally in terms of the Chief Justice's order of March 28, 2002.

(b) For directions as to the conduct of these winding up of proceedings. [See rule 4.23 [1] of the *Insolvency Rules* 1986].

(c) At the conclusion of the argument, of these applications while Mr. Andrews was present, Mr. Andrews made a further application for an injunction in an intended action by Demarco as plaintiff against CVC, CitiBank N.A. and International Equity Investments, Inc., ("IEII"). This order was made and my reasons for making it were delivered orally on the following Monday, that is June 24, 2002. These reasons should be read together with the reasons I am about to give.

The Applications to Strike Stay or Restrain the Petition

For all practical purposes these proceedings began in early 1999 with the preparation by Demarco of a draft petition for the winding up of CVC. As a result, CVC sought and obtained an injunction restraining Demarco from presenting such a petition. That injunction was set aside by the Court of Appeal and a further appeal by CVC to the Privy Council was dismissed in March 2002.

The petition by which this proceeding was formally commenced was issued immediately following decision of the Privy Council. Almost all the facts which provide the context for the determination of these applications are set forth in my reasons of June 24, 2002, in the judgments of the Court of Appeal and Privy Councill and in my judgment dismissing CVC's action in cause number 389 of 1999. It is abundantly clear, at least to me, that both appellate courts have held that Demarco is entitled to have his petition heard and determined by this court on its merits.

Nevertheless, Mr. Trace submitted that the petition as issued did not disclose a cause of action. When asked how this argument could be made in light of the judgment of the Court of Appeal, Mr. Trace advised that the petition as issued was not the same as the draft petition which became the subject matter of the injunction and the subsequent appeals. When pressed, Mr. Trace advised that the petition as issued differed from the draft in that the petition as issued contains statements that the draft petition did not. Consequently, Mr. Trace's attempt to characterize the petition as issued as insufficient in any respect was doomed to fail.

Mr. Andrews submitted that the time for applications to strike out, stay or restrain the petition had long passed. It may be that Mr. Trace recognized the force of that submission because he suggested in his argument that those applications, (with the exception of one point) should be stood over to be dealt with at the hearing of the petition. The exception relates to an offer to purchase Demarco's shareholding in CVC made in a letter from CVC's attorneys Hunter & Hunter dated June 18, 2002, i.e. two days prior to the hearing of the motions. This, of course, is not the first such offer. The June 18 offer is to purchase Demarco's shares at a price to be fixed by arbitration. That is an arbitrator chosen by the President of the Institute of Chartered Accountants of England and Wales. The letter contains the following in its penultimate paragraph.

> "This is an open offer made without prejudice to our client's rights of appeal against the judgment on the trial of cause 389 of 1999, which we hereby reserve."

The judgment there referred is the judgment I gave on May 31, 2002 dismissing CVC's action in cause 389 of 1999 in which CVC claimed that it was entitled to the return of the sum of US one million dollars paid to Demarco on or shortly after the commencement of Demarco's employment with CVC in the fall of 1997. CVC alleged that this money was repayable to it in certain circumstances, while it was Demarco's position that the US $1,000,000.00 payment was paid to him as a signing bonus and thus became his property absolutely.

The second major issue in cause 389 of 1999 was the extent of Demarco's entitlement to shares of CVC. CVC alleged that Demarco had an 0.875 per cent interest in CVC's share capital, while Demarco's position was that he was entitled to a 3.5 per cent interest in CVC. In cause 389 of 1999, Demarco was successful on both these issues and as matters stand now he is entitled to a

3.5 percent interest. In cause 389 of 1999, Demarco was successful on both these issues and as matters stand now he is entitled to a 3.5 percent interest in CVC.

The June 18, 2002 offer to purchase Demarco's shares states that his interest is "deemed to be 3.5 percent pursuant to the judgment of the Grand Court on the trial of cause number 389 of 1999". That statement is utterly and completely inconsistent with the penultimate paragraph of Hunter & Hunter's offer letter quoted above.

