IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 79 OF 2022 (DDJ)

Neutral Citation Number: [2026] CIGC (FSD) 10

IN THE MATTER OF THE COMPANIES ACT (2025 REVISION)
AND IN THE MATTER OF POSITION MOBILE LTD SEZC

Before:	The Hon. Justice David Doyle
Appearances:	Michael Wingrave and Jack Stringer of Dentons for the Petitioner Ben Valentin KC, Liam Faulkner and Lisa Yun of Campbells LLP, for the Respondents
Heard:	20 October 2025 – 6 November 2025 (10 sitting days)
Written submissions on *Aquapoint LP (in official liquidation) v Fan* [2025] UKPC 56 filed:	10 and 11 December 2025
Draft Judgment circulated:	10 February 2026
Judgment delivered:	17 February 2026

Determination of winding up petition on the just and equitable ground – relevant law and remedy – the importance of pleadings - lack of probity – justifiable loss of confidence in management - lack of independent investigation – failure to protect the best interests of the Company – threats and an improper scheme – oppressive conduct – winding up threshold crossed - alternative remedies – form of relief – buyout order

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JUDGMENT

Introduction

1. On 6 November 2025 I reserved judgment. On 10 and 11 December 2025 I received written submissions in respect of the judgment of the Judicial Committee of the Privy Council in *Aquapoint LP (in official liquidation) v Fan* [2025] UKPC 56 delivered on 27 November 2025. I now deliver my judgment.

2. At the outset I wish to reiterate my thanks to the attorneys and the respective legal teams for their valuable assistance to the court. I also reiterate my thanks to the Opus operatives, the information technology support staff and the marshals who enabled the trial to proceed in a timely and smooth fashion and for the court to benefit from a comprehensive documentary and transcript of evidence record. That has greatly helped in the production of this judgment and I do not take such assistance for granted.

Summary of outcome

3. In short summary I have held that the threshold for a just and equitable winding up order has been crossed. I have concluded that a buyout order is the appropriate form of relief and I have required the attorneys to file directions leading to a hearing to determine the appropriate figure at which the Petitioner's shares should be purchased, if agreement cannot be reached.

Importance of pleadings

4. In legal proceedings, pleadings play an important role generally and especially in relation to winding up petitions presented on the just and equitable ground.

5. Order 3 rule 2 (2)(d) of the Companies Winding Up Rules (2023 Consolidation) provides, amongst other requirements, that every winding up petition shall comply with the requirements of Order 9 of the Grand Court Rules (2023 Revision) ("GCR") and shall contain "a concise statement of the grounds upon which the winding up order is sought". Order 9 rule 2 (1) of the GCR provides that "Every petition … shall include a concise statement of the nature of the claim made or the relief or remedy required in the proceedings begun by the petition."

6. In *Oxleys of Douglas (Vauxhall) Limited* 2003-05 MLR 57 (Isle of Man High Court judgment dated 5 September 2003) I dealt with the first contested oppression petition in the courts of the Isle of Man under section 7 of the Companies Act 1968 (Act of Tynwald). In that case the petitioner sought an order that his shares in various companies be purchased by certain other shareholders at a value to be determined by the court. At [13] I commented that there was the potential for section 7 petitions to develop into "lengthy, cumbersome and extremely expensive proceedings." At [15] I stressed that they should be properly pleaded: "Both sides should identify the particular issues between the parties … the court would no doubt benefit from a short list of issues for determination." I stated at [16] that parties should be "discouraged from engaging in a "point scoring" or "mudslinging" exercise" and added "The parties should be encouraged to concentrate on the main issues in the case." I stated at [17] that "The parties should also be encouraged to explore mediation as an effective way of resolving their disputes without recourse to protracted, expensive and sometimes destructive litigation." All these points are applicable to just and

equitable winding up petitions especially those based on oppression, unfair prejudice and lack of probity.

7. Jonathan Crow JA delivering the judgment of the Court of Appeal of Jersey in *Financial Technology Ventures II (Q), LP v ETFS Capital Limited* [2021] JCA 176 ("*Financial Technology*") made similar points at [303] as follows:

> "Before concluding, we would observe that the task of the court below would have been considerably easier if the parties had taken a more streamlined approach, particularly in their pleadings. The Order of Justice, Answers and Reply occupied about 140 pages (not including various requests for further information etc.). They were discursive and argumentative, rather than being rigorous and focused, as they should have been. It is the function of pleadings in a case such as this to identify, as succinctly as possible, precisely which acts are said to be unfairly prejudicial, what prejudice is said to have been suffered, and exactly why it is unfair. The court does not propose to be prescriptive about the appropriate length of pleadings, because it fully recognises that different cases require different levels of detail. But in order for any case to be argued and determined within manageable bounds, the parties' legal representatives need to identify precisely what is in issue, and why. Particularly in the context of a jurisdiction such as that under Article 141, there is an understandable temptation to treat every email as forming a relevant part of the story. But, as Hoffmann J said in *Re a Company No 007623 of 1984* (1986) 2 BCC 99, 191, at 99,196: "*the very width of the jurisdiction means that unless controlled it can become a means of oppression".* That was said in relation to the substantive scope of the court's jurisdiction to grant relief, but it is equally true of the manner in which cases are presented and argued."

8. Linda Chan J in *China Oceanwide Group Limited* [2023] HKCFI 455 stressed the importance of pleadings in winding up cases and stated:

> "In my view, it is not open to a petitioner to rely on any facts or grounds not fairly stated in the petition and asks the court to make a winding up order against the company on the basis of any unpleaded facts or grounds." ([21])

> "… If a petitioner wishes to expand or change its case against the company, it must first amend the petition." ([22])
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> "Nor is it the practice of the Companies Court to allow a petitioner to expand its case by way of affirmations. There is a long line of authorities, where the court emphasised the requirement that a petition must set out the facts and matters relied upon by a petitioner in justifying a winding up order, and any defects or omissions cannot be cured by supporting affidavits …" ([27])
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> "… Save in exceptional circumstances or where it is impracticable for the petitioner to apply for leave to amend the petition, the court would *not* allow a petitioner to rely on any grounds or factual matters not fairly covered in the petition even if such grounds or matters have been stated in the affirmations filed in the proceedings." ([32])

9. In a different context, the importance of precise pleadings has been stressed at the highest level. Lady Rose delivering the judgment of the Board of the Judicial Committee of the Privy Council in *Lafresiere v New Mauritius Hotels Limited* [2023] UKPC 38 at [30] noted that: "the purpose of pleadings is to circumscribe the issues in the case."

10. Closer to home and more recently at first instance Asif J put it well, again in a very different context, but the general principles hold good in the present context, when in *Anglin v the Attorney General of the Cayman Islands* (Unreported judgment delivered 24 October 2024), he concisely and powerfully stated:

> "...it is important to focus on the pleaded case. The issues that will have to be grappled with and decided by the court are those set out in the pleadings. Unless and until leave to amend is obtained, a party has no right to go outside the bounds of his or her pleaded case."

The Amended Petition

11. The pleadings provided by the Petitioner in this case are far from ideal. The Petitioner adopted a somewhat unhelpful scattergun/kitchen sink approach.

12. In the amended winding up petition originally dated 1 April 2022 and redated 20 March 2025 (the "Amended Petition") Technology Investment Consortium LLC (the "Petitioner" or "TIC") seeks an order for the winding up of Position Mobile Ltd SEZC (the "Company", "PM" or "Position Mobile") on the just and equitable ground and that joint official liquidators be appointed or in the alternative an order that Genimous Investment (Hong Kong) Co., Ltd and Genimous Holding (HK) Limited (together the "Genimous HK Companies" or the "Respondents") be ordered to acquire the Petitioner's shares in the Company at a value to be determined by the court.

13. The grounds upon which relief is requested in the Amended Petition are outlined in Section "J. GROUNDS FOR PETITION". It is pleaded that the Petitioner has "justifiably lost all trust and confidence that the assets and affairs of the Company are being properly managed and mutual trust and confidence between the Petitioner and the Genimous HK Companies has irretrievably broken down" (paragraph 30 of the Amended Petition).

14. The Petitioner then pleads its belief "that there is a need to investigate the Company's affairs and the conduct outlined above, in particular the instances of mismanagement in general and threatened mismanagement that have occurred since the rejection of the 2021 Offer in particular" (paragraph 31 of the Amended Petition).

15. The "2021 Offer" is defined at paragraph 21 of the Amended Petition as "In early November 2021, Mr Wong approached Mr Stephens with a further offer (the '2021 Offer') from the Genimous HK Companies to purchase the Petitioner's shares in the Company …".

16. The Petitioner pleads that "it is just and equitable to wind up the Company and to place it under the control of independent official liquidators, in order to: i) ensure that its affairs are properly and promptly wound up, so that its remaining assets may be properly administered and returned to its economic stakeholders; ii) prevent any mismanagement of the Company and/or dissipation or misuse of its assets by the GGDs and/or Genimous HK Companies; iii) to prevent continued oppression of the Petitioner as a minority shareholder, and iv) facilitate an independent investigation into the Company's affairs to the extent that is considered appropriate" (paragraph 32 of the Amended Petition).

17. The "GGDs" are defined at paragraph 7 a. of the Amended Petition simply as "The directors appointed by Genimous HK Companies". "PDs" are defined as "directors appointed by the Petitioner".

18. At paragraph 13 of the Amended Petition it is pleaded that from the date of incorporation of the Company, the board of directors comprised 5 individuals:

> "Originally, those 5 individuals were:
> a. Ryan Stephens, PD and shareholder of the Petitioner;
> b. Cody Mahaffey, PD and shareholder of the Petitioner;
> c. Xingang 'Scott' Yu, GDD;
> d. Jing Sun, GGD; and
> e. Deming He; GGD"

I can find no definition of "GDD" and assume the first "D" is a typographical error for "G".

At paragraph 7 k. of the Amended Petition it says that the "Company on 8 November 2021 caused one of the GGDs [it does not plead which one] to resign and to be replaced by a US citizen, John Lash, as Security Director".

At paragraph 7 o. the Petitioner refers to "One of the individuals later appointed as GGD, Mr Zhifeng (Tony) Chen".

19. The Petitioner (at paragraph 3 of the Amended Petition) pleads that the Company was created as a joint venture vehicle between the Petitioner and the Genimous HK Companies. It is added "The Company was created and operates as a quasi-partnership between the Genimous HK Companies and the Petitioner."

20. At paragraph 4 it is pleaded that the "Company contracted and continues to contract out certain work connected with the development of the Apps [defined in paragraph 2 as "mobile internet products"] and various back-office functions to Spigot Inc ("Spigot") (of late renamed "Eightpoint Interactive Inc" …)". It is further pleaded that the "Genimous HK Companies acquired 100% of the shares of Spigot from, amongst others, Ryan Stephens, a member of the Petitioner – in or around May 2016 and Spigot employees and executives are closely involved in the operations of the Company."

21. At paragraph 5 it is pleaded that the Company is solvent and the Petitioner on 1 October 2019 acquired 2,450,000 shares in the Company for US$50,000.00 amounting to 49% of the issued share capital with the remaining 51% owned by the Genimous HK Companies.

22. At paragraph 6 it is pleaded that the Petitioner had a "legitimate expectation" that the Company "would be run with the best interests of all members in mind, whether as a quasi-partnership or otherwise, and that the members of the Company would maintain their mutual trust and confidence as if in a partnership firm."

23. In section "C. SUMMARY" at paragraph 7 the Petitioner seeks to rely on various matters including:

(1) exclusion from management and suspending quarterly meetings of the board;
(2) accounting processes being carried out by "wholly owned subsidiaries of the Genimous HK Companies" or related entities within the broader Genimous group of companies;
(3) failing to replace certain executives who resigned in October 2021;
(4) making offers to purchase the Petitioner's shares "at well below market value";
(5) refusing to allow PDs to access financial information;
(6) GGDs obfuscated and frustrated the Petitioner's attempts to sell its shares;
(7) the making of "threats to transfer the intellectual property belonging to the Company" and "threats were made to terminate certain of the Petitioner's shareholders that were employed by Spigot if the offer of the Genimous HK Companies was not accepted";
(8) "terminating" Nicholas Jackson and Daniel Miller from executive positions in Spigot "in retaliation for the Petitioner's refusal to accept Genimous HK Companies' offer to purchase its shares and to reduce the Petitioner's visibility into the actions of Spigot and other subsidiaries of the Genimous HK Companies";
(9) causing Spigot to be "overpaid millions of dollars for its services";
(10) breaches "of various service agreements";
(11) caused one of the GGDs to resign and be replaced by John Lash ("Mr Lash");

The Petitioner pleads that the "above conduct" has "justifiably led the Petitioner to lose all trust and confidence in the Company's management and represents oppression of the Petitioner as minority shareholder" and "evidences the need for an immediate investigation into its affairs by independent liquidators";

(12) misappropriation of intellectual property belonging to the Company.

(13) amending the contractual relations of the Company with Spigot to remove certain anti-competition covenants previously restricting Spigot, without corresponding benefit to the Company and in furtherance of the overall scheme of the Respondents to redeploy intellectual property belonging to the Company under "other Genimous owned or controlled entities, as Eightpoint and/or EET and/or ACS; and

(14) GGDs have failed to act against "the above-mentioned misappropriation or to protect the best interests of the Company in any or any adequate manner."

24. In section D which deals with the "Petitioner's legitimate expectations" the Petitioner at paragraph 8 refers to a presentation made by Mr Stephens to Genimous HK Companies in January 2018 in Beijing concerning the extension of the business into mobile phone applications. The Petitioner says that a new joint venture was proposed between Genimous HK Companies and the Petitioner to house that business and the new company would exist at arm's length from the Genimous HK Companies. It is pleaded that "the business of the Company duly began under those general terms, on the understanding that it would operate as a joint venture, at arm's length from Genimous HK Companies and its subsidiaries and that the business would be run with mutual trust and confidence, in the manner of a quasi-partnership".

25. The Petitioner relies heavily on what it defines at paragraph 9 as the "Term Sheet" which it describes as "On or about 30 July 2019, the Petitioner and the Genimous HK Companies signed a non-binding Agreement on Key Terms (the 'Term Sheet') back-dated to 11 April 2019."

26. At paragraph 11 it is pleaded that the Petitioner "had at all material times a legitimate expectation that the Company would be run upon the principles agreed in January 2018 and set out in the Term Sheet and/or" a buyout arrangement would be honoured or "at some stage in the future terms would be agreed for the purchase of the Petitioner's shares …".

27. At paragraph 12 it is pleaded that "the conduct of the Genimous HK Companies in the creation and early operation of the Company was consistent with the above mentioned terms and confirmed and/or independently gave rise to the above identified legitimate expectations on the part of the Petitioner."

28. At paragraph 14 of the Amended Petition it is pleaded that during the course of a meeting of the board of directors of the Company held on 11 December 2020 various items "discussed at the preceding board meeting in August 2020" were ratified:

    (1) the board of directors would meet quarterly;
    (2) financial and operational results would be regularly reported to all the directors of the Company;
    (3) Genimous HK Companies and the Petitioner would meet after the publication of the 2021 budget to discuss purchasing the "Petitioner's equity position in the Company"; and
    (4) the Company hired Ryan Dinyer as Treasurer for the Company with a non-voting seat on the board of directors.

29. At paragraph 17 it is pleaded that in 2021, there was a concern that Spigot was overcharging the Company and "this was brought up with Mr Dinyer". It is added that "it was thought that Spigot had over charged and the Company had paid several millions of dollars that should not have been paid but no action was taken either by the Company or by Spigot."

30. Section F of the Amended Petition refers to contact in December 2020 from Mr Hongda Lu ("Mr Lu") indicating that the Genimous HK Companies "present an offer (the "2020 Offer") to purchase the Petitioner's shares in the Company for US$5 million". It is pleaded at paragraph 18 that "Mr Yu stated that if Genimous HK Companies' offer were not accepted, Genimous HK Companies would use its leveraged position within the Company to appropriate its assets without compensating the Petitioner."

31. At paragraph 19 it is pleaded that "the Petitioner elected to accept" and the "Genimous HK Companies withdrew from the proposed transaction in January 2021".

32. At paragraph 20 there is reference to "the use of a SPAC" being "refused".

33. At paragraph 21 it is pleaded that in early November 2021 Mr Peter Wong ("Mr Wong") "the representative of Genimous HK Companies (and who was acting as CEO of Spigot)" (paragraph 20) approached Mr Stephens with a further offer (the "2021 Offer") and "a meeting was arranged for 18 November 2021 to discuss". The 2021 Offer was made in the amount of US$5.5 million. It is pleaded that during that meeting Mr Wong stated:

(1) Genimous HK Companies regretted setting up the Company as a joint venture;

(2) Genimous HK Companies took the view that they had the right to offer whatever purchase terms they wanted to the Petitioner;

(3) if the 2021 Offer was not accepted, Daniel Miller and Nicholas Jackson would be terminated from their executive positions in Spigot, in order to remove the Petitioner's visibility into and influence over the Company;

(4) Genimous HK Companies would strip assets from the Company and transfer them to other entities owned or controlled by them if the 2021 Offer was not accepted and remove funding from the projects in development for the Company; and

(5) the 2021 Offer was made in the amount of US$5.5 million, although the value of the Company was at that time far higher than it had been at the time of the 2020 Offer.

34. At paragraph 22 it is pleaded that the Petitioner resolved to reject the 2021 Offer and such rejection was communicated to Mr Wong on 7 December 2021 and the Petitioner indicated it would explore selling its shareholding in the Company to third parties.