In addition to the offer itself, Mr. Trace provided me with a letter to Hunter & Hunter from Demarco's attorneys dated June 22, 2002 commenting on the offer and Hunter & Hunter's reply thereto dated June 21, 2002, (the day these applications were heard). Mr. Andrew advised the court that he could not obtain properly considered instructions to accept or reject the offer in the time afforded, a position which I accepted as being totally reasonable.

As the transcript of the argument on June 21, 2002 demonstrates, I had a number of other reservations about the offer including, the "without prejudice" clause.

As will appear I am firmly of the opinion that this Court must maintain complete control of this case until after a trial on the merits and the granting or refusal of the petition. An arbitration would create more problems than it would solve and should not be forced on Demarco against his will. CVC is free to make as many offers to Demarco as it chooses, and if as a result the case is settled, then justice will have been done and will be seen to have been done. These offers can be made with prejudice as several of CVC's offers have been. In those circumstances the Court

will be in a position to deal with Demarco's rejection of offers, if any, and whether or not such rejection was reasonable or unreasonable.

Returning to the June 18, 2002 offer, Demarco's attorney's queries relating thereto include a number of questions as to the exact meaning of the language of the offer. The fact that Hunter & Hunter felt obliged to respond thereto is conclusive proof that the June 18 offer required clarification.

For these reasons and the reasons I expressed during argument and for the reasons to follow the applications to strike out or stay the petition for any reason should be dismissed and the parties should proceed as quickly as possible to the trial of the issues raised by the petition, as contemplated by the Privy Council and the Court of Appeal. For the same reasons, the applications to restrain Demarco from presenting any petition to wind up CVC is dismissed.

During the argument on June 21, 2002 Mr. Trace sought leave to appeal from my comments concerning the offer of June 18. Leave was refused. On June 28, 2002 Hunter & Hunter issued a notice of motion seeking leave from the Court of Appeal to appeal against the order of Justice Kellock made on June 21, 2002. The transcript of the argument on June 21 contains the following at page 48:

I quote,

> "The Court, well, Mr. Andrew indicated that he is still taking instructions. He has written to you raising some questions. I have raised some questions. I am not going to find Mr. Demarco must accept this offer as it presently exists or in default of acceptance have his petition struck out. I will not do that and I have said that. Should I say it again?"

I, therefore, assume that CVC wishes to launch yet another appeal in order to delay or derail this proceeding. The positive aspect to this is that the Court of Appeal will have an opportunity in deciding upon CVC's leave application to decide whether or not I have erred in my conclusion that this case should be tried on its merits, and that no further attempts to delay or prevent that trial should be tolerated. It seems to me that the portion of President Zacca's reasons on behalf of the Court of Appeal which I referred to in my reasons of June 24 constitutes this court's marching orders and those orders ought to be carried out unless some new significant and unforeseen circumstances arise, and that so far is not the case. I will have more to say on this subject at the end of these reasons.

The Applications to set aside the *ex parte* injunction

As will appear from these reasons and my reasons dictated on June 24, the injunction granted by the Chief Justice was necessary in order to preserve the *status quo*, once CVC's undertakings given to the Court of Appeal were at an end as a result of judgment of the Privy Council. That injunction was "suspended" by the Chief Justice himself upon CVC providing a series of further undertakings. These undertakings were ultimately extended to June 21, 2002 by further consent orders.

Mr. Trace argued that "suspended" meant that the order had no further effect. Mr. Andrew's position was that suspended means "suspended", and that the Chief Justice's order of March 28, 2002 came back into effect once the force of the undertakings were spent.

Despite Mr. Trace's argument about the meaning of "suspend", he made submissions to the effect that this injunction which was granted on an *ex parte* basis should be discharged by reason of material nondisclosure on Demarco's part. In addition, he argued that the petition did not disclose a cause of action, that Demarco's undertaking as to damages was inadequate and that there was no risk of the dissipation of CVC's assets.