35. Section G of the Amended Petition concerns "conduct of GGD, following refusal of purchase offer."

36. It is pleaded that the GGDs:

(1) continued to "fail or refuse to hold board meetings or meetings that included the PDs, despite requests from Mr Stephens to do so";

(2) frustrated the Petitioner's "offers to secure a buyer for their shares in the Company by refusing to execute connected non-disclosure agreements." It may be that the word "offers" should have read "efforts";

(3) failed to circulate regular financial and operational information packages to the PDs that had previously been circulated on a monthly basis;

(4) refused or caused to be frustrated request made by Mr Mahaffey for financial and operational information of the Company made in February and March 2022;

(5) out-sourced the accounting functions from the Company to non-independent third parties;

(6) failed to replace the Company Secretary and Treasurer "with executives not employed by wholly owned Genimous HK Companies entities, despite the resignations of both individuals in the third quarter of 2021";

(7) refused to respond substantively to a request from Mr Stephens for an audit; and

(8) terminated or "caused the termination of Mr Miller and Mr Jackson from their executive positions at Spigot on or about 19 January 2022."

The Petitioner says that such "terminations, damaged the revenue stream of the Company".

37. It is further pleaded at paragraph 23j that the GGDs continued their threats to appropriate the assets of the Company and took steps to misappropriate those assets for the benefit of other Genimous entities and for the wider benefit of the Genimous HK Companies by:

(1) transferring or allowing the transfer of a game App named Snow Roll which had been developed for the Company, and later allowing it to be published "under" EET;

(2) causing, permitting or allowing the Company to enter into or purport to enter into an Amended Research and Development Agreement with Spigot which amended agreement had not been shown to or discussed with the PDs and which purported to permit Spigot to provide services to competitors of the Company without any corresponding benefit;

(3) causing, permitting or allowing Spigot to use App code and other intellectual property/proprietary information belonging to the Company to be copied or otherwise reproduced in various Apps released by "EET and/or Eightpoint and/or ACS and allowed proprietary information to be used by those companies in marketing those products";

(4) refusing and failing to take steps to hold "Spigot and/or EET and/or Eightpoint and/or ACS accountable for the misappropriation and use of the Company's intellectual property despite the provision of independent expert evidence to support the Petitioner's allegations, allowing these entities to profit from the misuse while harming the Company's commercial position through unfair or improper competition";

(5) permitting apps based on the Company's intellectual property to compete directly with the Company's own apps "on the Google Play and Apple Store, damaging the Company's commercial interests, and exposing the Company to the risk of de-platforming, as both

stores prohibit the same developer from publishing duplicate apps under multiple entities, violating their policies";

(6) reducing or completely ceasing marketing and research and development spending on the Company's apps – coinciding with the release of apps based on the Company's intellectual property by other entities owned or controlled by Genimous HK Companies – damaging the Company's interests and commercial position; and

(7) causing or permitting the business of the Company to suffer in favour of "other Genimous HK Companies – owned entities and taking no action to further the commercial best interests of the Company."

38. Under section H entitled "Whistleblower Information" there are references at paragraph 24 to "transfers of various pieces of intellectual property belonging to the Company were imminent". There is reference at paragraph 25 to the Apps of the Company suffering in the rankings "since the termination of Mr Miller and Mr Jackson" and a "refusal to publish a mobile game" and the consideration by the GGDs of "adding a crypto coin to the application produced by the Company". There is also reference to the appointment of Mr Lash as a new director (paragraph 26).

39. At paragraph 27, still under Section H, it is pleaded:

> "The above instances, whether separately, together or in combination represent unreasonable and oppressive conduct against the Petitioner, being at all material times in the position of a minority shareholder. The actions of the Genimous ~~Group~~ HK Companies have been entirely at odds with proper business practices and/or with the legitimate expectations of the Petitioner as set out above. Furthermore, the above conduct represents serious mismanagement of the Company on the part of the GGDs, which mismanagement the Petitioner and/or the PDs have been powerless to prevent, arrest or rectify and which mismanagement appears to be ongoing in nature."

40. In section I "Need for an investigation in the affairs of the Company" which commences at paragraph 28 it is pleaded as follows:

> "The GGDs made threats concerning Spigot employee termination, on which they followed through, and/or threats to strip intellectual property from the Company and ~~appear to have taken preparatory steps~~ to transfer certain of those assets to other entities upon which they appear to have followed through. The GGDs have frozen the PDs out of the management of the Company and/or made overpayments to Spigot and refused to investigate the same. Accounting functions have been outsourced to entities controlled by Genimous ~~Group~~ HK Companies. The GGDs have refused to hold other Genimous entities to account for clear misappropriation and misuse of intellectual property of the Company, supported by independent expert evidence with which they have been provided. The Petitioner has no visibility over whether or how the Company is being managed, the true financial position of the Company, whether or not intellectual property had been transferred or is in the process of transfer to other entities and/or upon other matters that may have impacted and may continue to impact on the value of the Petitioner's shareholding in the Company."

41. At paragraph 29 it is pleaded that "there is a clear and urgent need to investigate the affairs of the Company and in particular the conduct of the GGDs since the PDs were excluded from the management of the Company."

42. Section J is headed "Grounds for the Petition" and it is worth setting it out in its entirety:

> "J. GROUNDS FOR THE PETITION
>
> 30. For the reasons set out above, the Petitioner has justifiably lost all trust and confidence that the assets and affairs of the Company are being properly managed and mutual trust and confidence between the Petitioner and Genimous ~~Group~~ HK Companies has irretrievably broken down.
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> 31. The Petitioner believes that there is a need to investigate the Company's affairs and the conduct outlined above, in particular the instances of mismanagement in general and threatened mismanagement that have occurred since the rejection of the 2021 Offer in particular.
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> 32. In all the circumstances, the Petitioner considers that it is just and equitable to wind up the Company and to place it under the control of independent official

liquidators, in order to: i) ensure that its affairs are properly and promptly wound up, so that its remaining assets may be properly administered and return to its economic stakeholders; ii) prevent any mismanagement of the Company and/or dissipation or misuse of its assets by the GGDs and/or Genimous ~~Group~~ HK Companies; iii) to prevent continued oppression of the Petitioner as a minority shareholder; and iv) facilitate an independent investigation into the Company's affairs to the extent that is considered appropriate."

43. In Section K the Petitioner nominates individuals from Alvarez & Marsal Cayman Islands Limited for appointment as joint official liquidators of the Company.

44. Added Section L now concerns alternative relief and reads as follows:

"L. ALTERNATIVE RELIEF

34. To the extent that the threshold for winding up on the just and equitable basis is satisfied, whether on the basis of concession or following evidence at trial, the Petitioner seeks an order, pursuant to s.95(3)(d) of the Companies Act, that the Genimous HK Companies be ordered to acquire the Petitioner's shares in the Company at a value determined by the Court and set at a point in time to be determined by the Court. The Petitioner will say that it has not been able to secure any reasonable offer from the Respondents for its shares and has been prevented from selling those shares to third parties by the GGDs and/or the Genimous HK Companies more widely. Accordingly, the Petitioner will say that it was left with no other reasonable option but to issue the present Petition for winding up to secure either the winding up of the Company or an order for the purchase of its shares at a reasonable price. Further, the Petitioner will say that the value of its shares in the Company on the open market has been greatly reduced by provision of the i/p of the Company to subsidiaries of the Genimous HK Companies, which amounted to the stripping of valuable assets, and the conduct of the Genimous HK Companies generally in connection with the Company."

The Amended Defence

45. The Amended Defence is filed on behalf of Genimous Investment (Hong Kong) Co., Limited ("Genimous Investment HK") and Genimous Holding (HK) Limited ("Genimous Holding HK" and together "Respondents").

46. In short summary the Respondents deny that the Petitioner is entitled to the relief sought and refer to the way in which the Amended Petition is drafted and the two grounds relied upon, namely that "the conduct of the Company" has:

(1) "justifiably led the Petitioner to lose all trust and confidence in the Company's management and represents oppression of the Petitioner as a minority shareholder" (paragraph 7(1), 30 and 32); and

(2) "evidences the need for an immediate investigation of [the Company's affairs] by independent liquidators" (paragraphs 7(d) and 32).

47. The factual allegations made in the Amended Petition are denied and in particular it is denied that:

(1) the Company is properly characterised as a quasi-partnership or, to the extent alleged, that it is appropriate to subject the legal rights of the Petitioner *qua* contributory to equitable considerations;

(2) the Petitioner had, or could properly have had, any relevant 'legitimate expectation' beyond the clear and uncontroverted terms of the legally binding arrangements between the parties;

(3) the Company or the GGDs have acted or failed to act in the manner complained of.

48. It is further denied that the matters complained of, even if proved, would (in part or in *toto*):

(1) entitle the Petitioner to justifiably lose trust and confidence in the Company's management;
(2) constitute oppression of the Petitioner as a minority shareholder; or

(3) evidence the need for an immediate investigation into the Company's affairs by independent liquidators.

49. At paragraph 11 of the Amended Defence the following is pleaded:

> "The Petition must be considered against the backdrop of the Petitioner's unsuccessful attempts since around November 2021 to sell its shares[1] in the Company for an inflated price. The Petitioner is using the Petition as a coercive tool in its attempts to seek to pressure the Genimous Respondents into acquiring the Petitioner's shares in an amount far in excess of their value. Accordingly, and for the reasons particularised more fully in section E~~F~~, the Petition is an abuse of process that has been brought for a collateral purpose of seeking to pressure the Genimous Respondents to acquire the Petitioner's shares in the Company for an inflated amount in circumstances in which the Petitioner has refused to accept reasonable offers made by the Genimous Respondents.
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> ---
>
> [1] Such shares constituting a minority shareholding in the Company."

50. At paragraph 52(l) of the Amended Defence "Alleged appropriation of Assets" it is pleaded that on 21 May 2024 the Petitioner commenced a new set of proceedings in cause number FSD 162 of 2024 (DDJ) (the "Writ Action Proceedings") against various third parties, including certain of the GGD's in their personal capacity as directors of the Company in relation to the same or substantially the same allegations made at paragraph 23j. of the Amended Petition and it is added that "these allegations give rise to disputed issues of fact and law, which will need to be determined in the Writ Action Proceeding." At paragraphs 53 and 56 it is pleaded that the allegations made by the Petitioner against certain third parties in the Writ Action Proceedings will need to be determined in those proceedings.

51. Section E of the Amended Defence is entitled "Abuse of Process" and at paragraph 68 it is averred that "the allegations in the Petition have been falsely asserted and the Petition has been presented with the ulterior motive of seeking to pressure the Genimous Respondents to acquire the Petitioner's shares in the Company at a price above a fair value by way of settlement."

52. In Section F "Alternative remedies available to the Petitioner" it is averred that the court should find that the 2022 Offer and/or the VL Offer (defined in paragraph 56 as the letter dated 24 May 2024 to the Petitioner proposing voluntary liquidation being subject to the supervision of the court) was a suitable alternative remedy which acting reasonably the Petitioner ought to have accepted or make an alternative order in respect of regulating the conduct of the Company's affairs in the future and or directions "in relation to the extant leave to continue application filed in the Writ Action Proceeding."

The Amended Reply

53. At paragraph 14 of the Amended Reply in the context of quasi-partnership versus a purely commercial association, it is averred:

(1) Genimous Group entities, including the Respondents, were "familiar" with Mr Stephens and Mr Lee who were provided with "Partners of Genimous" awards in 2020 and 2019 respectively;

(2) Both Mr Stephens and Mr Mahaffey were appointed to the board of directors of Genimous Investment (Hong Kong) Co., Ltd;

(3) Mr Stephens, Mr Lee and Mr Mahaffey "were so valued by the Genimous Group that each received stock options in Genimous Technology Co., Ltd (a member of the Genimous Group) to incentivize foreign management personnel and core business personnel of the Company";

(4) The operations of what would become the Company commenced a substantial period of time before incorporation and/or before the Corporate Documents were prepared or entered into. Those operations were carried out under the auspices and understandings recorded in the Term-Sheet and under the general understandings arising out of the discussions between Mr Stephens, Mr Lee and representatives of the Genimous Group in January 2018;

(5) The opening clause (a) of the Term-Sheet records that the Company was conceived on the basis that it would operate "… on the basis of voluntary, equal, mutual benefits and trusts";

(6) The Petitioner provided the time and expertise of its shareholders "in furtherance of the business of that which became the Company on the basis of the above understandings and legitimate expectations which existed even before the advent of the Term-Sheet."

54. At paragraph 17 the Petitioner admits that "the Corporate Documents were prepared with the assistance of attorneys."

55. At paragraph 17 b.vi it is averred that "The Company, being a joint venture and quasi-partnership between the Petitioner and the Respondents is not an incentive structure of a sort deployed anywhere else within the Genimous Group outside the PRC."

56. At paragraph 46 l the Petitioner avers that a wholly owned Genimous Group entity, namely EET has published a number of applications (including Snow Roll and Scan QR Code) which "contain large portions of code or other proprietary information belonging to Apps either developed by or that had been in development for the Company at Spigot or otherwise belonging to the Company and seems to have been wrongfully provided by Spigot." The Petitioner avers that the "publishing of Scan QR Code and Snow Roll represents diversions of the intellectual property of the Company and establishes a breach of the Research and Development Agreement between the Company and Spigot, dated 19 October 2019." The Petitioner avers that "the GGDs in office from time to time were instrumental in the above-described misappropriations and acted at the behest of the Respondents *qua* shareholders. In consequence, it is denied that these matters are only capable of resolution in the derivative proceedings and the Petitioner avers that the parties have, by reason of the directions order of 31 October 2024, been preparing to try the same in these proceedings."

57. In respect of its case on oppression at paragraph 53 it is stated that "The Petitioner repeats its case on quasi-partnership."

58. At paragraph 56 it is averred that "the proper valuation of the Company lay between US$106 and 131 million in July 2022" and it is denied that the 2022 Offer was reasonable or represented a suitable alternative remedy to the relief sought in the Amended Petition …".

59. At paragraph 57 it is stated:

"<u>While an order for the winding up was sought as the primary relief at the time the Petition was filed, at which point the Company's assets retained substantial standalone value in a</u>

> liquidation scenario, the Respondents' conduct since that time has rendered a buyout order the most appropriate relief. The Petitioner now seeks a buyout order as the most equitable relief, having been forced into that position by the deliberate conduct of the GGDs, acting at the behest of the Respondents, which has operated to dissipate the Company's property to other Genimous Group entities and destroy its business operations. That conduct has included the misappropriation of the Company's assets, products and business know-how for the benefit of competitor entities within the Genimous Group, significantly diminishing the prospects of any third-party buyer acquiring the Company's assets in a liquidation, given the extent to which those assets have been replicated and embedded in competing businesses controlled by the Respondents and Genimous Group. As a result, the only party capable of deriving any material value from the Company's assets in a liquidation is the Genimous Group itself. The Petitioner therefore seeks a buyout order valuing its shares as at a date before the destruction of value effected by the Respondents and avers that a winding up order should be granted in the alternative if no buyout is ordered."

60. At paragraph 59 the Petitioner denies that either the 2022 Offer or the VL Offer "constituted a suitable alternative remedy which the Petitioner ought to have accepted, acting reasonably."

The Amended Rejoinder

61. At paragraph 11 of the Amended Rejoinder it is averred that "the work which the Petitioner contends was carried out as pre-incorporation business of the Company (namely the production, publishing and monetization of certain Apps) was in fact undertaken by Eightpoint and subsequently acquired by the Company (after its incorporation) pursuant to an arm's length contract with Eightpoint in the form of an Intangible Asset Purchase Agreement dated 1 October 2019" with a consideration of US$4,400,000.

62. At paragraph 14 it is admitted that "the Petitioner's members, in addition to other employees and officers of Spigot, Eightpoint, and certain other entities within the Genimous Group contributed certain time and expertise to the Company's business."

63. At paragraph 19 the Respondents repeat the denial that the arrangements between the parties operated as a quasi-partnership and it is averred that the agreed purpose of the arrangements between the parties was to motivate the members of the Petitioner to grow the business.

64. At paragraph 37 it is stated "As to paragraph 46 it is denied that the (unspecified) actions of the GGDs in office from time to time in connection with the Company were "dictated" by the Genimous Respondents qua shareholders, and the allegation is inadequately particularised."

65. At paragraph 44 of the Amended Rejoinder it is pleaded:

> "As to paragraph ~~50~~ 46(l), it is averred that Snow Roll was developed by a third party on behalf of Spigot for Eightpoint and East End Technologies. Its production was paid for by Eightpoint and East End Technologies. With respect to Scan QR Code, while, in the first few days of testing, prior to formal code review being undertaken, there was a glitch linking the app to certain aspects of code on which Spigot previously worked, this glitch has been remediated. The actual code, website, terms of service, and privacy policy for Scan QR Code are owned by, developed for, and paid for by Eightpoint on behalf of East End Technologies. It is denied that there has been any deliberate diversion of the Company's intellectual property and it is averred that the only breach of the Research and Development agreement with Spigot has been due to the Company's failure to timely make payment. The further averments made in paragraph 46(l) are denied."

66. At paragraph 46 it is "denied that there has been any intentional breach by the Genimous Respondents of the undertaking given to the Court on 14 June 2022…".

The Writ Action

67. The Amended Statement of Claim dated 23 May 2024 (originally dated 21 May 2024) in FSD 162 of 2024 (DDJ) (the "Writ Action") refers to two plaintiffs – Technology Investment Consortium LLC (the Petitioner in FSD 79 of 2022 (DDJ)) and "Position Mobile SEZC Ltd" (the target company in FSD 79 of 2022 (DDJ)). There are 10 Defendants:

> "1. East End Technologies Limited
> 2. Eightpoint Technologies SEZC Ltd
> 3. Spigot Inc
> 4. Genimous Technology Co. Ltd
> 5. Zhifeng Chen

6. John Lash
7. Deeming (sic) He
8. Huang Ying
9. Cody Miller
10. Advanced Commerce Solutions Inc"

None of those Defendants are parties to FSD 79 of 2022 (DDJ).