The alleged nondisclosure was said to be in part the failure to tell the Chief Justice that the petition had been issued in breach of the injunction granted by Mr. Justice Graham, by reason of the fact that the decision of the Privy Council had not become effective at the time the petition was filed, and, therefore, Demarco was in breach of Mr. Justice Graham's order. This argument was expressly abandoned before me by Mr. Trace. However, the fact that this argument was made at all is of importance. It was based on the suggestion, that while Her Majesty had accepted her Privy Council's advice by the time the winding up of petition was issued and a draft Order-In-Council had been circulated to counsel for all parties to the appeal, that Order-In-Council had not been signed. In fact, it appears it had not been signed because CVC's counsel had failed to return the draft order to the Privy Council office as requested by that office.

In the context of CVC's conduct described in 389 of 1999 and in this litigation and the conduct which has led to the finding of contempt made by the Chief Justice, I would say that the time has come for this court to take steps to protect its process from further abuse by the Dantas' interests. These steps could include wasted cost orders and perhaps a blanket order prohibiting CVC from instituting any other proceedings of any kind whatsoever in this court without prior leave. In addition to the unmeritorious argument concerning the Order-In-Council, Mr. Trace put forward

the following: He said Demarco had failed to disclose to the Chief Justice on the *ex parte* application for the injunction;

(a) The fact that Hunter & Hunter had written to Demarco's attorneys seeking an undertaking that he would not present a winding up petition until cause 389 of 1999 had been tried.

(b) The pleadings in cause number 389 of 1999.

(c) The judgment of my brother Sanderson J. dated November 14, 2001 concerning the use by CVC of documents stolen from Demarco.

(d) Demarco's financial circumstances which CVC alleges are insufficient to answer his undertaking to pay damages.

(e) A Mareva injunction had been granted against CVC in cause number 229 in 2001, (a proceeding in which Demarco is not a party).

(f) The form of the injunction signed by the Chief Justice was not in "standard form".

(g) CVC did not have assets in this jurisdiction. (This submission was totally false as evidenced adduced on behalf of CVC at the trial of cause 389 1999 conclusively demonstrates. When asked by me about that Mr. Trace said he was not paying attention to this evidence when it was given although he was counsel for CVC at that trial).

These and other submissions were made by Mr. Trace are utterly without merit.

In addition, a party seeking to set aside an *ex parte* order must move to do so without delay. Instead CVC chose to offer up undertakings in order to have the injunction suspended.

Mr. Trace went on to argue that this alleged nondisclosure disentitled Mr. Demarco to any further injunctive relief.

The application to set aside the *ex parte* injunction, (assuming contrary to Mr. Trace's submission), that it had been revived by the expiration of CVC's undertakings, is frivolous and vexatious and will accordingly be dismissed.

I should also say that it was entirely moot because I have reinstituted that order as my order. In addition, I am convinced that it is absolutely essential to prevent CVC from frustrating Demarco's rights, if such are established at trial, and I have, therefore, as I have said, replaced the Chief Justice's order with an order of my own.

The Application to Restrain Demarco from Publishing the Facts of These Proceedings

Reference has already been made to the gag order made by my brother Sanderson J. in November 2001. I had occasion in deciding cause 389 of 1999 to grant leave to the parties to that action to make whatever use of the proceedings at the trial of 389 of 1999 and my reasons for judgment as would otherwise be proper had Mr. Justice Sanderson's order not been made. Since then it has been brought to my attention that on March 11, 2002 Mr. Justice Sanderson clarified his order as follows in an order made in cause number 398 of 2001.

I quote,

> "for greater clarity the parties may provide copies of judgments or orders to the media or their investors but only if asked."

I pause here to say that the parties are Demarco and CVC. Mr. Justice Sanderson continued:

> "They may not say anything about these ongoing proceedings or other related proceedings, except whether or not an appeal has been filed."