68. At paragraph 1 of the Amended Statement of Claim it is stated that the Plaintiffs' case is that "the intellectual property of the PM was unlawfully provided to and copied by various companies and individuals as hereinafter described for the benefit of those Defendants resulting in loss to the Plaintiffs."

69. At paragraph 2 it is stated that TIC brings the claims "on its own behalf and/or derivatively on behalf of PM". There are references to the Term Sheet and various agreements including the Research and Development Agreement, and the Intangible Asset Purchase Agreement. There is a reference to the 2021 Offer, the termination of Mr Jackson and Mr D Miller and these proceedings in FSD 79 of 2022. There are allegations of code copying and Spigot overcharging PM for its services. There are references to the Scan QR Code, Snow Roll and NewsNow. There are allegations of (1) unlawful means conspiracy; (2) breach of fiduciary duties; (3) dishonest assistance; (4) breach of contract; (5) copyright infringement; (6) tortious interference; (7) breach of confidence and (8) unjust enrichment. There are references to intellectual property and proprietary information "developed for PM and held by Spigot would be misappropriated, copied, unlawfully shared and/or otherwise transmitted away from PM" to others (paragraph 47a). At paragraph 48 it is alleged that the "GGDs acted in breach of their fiduciary duties owed to PM" and details are provided in sub-paragraphs a. to n.

70. Paragraph 58 of the Amended Statement of Claim is under the heading "Particulars of Loss". At a. there is an allegation of "Payment of over-inflated fees to Spigot consequent upon overcharging". Various allegations of loss of revenue and diminution in the value of PM's Apps are pleaded in general terms and at h. is a claim in respect of "Diminution in the value of PM and, as a result, in the value of its shares."

71. The Plaintiffs claim damages against each of the Defendants, delivery up of "PM's I/P", injunctive relief, an account of profits, declarations that "each of the GGDs acted in breach of their fiduciary duties to PM", interest and costs.

72. It can be seen that there is a considerable overlap in respect of the allegations of Spigot overcharging, the misappropriation of PM's intellectual property, and the reduced value of the TIC's shares in PM, made in the Amended Petition in FSD 79 of 2022 (DDJ) and in the Amended Statement of Claim in FSD 162 of 2024 (DDJ).

The main characters and where relevant their shareholdings

73. It may be useful to refer to the main characters and where relevant their shareholdings.

The Petitioner

74. The members of the Petitioner and their percentage of membership interests held since 17 May 2019 are as follows:

(1) Ryan Stephens ("Mr Stephens") 20%
(2) Cody Mahaffey ("Mr Mahaffey") 20%
(3) Nicholas Jackson ("Mr Jackson") 20%
(4) Daniel Miller ("Mr D Miller") 20%
(5) Justin Lee ("Mr Lee") 20%

75. The Petitioner holds 49% of the issued shares of the Company.

The First Respondent

76. Genimous Investment (Hong Kong) Co., Ltd ("Genimous Investment" or the "First Respondent") is a limited company incorporated in Hong Kong on 12 June 2015. It holds 36% of the issued shares of the Company. It also holds 100% of the issued shares of Genimous Interactive Investments Co., Ltd ("Genimous Interactive") a company incorporated in Nevada USA which holds 100% of the issued shares of Spigot, Inc. (now Eightpoint Interactive Inc) ("Spigot") a company incorporated in Nevada USA in 2011. Spigot was founded by Rodrigo Sales (who sold

his 61% holding in Spigot to Genimous Interactive in August 2015) and Michael Levit (who sold his 30% shareholding in Spigot to Genimous Interactive in August 2015) and indirectly acquired by Genimous Technology Co., Ltd ("Genimous Tech") in August 2015 for approximately US$144 million. Genimous Tech is a limited company incorporated in the People's Republic of China ("PRC") and listed on the Shenzhen Stock Exchange with a market cap of approximately US$1.5 billion and over 500 employees worldwide across its various subsidiaries. Genimous Tech is the ultimate parent company of Genimous Investment.

77. The First Respondent also holds 100% of the issued shares of Eightpoint Technologies Ltd SEZC ("Eightpoint") an exempted special economic zone company incorporated in the Cayman Islands which in turn owns 100% of the issued shares of East End Technologies Ltd ("EET") a company incorporated in the Cayman Islands on 24 July 2019. The First Respondent also had 100% of the issued shares of Polarity Technologies Ltd, prior to its dissolution.

The Second Respondent

78. Genimous Holding (HK) Limited (the "Genimous Holding" or the "Second Respondent") is a limited company incorporated in Hong Kong on 29 November 2019 and holds 15% of the Company's shares.

The shareholdings held in the Company

79. It can be seen therefore that the Petitioner holds 49% of the issued shares of the Company and together the Respondents hold 51%.

The Company

80. The Company was incorporated as a Cayman Islands company on 7 August 2018 and commenced operations in around November 2019. Its present directors appear to be:

(1) Mr Chen (as defined below)
(2) Mr Lash
(3) Huang (Jackie) Ying
(4) Mr Stephens

(5) Mr Mahaffey

Mr Chen

81. Zhifeng (Tony) Chen ("Mr Chen") has been a director of the Company since 16 November 2021, a director of Spigot since 9 November 2021, Chairman of the Spigot Board since 15 April 2023, director of Eightpoint since 16 November 2021, director of Genimous Investment (the First Respondent) since 28 February 2022 and Vice Chairman of the Board of Directors and General Manager of Genimous Tech.

Mr Stephens

82. Mr Stephens was employed by Adknowledge Inc ("Adknowledge") from April 2010 to March 2015. Mr Mahaffey, Mr D Miller, Mr Jackson and Mr Lee were also employed by Adknowledge from around 2012-13 until late 2016. Mr Stephens joined Spigot on 9 March 2015 and sold his 4.7% shareholding in Spigot to Genimous Investment in August 2015. Mr Stephens has been a director of the Company since 8 August 2018. He was CEO of Spigot from 1 March 2019 to 15 July 2020. He has been the "Managing member" of the Petitioner since 17 May 2019.

Mr Mahaffey

83. Mr Mahaffey was employed by Spigot between September 2016 to August 2018, then by Eightpoint from September 2018 to September 2020 following his resignation in June 2020. He was a director of Eightpoint between 5 July 2018 and 28 August 2020 and President of Eightpoint from 5 July 2018 to 10 September 2020. He was a director of Genimous Investment between 6 June 2018 and 29 December 2020. He has been a director of the Company since 8 August 2018.

Mr Jackson

84. Mr Jackson was employed by Spigot from September 2016 to January 2022 and held the title of Chief Marketing Officer from June 2021 to January 2022.

Mr D Miller

85. Mr D Miller was employed by Spigot from September 2016 until January 2022, first as Manager of Engineering, then as Director/VP/General Manager of new product research and development and mobile, and ultimately as Chief Technology Officer.

Mr Lee

86. Mr Lee was employed by Spigot between September 2016 and June 2020.

Mr Cody Miller

87. Mr D Miller is not to be confused with Mr Cody Miller who was the Company Treasurer from 8 October 2021 to 3 June 2025, having been appointed by Board resolution dated 8 October 2021. Cody Miller joined Spigot in around May 2018 and subsequently joined Eightpoint as President from 10 September 2020. He is currently the Chief Financial Officer of Spigot. He has been a director of Eightpoint since 10 September 2020.

Mr Benjamin Newell

88. Benjamin Newell ("Mr Newell") is described in the agreed dramatis personae as "A US-licensed in-house lawyer employed by Spigot, who assisted with operational matters involving SPE and the Company." SPE appears to be the defined term for Spigot, Polarity and Eightpoint.

Mr Chase Peterson

89. Chase Peterson ("Mr Peterson") was employed by the Company with the title of President for a nine-month period between July 2020 and March 2021, appointed pursuant to a Board resolution dated 6 July 2020. He was Company Secretary from 16 July 2020 to 15 March 2021. Prior to joining the Company, Mr Peterson was employed by Eightpoint between September 2018 and July 2020, and prior to that he worked at Spigot as a Financial Analyst from September 2016.

Ms Karetha Strand

90. Karetha Strand ("Ms Strand") replaced Mr Stephens as President of Spigot following his resignation in around June 2020. Ms Strand left her employment with Spigot in around Q2 of 2021.

Mr Peter Wong

91. Peter Wong ("Mr Wong") was President and CEO of Spigot from 1 July 2021 to 15 April 2023 and Director of Spigot from 9 November 2021 to 15 November 2023. Mr Wong ceased his employment with Spigot in July 2023.

Mr Lu

92. Mr Lu has been the sole director of Genimous Holding (the Second Respondent) since 28 May 2024. He was a director of the Company from 30 October 2019 to 6 December 2019.

Mr Lash

93. Mr Lash has been a director and security director of the Company since 8 November 2021, appointed pursuant to a unanimous written resolution of the board dated 8 November 2021. Mr Lash has been a director and security director of Eightpoint since 8 November 2021.

Huang (Jackie) Ying

94. Huang (Jackie) Ying has been a director of the Company since 1 January 2023.

Mr Xingang (Scott) Yu

95. Xingang (Scott) Yu ("Mr Yu") was a director of Spigot from 23 May 2016 to 31 December 2022, CEO of Spigot from June 2020 to April 2021, director of Eightpoint from 16 August 2016 to 19 June 2018, director of the Company from 8 August 2018 to 16 November 2021, and director of Genimous Investment from 2016 to January 2023. Mr Yu ceased his employment with Spigot in April 2024.

The Issues

96. The parties filed competing lists of issues.

97. The Petitioners' list of issues for trial was as follows:

> "First Issue
>
> 1. Is it just and equitable for the Company to be wound up? Relevant to that are the following questions:
>
> Quasi-partnership and irretrievable breakdown
>
> (a) Is the Company a quasi-partnership?
>
> (b) If so, has there been an irretrievable breakdown in trust and confidence between members of the Company?
>
> Want of probity, etc
>
> (c) Irrespective of whether the Company is a quasi-partnership, has there been a lack of probity and/or impartiality leading to a justifiable loss of confidence in management or majority ownership?
>
> Oppressive conduct
>
> (d) Have the majority members and/or officers of the Company acted in a manner that is oppressive and/or unfairly prejudicial to the interests of the minority?

The need for an investigation

(e) Is there a need for an investigation into the Company's affairs by independent liquidators?

Alternative remedies

(f) Is there an adequate alternative remedy that the Petitioner has unreasonably failed to accept or pursue? Relevant to that are the following questions: (i) Are the Respondents' previous offers fair and, if so, has the Petitioner unreasonably refused to accept those offers such that a winding up order should be refused? (ii) Does the Petitioner's derivative claim provide for an adequate alternative remedy such that a winding up order should be refused?

Second Issue

2. If it is just and equitable for the Company to be wound up, should the Company be wound up or, alternatively, should the Respondents be required to purchase the Petitioner's shares in the Company?"

98. The Respondents' list of issues for trial was as follows:

"*This List of Issues is prepared for case management purposes and as a trial aid only and is not intended to alter or supersede the parties' pleaded cases which remain as set out in their respective pleadings.*

The Gateway Issue

1 Is it just and equitable, on the grounds as pleaded, for the Company to be wound up pursuant to section 92(e) of the Companies Act?

Quasi-partnership

2 Was the Company created as a quasi-partnership between the Respondents and the Petitioner and, if so, does it continue to operate as a quasi-partnership?

3 If so, is the Petitioner entitled to a winding up order based on its pleaded case that mutual trust and confidence between the shareholders has irretrievably broken down?

Justifiable loss of trust and confidence in the Company's management

4 Irrespective of whether the Company is a quasi-partnership, is the Petitioner entitled to a winding up order based on its pleaded case that it has justifiably lost all trust and confidence that the assets and affairs of the Company are being properly managed, stemming from a lack of probity on the part of the directors nominated to the Company's Board by the Respondents?

Need for an investigation

5 Irrespective of whether the Company is a quasi-partnership, is the Petitioner entitled to a winding up order based on its pleaded case that there is a need for court supervised liquidators to investigate the Company's affairs?

Oppression

6 Irrespective of whether the Company is a quasi-partnership, is the Petitioner entitled to a winding up order based on its pleaded case of shareholder oppression?

Alternative Remedies

7 In all the circumstances of this case, does the Petitioner have one or more adequate alternative remedies which it has unreasonably failed to pursue or accept?

Form of relief if the Gateway Issue is met

8 In the event that the Petitioner succeeds at trial on the Gateway Issue (because it has established a ground or grounds to make a winding up order and no adequate alternative remedy exists), should the Court make any other order, as an alternative to winding up, under s.95(3) of the Companies Act?"

The Law

Section 92 (e)

99. Under section 92 (e) of the Companies Act (2025 Revision) (the "Companies Act") a company may be wound up by the Court if "the Court is of opinion that it is just and equitable that the company should be wound up."

Section 95(3) alternative relief – buyout order

100. Section 95(3) of the Companies Act provides that 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 … (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 resolution of the company's capital accordingly."

101. Section 4(b) of the Interpretation Act (1995 Revision) provides unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided words in the singular include the plural and words in the plural include the singular.

102. Chadwick P in *Asia Pacific Limited v ARC Capital LLC* 2015 (1) CILR 299 ("*Asia Pacific*") at [39] stated:

"39 When making a buy-out order under s.95(3)(d) of the Companies Law, the court does not "dismiss" the winding-up petition for the obvious reason that, if it were to dismiss the petition, it would have no jurisdiction to make the buy-out order. The true analysis is that the court allows the petition, holding that the petitioner has established grounds upon

which it would be just and equitable to wind up the company, but it goes on to hold that, in the circumstances, it would be appropriate "as an alternative to a winding-up order" to make an order under s.95(3). It may be said that a failure to appreciate that there is no free-standing jurisdiction to make a buy-out order under the Companies Law infected the appellant's approach in the present case."

103. In *Tianrui (International) Holding Company Limited v China Shanshui Cement Group Limited* 2019 (1) CILR 481 ("*Tianrui*") Martin JA stated:

> "14 As this court has pointed out on a number of occasions, s.95(3) is not a direct equivalent of what is now s.994 of the UK Companies Act 2006 (formerly s.459 of the Companies Act 1985). The latter section gives a separate remedy by petition to a member of a company who complains of unfairly prejudicial conduct of the company's affairs. The petition is not a winding-up petition, and is not based on the contention that it would be just and equitable to wind up the company. In the Cayman Islands, however, the only mechanism for complaining of unfairly prejudicial conduct of a company's affairs is a winding-up petition presented on the just and equitable ground. Such a petition is the sole gateway to obtaining the alternative relief set out in s.95(3). The position was stated as follows by Chadwick, P. in (sic)):
>
> > "38 In my judgment in *Camulos Partners Offshore Ltd. v. Kathrein & Co* ... (with which the other members of the court agreed), I pointed out (2010 (1) CILR 303, at para. 36) that the provisions enacted by s.95(3) of the Companies Law had been introduced into the Law by the Companies (Amendment) Law 2007, following a report of the Law Reform Commission in 2006. I went on to say this (*ibid*., at paras. 37-38):
> >
> > > '37 A footnote to the provisions in the draft bill proposed by the Law Reform Commission suggests that –
> > >
> > > > "sub-sections (3) to (6) [of clause 95] are equivalent to sections 459-461 of the English Companies Act 1985. The overall effect of the amendment is to codify the decision in."

A note to s.95 in an introductory 'Memorandum of Objects and Reasons' to the bill itself is to the same effect: 'Subsections (3) to (6) are equivalent to sections 459 to 461 of the English Companies Act 1985.'

38 If that were the intention or expectation of the draftsman, it was not reflected in the legislation. There is nothing in the Companies Law which corresponds to s.459 of the UK Companies Act 1985. The section in the 1985 Act which corresponds to s.95(3) of the Companies Law (2009 Revision) is s.461(2). Section 459 of the 1985 Act enables a member of a company to petition for an order under Part XVII "on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of … some part of its members (including at least himself)." If is, of course, correct that, if that ground is made out, the orders which the court may make (under s.461(2) of the 1985 Act) are similar to the orders which can be made under s.95(3) of the revised Law. But the gateway to an order under s.95(3) of the Law is that the court is satisfied that (but for that order) it would be "just and equitable" to wind up the company. As Vos J.A. explained in this court in (sic)):

> "…[E]ven when the new s.95(3) … comes into force, it will allow a statutory remedy for minority shareholders by, for example, ordering the purchase of shares, but it will do so in the context of a contributories' 'just and equitable' petition; there will, even then, be no free-standing unfair prejudice petition in the Cayman Islands."'

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

> that, in the circumstances, it would be appropriate 'as an alternative to a winding-up order' to make an order under s.95(3).""

104. Martin JA in *Re Virginia Solution SPC Ltd; Augusta Healthcare Inc v Valley Health System* (CICA unreported judgment 28 July 2023) ("*Re Virginia Solution"*) dealt with the topic of "Alternative remedies" from [58] onwards. At [61] Martin JA stated: "… once the judge had determined in the present case that the petitioner had established a prima facie case for winding up, she should have gone on – either then or, as Augusta claims to have asked her to do, at a subsequent hearing – to consider whether any of the statutory remedies was a more appropriate method of dealing with the situation. One obvious possibility would have been an order under section 95(3)(b) "requiring the company … to do an act which the petitioner has complained it has omitted to do", namely an order requiring payment of the outstanding dividends in accordance with the Dividend Policy. She did not consider this or any other of the statutory remedies …".

105. In *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324 ("*Meyer*") Lord Denning at page 368 commented that a winding up order "would unfairly prejudice Dr Meyer and Mr Lucas because they would only recover the break-up value of their shares". Lord Denning considered that the appropriate remedy was a buyout order and at page 369 stated:

> "One of the most useful orders mentioned in the section [210 of the Companies Act, 1948] – which will enable the court to do justice to the injured shareholders – is to order the oppressor to buy their shares at a fair price: and a fair price would be, I think, the value which the shares would have had at the date of the petition, if there had been no oppression."