In the order dated March 29, 2002 made by the Chief Justice to suspend the injunction granted by him the day before, Demarco was restrained from publishing to the public and in particular any media, any of the facts or events relating to these proceedings including the presentation of the petition herein and the making of the order herein, i.e. the order suspending the injunction. No reference to this issue is made in Mr. Trace's argument but he submitted orally that the order of April 29, 2002 referred to above is still in force. Mr. Andrew submitted that it was an order made on an interlocutory basis concerning the management of this case and that accordingly I could and should vary it. That submission was made because CVC has sought to use this gag order for purposes which the Chief Justice could not possibly have intended. It seems to me that the life of the April 29, 2002 gag order which was made on the basis of CVC's undertakings was effective as long and only as long as those undertakings were effective.

Accordingly, as the effect of the undertakings expired June 21, 2002, the Chief Justice's gag order also ceased to have effect after that date. I am therefore content to let Sanderson J's order govern. If anyone considers that Sanderson J's orders does not govern I may be spoken to.

The Inquiry into Damages Resulting from the Order of March 28, 2002

That order was discharged the next day and, therefore, could not have occasioned any damage. However, if it did I have refused to set aside. I am also of the view that it was properly made and CVC is not entitled to any damages.

Demarco's Applications

I can now turn to Demarco's applications for an injunction and directions. I will deal with the question of directions first.

The Application for Directions

As the Court of Appeal and the Privy Council have held, Demarco is entitled to have the majority shareholder of CVC effectively Dantas offer a fair price for Demarco's shares in order to avoid the winding up of CVC.

Further, the Court of Appeal held that the petition proceedings should be "remitted to the Grand Court for the hearing of the petition". As President Zacca said, I quote him again,

> "The judge can then hear evidence as to whether there is a real dispute as to the value of the shares and whether the offer made is a fair one. Then the trial judge may consider whether the petition should be struck out".

There can be no doubt that the Court of Appeal was well aware that the House of Lords expressed the view in *O'Neill* v. *Phillips and others*, (1999) 1 WLR 1092, that an offer to pay a price fixed by an arbitrator chosen by the President of the Institute of Chartered Accountants of England and Wales would be a fair offer in the context of that case. Mr. Trace argued that this mechanism was binding on me.

However, Mr. Trace did not point out to me, that I recall, that in *O'Neill* v. *Phillips*. Lord Hoffmann's discussion of the arbitration mechanism was preceded by these words. I quote from page 1106 of the report,

> "Mr. Ralls, who appeared for Mr. Phillips submitted that even if his conduct had been unfairly prejudicial the petition should have been dismissed because he had made an offer to buy the shares at a fair price, which was the whole of the relief to which Mr. O'Neill would have been entitled."
>
> "In view of the conclusion I have reached about the absence of unfair prejudice with which I understand your Lordships to agree, this point does not need to be decided. Nevertheless, the effect of an offer to buy the shares as an answer to a petition under section 459 is a matter of such great practical importance that I would invite your Lordships to consider."

Lord Hoffmann then recorded his views with which the other Lords agreed. Having failed to draw any attention to that passage Mr. Trace sought to persuade me that the views expressed by Lord Hoffmann were to be treated by me almost as if they were gospel or enshrined in a statute.

There can be no doubt that the Privy Council when considering CVC's appeal were well aware that the Court of Appeal had decided that in this case, the value of Demarco's shares was a question for the trial judge, not an arbitrator. The following is contained in paragraph 25 of the Case for Appellants (i.e. The Dantas interests) in the record of the appeal to the Privy Council. I am assuming that the "case" is the so-called "skeleton argument" that is placed before the Privy Council.

In the "case" Mr. Hollington, Q.C. submitted on behalf of the Danta's interests that:

> "As appears from the last paragraph of its judgment, the Court of Appeal directed that this dispute be determined by the judge, and I take him to mean the trial judge, in the winding up proceedings as a preliminary issue in the petition."

That document was included in Mr. Trace's authorities bundle but he made no reference to it in his oral submissions. In particular, my attention was not directed to Mr. Hollington's submission

which I just quoted. In addition, the Privy Council in this case cited with approval the judgment of the English Court of Appeal in *North Holdings Limited* v. *Southern Tropics Limited*, (1991), BCC 746. In that case, which was an oppression/winding up case, Lord Justice Aldous said, and I will quote,

> "The substantive issue raised on the appeal resolves around the alleged misuse of assets of *Southern Tropics* by Mr. and Ms. Clark, to start and build up Kasmere into the prosperous enterprise it is. It was that misuse of assets which it was said had unfairly prejudiced the interests of *Northern Holdings* and which meant that the price to be paid for the B shares should be determined by the court, and not as suggested by the respondents.
>
> That being so the petition was not an abuse. For the purpose of the appeal, the respondent did not dispute that Mr. and Ms. Clark had used certain assets of *Southern Tropics* to build up the business of Kasmere. They submitted that the auditors or another accountant could assess the value of any misuse if there had been misuse and take that into account when arriving at the value of the B shares. *Northern Holdings* accept that in many cases that is a practical way to proceed, but submitted that it was not in this case, as the issue between the parties raised serious issues of law which necessitated the valuation being carried out by a court in light of all the facts.
>
> The claim was not merely that full value should be paid for the assets used. It was that Kasmere or Mr. and Ms. Clark should account to *Southern Tropics* for the profits made by Kasmere flowing from the improper use of *Southern Tropics* assets. If that is right it raises a complicated issue of mixed fact and law which would not appear suitable for determination by an accountant".

I am, therefore, firmly of the view that an arbitration is not appropriate in this case, nor does the solution lie in the appointment of a court expert under order 40 as Mr. Andrew has submitted.

Bearing in mind that the valuation process will involve the valuation of several, perhaps eight companies, carrying on business in Brazil, I am aware that or I believe, I should say, that possible purchasers of those companies or the controlling interests therein, may well be Brazilians but may also be persons from

any other place on the face of the earth. There is no obvious expertise, it seems to me, residing in any single individual, particularly an accountant and particularly someone carrying on practice in England, so as to make it desirable that the necessary information gathering process and the determination of the value of CVC and thus the value of what a fair offer to Mr. Demarco might be should be left to that sort of arbitration solution.

It seems to me that the Privy Council was aware, to what extent I don't know, that there was a possibility that CVC might be replaced as the general partner of the L.P. I very much doubt that their Lordships had all of the information that is now before me. I say that because of what was said by Lord Millet at paragraph 55 of the Privy Counsel's judgment. I will quote that paragraph.

> "The fact that the court lacks the necessary power to make a more suitable order does not mean that a winding up order would be unjust, if Opportunity declines to make a fair offer for Mr. Demarco's shares. By presenting a winding up petition on the just and equitable ground, Mr. Demarco is invoking the traditional jurisdiction of equity to subject the exercise of legal rights to equitable considerations. If he can make good his contention that the business venture, which the parties carried on through the medium of the company possessed the necessary characteristics, then equity will not allow Opportunity to exploit its position to make a profit at his expense. If it wants to carry on the company's business as a going concern without him it must offer to pay him the going concern value of his interest. If it is unwilling to pay him more than the break up or liquidation value of his interest then the Court may order that company be wound up. This will not obtain more for Mr. Demarco than he has already been offered, but it will achieve a fair and just result between the parties by ensuring that they are treated equally".

It is now clear that Dantas, (who is the person behind Opportunity) and Demarco will not be treated equally on a liquidation if CVC (which is effectively Dantas), is replaced as general partner of the L.P. by Dantas in another corporate form.

A winding up of CVC in those circumstances could not possibly be described as a fair and just result unless CVC was possessed at the time of the winding up of all the advantages accrued to or accruing to it as the general partner of the L.P. The possibility of CVC's replacement and thus the possibility that there will be a failure of justice is now a clear and present danger as I have held in my reasons for granting the *ex parte* injunction against CitiBank N.A. and IEII.

In referring to the *North Holdings* case the Privy Council held that while the limited partners, that is CitiBank and IEII may remove CVC as the general partner, it did not follow that it was open to the individuals behind Opportunity (i.e. Dantas) to, I quote,

> "Accept the substitution of another company with different shareholders without accounting for any benefit which they might themselves obtain by the substitution".