106. In *Financial Technology* the Jersey Royal Court at first instance made a buyout order. Crow JA in the Court of Appeal at [62] onwards referred to "The remedy" and buyout orders and the trial court conducting an evaluation rather than a valuation. At [169] Crow JA commented that "The court was certainly exercising a discretion in deciding whether to order a buy-out in the first place, and it was also exercising an evaluative judgment (which might conveniently be described as a 'discretion') when fixing the price at which any such buy-out should be effected". The Court of Appeal of Jersey did not set aside the buyout order.

107. In *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 ("*Westbourne Galleries*") Plowman J at first instance refused to order a purchase of the appellant's shares but made an order winding up the company (see page 363 of the report). The Court of Appeal allowed an appeal and the House of Lords allowed the subsequent appeal and restored the judgment of Plowman J.

108. In *Madera Technology Fund (CI), Ltd* (FSD unreported judgment dated 28 August 2023) ("*Madera*") Richards J, in the particular circumstances of that case, concluded at [260] "that the justice of this case can properly be met by the alternative remedy of the making of an order providing for the purchase of the Petitioner's shares" under section 95 (3) (d) of the Companies Act. At [259] Richards J noted that "the directors acted without probity".

109. In *Bird Precision Bellows Ltd* [1986] Ch 658 ("*Bird Precision Bellows*") (an appeal involving section 75 of the Companies Act 1980 – unfair prejudice) it was held by the Court of Appeal of England and Wales that the court had a very wide discretion to do what was fair and equitable in all the circumstances so as to put right the unfair prejudice to a petitioner and cure it for the future. The discretion extended to the terms of an order for the purchase of a petitioner's shares under section 75 (4) (d), so that the proper price for a petitioner's shareholding was the price which the court determined to be proper in all the circumstances of the case. *Meyer* and *Westbourne Galleries* were applied. Reference was made to the words of Lord Cross in *Westbourne Galleries* at 385:

> "What the minority shareholder in cases of this sort really wants is not to have the company wound up – which may prove an unsatisfactory remedy – but to be paid a proper price for his shareholding."

110. In *London School of Electronics* [1986] Ch 211 ("*London School of Electronics*") Nourse J dealt with another case arising under section 75 and, having been satisfied that the conduct complained of was unfair and prejudicial, held that the petitioner was entitled to an order requiring the respondent majority shareholder to purchase his shares. Nourse J at page 224 makes references to various authorities in respect of the date of the valuation.

111. *Grace v Biagioli* [2006] BCC 85 ("*Grace v Biagioli*") concerned unfairly prejudicial conduct and appropriate remedies. In that case a petitioner was criticised for seeking out alternative opportunities in an underhand and secretive manner and in a position of conflict. The negotiations never reached fruition but what justified his dismissal as a director was his willingness to embark

on such negotiations without any prior disclosure or discussion with his fellow directors and shareholders and his attempts to conceal the existence of the negotiations by making statements which were either untrue when made, or at the very least became untrue and remained uncorrected. The only issue before the Court of Appeal of England and Wales was whether the judge, having held that the failure to pay the 2002 dividend and distribution of profits between the respondents under the guise of management expenses did constitute unfair prejudice to the petitioner as a shareholder, was right to decline to order the respondents to purchase the petitioner's shares and instead to order payment by the company of a dividend which was due to him. The Court of Appeal held that having established unfairly prejudicial conduct, it was incumbent on the judge to consider the whole range of possible remedies and to choose the one which on his assessment of the existing relations between the parties was most likely to remedy the unfair prejudice already suffered and to deal fairly with the situation which had occurred. In most cases, the usual order to make would be the one requiring the respondents to buy out the petitioning shareholder at a price to be fixed by the court. This is normally the most appropriate order to deal with intra-company disputes involving small private companies. The Court of Appeal concluded that a share purchase order was the sure and fair way of dealing with the situation which had occurred in that case. Patten J gave the judgment of the court (alongside Mummery and Mance LJJ).

Just and equitable generally

112. Field JA in *Aquapoint LP v Fan* (CICA judgment delivered 4 October 2023) referred to Lord Wilberforce's oft-quoted judgment in *Westbourne Galleries* at 379-380 including the following extracts:

> "… a limited company is more than a mere legal entity, with a personality in law of its own … there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations *inter se* which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable consideration;

considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights or to exercise them in a particular way.

It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stage and go elsewhere.

It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to "quasi-partnerships" or "in substance partnerships" may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words "just and equitable" sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in."

Winding up in "quasi-partnership" cases on grounds of irretrievable breakdown in trust and confidence between members

113. In *Chu v Lau* [2020] UKPC 24; [2020] 1 WLR 4656 ("*Chu v Lau*") Lord Briggs at [15] stated:

> "… where the company is a corporate quasi-partnership, an irretrievable breakdown in trust and confidence between the participating members may justify a just and equitable winding up, essentially on the same grounds as would justify the dissolution of a true partnership."

114. At [17] Lord Briggs added that this "is the response of equity to a state of affairs between individuals who agreed to work together on the basis of mutual trust and confidence where that trust and confidence has completely gone …"

115. In *China CVS (Cayman Islands) and FamilyMart China Holdings Limited* 2020 (2) CILR 201 ("*FamilyMart*") Moses JA stated:

> "33 A just and equitable petition may be based on the irretrievable breakdown of a relationship of trust and confidence, in circumstances where equity recognizes that such a relationship is not encompassed in the company structure defined by the relevant Companies Act and by the articles of association. The *locus classicus* of equity's recognition that it may be necessary to look beyond the legal structure of a company is the speech of Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd.* (13), a case which included a petition that the company should be wound up on a just and equitable basis ([1973] A.C. at 379):
>
> > "The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."

34 In *CVC/Opportunity Equity Partners Ltd. v Demarco Almeida* (7), Lord Millett explained (2002 CILR 77, at para. 36):

> "36 Companies where the parties possess rights, expectations and obligations which are not submerged in the company structure are commonly described as 'quasi-partnership companies.' Their essential feature is that the legal, corporate and employment relationships do not tell the whole story, and that behind them there is a relationship of trust and confidence similar to that obtaining between partners, which makes it unjust or inequitable for the majority to insist on its strict legal rights."

35 To establish this basis for a just and equitable winding up, the petitioner has no need to rely upon a contract, it is sufficient to establish mutual understanding. In *In re Fildes Bros. Ltd* (14), a contributory sought to wind up his brother's retail company, on just and equitable grounds on the basis that he had been unfairly shut out of that business. He failed, but Megarry, J. said ([1970] 1 W.L.R. at 596):

> "It cannot be just and equitable to allow one party to come to the court and require the court to make an order which disregards his contractual obligations. The same, I think, must apply to a settled and accepted course of conduct, between the parties, whether or not cast into the mould of contract."

36 In *Re Estate of Kam Kwan Sing* (20), Lord Millett added ([2015] HKEC 2370, at para 46):

> "In terms of what may constitute considerations of a personal character involving mutual confidence, this may come in the form of mutual understandings between members of a company or what may have been 'an accepted course of conduct between the parties 'whether or not cast into the mould of a contract.' Much of course depends on the facts and background of each case …"

37 Even where parties to a commercial joint venture agreement include an entire agreement clause, as in the instant case, an obligation to act in good faith may be imposed (see *Ross River Ltd. v. Waveley Comm. Ltd.* (30) and *Al Nehayan v. Kent* (5))."

116. The point made by Moses JA at [37] is consistent with the point made by Lord Richards at [75] of *Aquapoint v Fan* [2025] UKPC 56.

117. In *Re Virginia Solution* Martin J.A. at [42] stated:

> "… quasi-partnership is no more than a shorthand name for circumstances in the formation or operation of a company which indicate the existence of an understanding between the parties that the company would operate on a particular basis even if, as a matter of strict contract, that basis could be frustrated by one party or another."

118. *Re Virginia Solution* concerned an appeal against a winding up order made by Ramsay-Hale J (as she then was) and it was held by the Court of Appeal of the Cayman Islands that a company may not start out as a quasi-partnership but may become one and the converse is also true: a company may start out as a quasi-partnership but cease to be one. The relevant time in either case is when the acts complained of occurred ([43]). Martin JA at [13] referred to a 26 page Participation Agreement as "an important document" adding "Overall, it represents an attempt to provide a comprehensive consensual regime for participation by the members in the Company's affairs". Augusta relied on six grounds of appeal:

(1) the judge's delay in giving judgment, her failure to give Augusta an opportunity to make additional submissions (particularly in relation to alternative remedies), her failure to confine Valley to its pleaded case and to admissible evidence and her failure to give adequate reasons;

(2) the judge was wrong to hold that the Company was a quasi-partnership;

(3) the judge was wrong to hold that there had been an irretrievable breakdown of mutual trust and confidence;

(4) the judge was wrong to hold that Augusta had acted in a way contrary to Valley's legitimate expectations;

(5) the judge failed to consider or grant alternative remedies under section 95(3) of the Companies Act; and

(6) the judge was wrong to hold that there was no public interest or public policy considerations relevant to the exercise of her decision.