If the accounting contemplated by the Privy Council were provided, then it would be possible to say that Dantas and Demarco would be treated equally and fairly on the liquidation of CVC, if but only if the assets liquidated included the profits to be earned by the general partner, even if CVC had been replaced. That situation can only be realized if such profits are paid by the L.P. to CVC and maintained subject to the injunctions I have granted.

The Privy Council was also aware that these proceedings fall to be determined under an obsolete statute which does not expressly provide for the oppression remedies now available in England and in other common law jurisdictions. Where such legislation does exist, the court is vested with ample power to remedy any oppression of minority shareholders by the majority. However, Lord Millet said on behalf of Privy Council that the conduct which would have led the court to wind up a company on the just and equitable basis under the earlier English statutes could be properly described as the same conduct which now leads in England to the award of an oppression remedy. However, in the absence of statutory authority, which is the case in the Cayman Islands, it is said that this court cannot order the Dantas interests to purchase Demarco's shares at their fair value, which would be one of the remedies available under the oppression statutes in England and elsewhere.

It is said that the Dantas interests may decline to make an offer and simply sit by and let CVC be would up having arranged its affairs so that any future profits accruing to the general partner of the L.P. will not be paid to or held by CVC and therefore not come into the hands of the liquidators on a winding up.

As I read the judgment of the Privy Council their Lordships did not take the view that this would be appropriate in the light of the statements made in paragraph 7 of their judgment. I, therefore, doubt that the Privy Council contemplated that the Court would allow Dantas to implement a scorched earth policy appropriating or misappropriating to himself the value of CVC's prospective profits as the general partner of the L.P. A winding up of CVC after Dantas had stripped it of that

which may be its most valuable asset could not be regarded by anyone as resulting in equality of treatment of Dantas and Demarco or a fair and just result. Consequently it seems to me to be essential for this court to give all of the necessary directions and make all of the necessary orders to ensure that at the end of the day Demarco, if he establishes his case, is treated fairly and equally with the majority shareholder of CVC. It may well be that this court may have to consider making an order requiring the Dantas' interests to purchase Demarco's shares at the fair value determined by the court, even in the absence of express statutory authority for so doing.

The common law has demonstrated over the years an ability to adjust to changing circumstances. I recently read an article concerning the death of Lord Keith of Kinkel. It was pointed out there that Lord Keith had authored a judgment in a criminal case reversing century's old law for that reason. There are many other examples.

Other alternatives may also be suggested. For example, one way in which the Dantas' interests and Demarco's could be afforded equal treatment is if a winding up order is made and liquidators for CVC appointed, and then an application made by the liquidators for the winding up of the L.P., pursuant to the section 15 of the Exempted Limited Partnership Law. Indeed it seems possible for the court to make both winding up orders almost simultaneously. Section 15(2) of the Exempted Limited Partnership Law provides the court with ample jurisdiction to "make such orders and give such directions for the winding up" of the partnership or the affairs of the L.P. in this case, "as may be just and equitable". That

procedure would ensure that the assets, i.e. the investments of the L.P. were sold and the proceeds distributed among the partners of the Exempted Limited Liability Partnership, including CVC in a just and equitable manner. In that way, equality of treatment between Demarco and the Dantas' interests could be achieved because CVC and its liquidators would then be possessed of the wherewithal to make the required distribution on a liquidation.

The court could, of course, decline to make such orders if the Dantas' interests offered to purchase Demarco's CVC shares forthwith for cash and at the price fixed by the court. Unless and until the court is invited to take those steps it is my duty to see to it that this proceeding is concluded quickly and fairly and that is the purpose of the orders I have made and will make.

It is probably the case that the winding up of the L.P., if such is ordered, would occur at a time which would not be the optimum time for the maximization of the L.P.'s profits which one could reasonably expect to be of significant magnitude based on Ms. Putney's evidence.

As I have found, CitiBank has chosen to suggest that its economic interests which are based solely on their magnitude, are to be preferred to Demarco's "tiny minority" interest, as it was put by Ms. Putney.

If Ms. Putney's evidence was intended to persuade me to deny Demarco's rights it was ill conceived. On the contrary, as I have found CitiBank or IEII and CVC are partners. And CitiBank is entitled to expect honest conduct from CVC. As I have said, I expected CitiBank to see to it that CVC would treat Demarco honestly and

fairly. I would be very surprised indeed if when CitiBank is faced with a winding up of the L.P. the "Dutch Uncle" chat I referred to in my reasons of June 24, 2002 did not take place. After all, CitiBank chose the Cayman Islands in which to erect the L.P. It should not be heard to complain if the Grand Court of the Cayman Islands interprets and applies the law of this jurisdiction in such a way as to do justice without regard to the wealth or lack thereof of those who seek the court's protection.

There are, therefore, two major issues to be determined at the trial of this petition. The first is whether or not the circumstances of this case are such as to make the just and equitable winding up remedy available. Mr. Trace advises that Mr. Demarco will be required to establish this case at trial. The second issue will be what the fair value of Demarco's shares in CVC is. It appears that the L.P. has invested in and may control at least eight substantial companies located and doing business in Brazil. The L.P.'s investment policy has been from the outset to acquire companies; manage them for a period of time and then sell them for a capital gain. (See my Reasons for Judgment in cause 389 of 1999). The L.P. is to last until sometime in 2005, although I understand its life may be extended. CVC as the general partner is entitled to a significant share in the ultimate profits of the L.P., if those profits are sufficient to provide the limited partners with a sum by way of profit specified in the limited partnership agreement. This specified profit has been described as something over a "hurdle rate".

Consequently, the task of valuing CVC at any date prior to the time all of the L.P.'s profits or lack thereof are known will be a difficult task. It will, first of all,

I have already alluded to the steps the Court might take in those circumstances. In any event, the directions to be given must facilitate the resolution of these two issues and the ultimate disposition of the petition for winding up. I have given Mr. Andrew's submission to the effect that an expert should be appointed under rule 40 to value Demarco's shares, serious consideration. In considering that possibility, I have taken into account the provisions of Order 40 rule 2 sub rule 3. This rule states that, "any part of the Court's expert report which is not accepted by all the parties to the cause or matter in which it is made shall be treated as information furnished to the Court and be given such weight as the Court thinks fit".

In addition, Order 40 provides for the cross examination of the Court appointed expert and further expert evidence. Consequently, the decision as to value must be made by the Court even if Order 40 were to be invoked. With the proper evidence before it the Court will be in as good a position and perhaps a better position to value Demarco's interest in CVC than any expert in any single particular field. That to me is what Courts are all about. It is the making of decisions in cases where the input to the decision is provided in some cases by many experts in a number of fields. Unlike the expert, the Court also possesses the power and jurisdiction to resolve this case if a reliable valuation cannot be achieved for lack of reliable information or otherwise. In addition, unless and until the necessary information is provided no one can know what expertise is required.

I have reason to believe that the determination of value required in this case will have to be based not merely on accounting evidence, financial information or the like, but on what the market for the L.P.'s investments, that is the Brazilian companies was and is likely to be in the future. That determination has to take into account forecasts for the economy and the political climate expected to prevail in Brazil or which was expected, I should say, to prevail at the valuation date selected.

I would expect, therefore, that the court will require the assistance of the evidence of accountants, investment bankers, economists and perhaps people trained in some other discipline as well. I will, therefore, issue the following directions, keeping in mind the need for the information required to allow expert witnesses to value CVC and Demarco's shares.

In addition, it is necessary as part and parcel of these reasons to fix the criteria for the valuation. The fixing of those criteria in my judgment involves questions of law or questions of mixed law and fact as described by Lord Aldous in the North Holdings case. The Privy Council determined that CVC should be valued on a going concern basis and that Demarco's shares should not be valued on the basis of a discount by reason of the fact that he is a minority shareholder. Those two criteria are specified as matters of law. There are other such matters I will take up, firstly, the valuation date to be used.

Arguably, Demarco should have received a fair offer to purchase his shares on February 4, 1999 when his employment was terminated, and as a result he ceased