119. In respect of the just and equitable ground Martin JA quoted from Lord Wilberforce in *Westbourne Galleries*. Martin JA referred to Lord Wilberforce quoting from Smith J in the Australian case *In re Wondoflex Textiles Pty Ltd* [1951] VLR 458 ("*Wondoflex*"). Martin JA also quoted from various paragraphs of the judgment of the Privy Council in *Chu v Lau* namely [14], [15], [17] and [92].

120. At [40] Martin JA referred to *Loch v John Blackwood Limited* [1924] AC 738 ("*Loch v Blackwood*") and stated:

> "Absent a quasi-partnership, a breakdown of trust and confidence is not in itself enough to justify winding up on the just and equitable ground – although if the breakdown is the consequence of a lack of probity by a shareholder it may on its own suffice for a winding up order whether or not the company is a quasi-partnership or is suffering from functional deadlock …".

121. At [41] Martin JA referred to the English first instance judgment of David Richards J (as he then was) in *Re Coroin* [2012] EWHC 2343 (Ch) which was primarily concerned with a petition brought under section 994 of the Companies Act 2006 (of the UK Parliament) alleging unfairly prejudicial conduct. Martin JA added "that section is not directly concerned with the just and equitable ground for winding up, and has no direct parallel in the Cayman Islands legislation." Martin JA however referred to the judgment of David Richards J and that judge's reference to Lord Hoffmann's judgment in *O'Neill v Phillips* [1999] B.C.C 600 ("*O'Neill v Phillips*") and "legitimate expectations". David Richards J at [635] stated:

> "Equitable considerations, affecting the manner in which legal rights can be exercised, will arise only in those cases where there exist considerations of a personal character between the shareholders which makes it unjust or inequitable to insist on legal rights or to exercise them in [a] particular way. Typically that will be in the case of a company formed by a

> small number of individuals on the basis of participation by all or some of them in the management of the company."

122. At [636] David Richards J felt that there was no room for such equitable considerations in the case before him. He noted in particular that the company was formed by a group of highly sophisticated and experienced business people and investors with a view to purchasing a group of hotels and retaining and managing some of them. He noted that there was little prior relationship between many of the investors. He noted more importantly that articles of association and a shareholders agreement were negotiated and drafted, containing lengthy and complex provisions governing their relations with each other and with the company. David Richards J stated:

> "I find it hard to imagine a case where it would be more inappropriate to overlay on those arrangements equitable considerations of the sort discussed by Lord Wilberforce and Lord Hoffmann."

123. At [44] Martin JA felt that the judge's framing of the issue for her to decide was "perfectly proper" but it failed to recognise expressly that the dichotomy identified may change over time. The judge had framed the issue as follows:

> "The question for the court is whether the Company was established or its business conducted on the basis of mutual trust and confidence between founding members or whether the relationship between the members is a purely commercial one in which the parties' contractual arrangements set out and define the scope of the parties' rights and obligations within the company …".

124. Martin JA at [45] held that the judge had been entitled to find the existence of a quasi-partnership in the early years of the company's life. There was reference to the company until 2008/9 being operated on a combination of basic constitutional documents and certain "understandings". The judge relied on "the fact that the principals were known to each other, that the founding members would have an equal voice in the management of the concern regardless of other capital contributions, the fact that they regarded each other as "partners" indicated a substantial element of trust and confidence that an essentially informal arrangement could be made to work."

125. Martin JA at [46] referred to the founding members after "2008/9" deciding to record the basis of their participation in a number of documents. At [47] Martin JA stressed "The key document in the Participation Agreement" holding that it was "a powerful indication that the members thought and intended that the rules governing the relationship between themselves, and between them and the Company, were exclusively contained in the Participation Agreement and related documents."

126. At [48] Martin JA noted that from this point on "the members were engaging in a high degree of corporate formality. Thereafter, it seems to me that there was no scope for the superimposition of equitable considerations. No doubt the remaining members, including by the end only Augusta and Valley, regarded themselves informally as "partners", and no doubt also they expected their relations to operate on the basis of trust and confidence. But many parties to contracts enter into them on the basis that they trust the counterparty and have confidence in that counterparty's ability and willingness to perform its contractual obligations; and if they do not, the remedy lies in contract, not in equity … Once the Participation Agreement was in place, it was that document (together with the other constitutional documents) which defined the parties' relationship. It left no room for any super-added obligation …".

127. At [49] Martin JA stated "In this case, the members set about putting in place a sophisticated contractual regime with contractual projections … Any remedies lie in contract: there is no scope for equitable intervention."

128. At [63] Martin JA allowed the appeal and discharged the joint official liquidators and dismissed the winding up petition.

129. Mr Wingrave relied on *Strahan v Wilcock* [2006] EWCA Civ 13 (an authority added late to the authorities bundle and which appears at tab 88 of 91 tabs) I think principally for the proposition that there can be quasi-partnerships in an employment context. This was a case under section 461 of the Companies Act 1985 (an Act of the UK Parliament) for an order that a majority shareholder buy out the minority shareholding following an unfair prejudice petition under section 459. In respect of the valuation basis it was thought relevant to consider whether there was a "quasi-partnership" relationship. Arden LJ (as she then was) at [18] referred to Lord Wilberforce's speech in *Westbourne Galleries* and stated:

> "In general, the relationship between shareholders is governed exclusively by the terms of the memorandum and articles of association of the company of which they are shareholders. Their rights and obligations are derived from those documents and those alone. In some circumstances, however, equitable obligations, will arise between shareholders. The relationship where such equitable obligations exist is often labelled, not always helpfully, as a "quasi-partnership"."

130. At [19] Arden LJ felt that it was "relatively easy to establish whether a relationship between shareholders constitutes a "quasi-partnership" when a company was formed by a group of persons who are well known to each other and the incorporation of the company was with a view to them all working together in the company to exploit some business concept which they have". She felt it was "much less easy to determine" when the parties did not know each other when the company was formed and one joined as an employee and subsequently acquired some shares and became a director.

131. At [19] and [21] Arden LJ made a reference to a "personal relationship" being an ingredient of a "quasi-partnership". At [21] Arden LJ stated that:

> "… it is important to ask whether at that point in time [when Mr Strahan acquired his shares] the company would have been formed on the basis of a personal relationship involving mutual confidence. It would also be appropriate to ask whether, under the arrangements agreed between the parties, all the parties, other than those who were to be "sleeping" members, would be entitled to participate in the conduct of the business. Likewise it would be appropriate to ask whether there was a restriction on the transfer of the members' interests in the company …".

132. In the case before Arden LJ, Mr Strahan was given options exercisable within a five-year period to acquire shares. It was not committed into writing. It was a reward for Mr Strahan's efforts in the company and as an incentive to him. Mr Strahan was participating in management decisions of the company. Arden LJ at [23] felt that the fact that the terms of the options were never committed to writing reinforced the conclusion that "there was a personal relationship involving mutual trust and confidence between the parties". The judge felt that the relationship was more a "quasi-partnership" relationship than a relationship between a majority shareholder and company

executive. The other side argued that the relationship was just a "commercial one" with the first option being "a purely commercial arrangement between parties dealing at arm's length" ([243]).

133. At [27] Arden LJ referred to Lord Hoffmann's judgment in *O'Neill v Phillips* at 607-608 and stated:

> "In determining what equitable obligations arise between the parties, the court must look at all the circumstances, including the company's constitution, any written agreement between the shareholders, and the conduct of the parties."

134. At [28] Arden LJ said that "the crucial question is whether … equitable principles arose which made it unfair for a party to exercise rights conferred by the articles".

135. At [30] Arden LJ commented that Mr Strahan's departure from the management of the company was involuntary. Once he left he was no longer able to do that which the parties anticipated that he should have the opportunity to do, namely to purchase the shares pursuant to the first option. He retained his existing shares. His shares should be bought, but not on a discounted basis.

136. In *Seahawk China Dynamic Fund* (FSD unreported judgment delivered 9 August 2022) ("*Seahawk*") at [1] I stated that it was "a very serious step to make an order winding up a solvent company." In *Seahawk* there were allegations of loss of confidence on the basis of lack of probity. I was not satisfied that it was a quasi-partnership type of case and I was not persuaded that there should be any superimposition of equitable considerations in *Westbourne Galleries* terms. There was "nothing more" in *Westbourne Galleries* terms ([105]). At [106] I commented that "Despite casual phrases in the messages between Mr Lau and Mr Liang and wedding ceremony invites and attendance at dinner it was plain that the foundation and core of their relationship was strictly business … I agree with Mr Smith when he says that mutual benefit, trust and polite communications are basic aspects of modern business relationships."

137. In *Fan v Aquapoint LP* (FSD unreported judgment delivered 10 June 2022) I found that there was plenty "more" in *Westbourne Galleries* terms ([165]). I found that it was just and equitable that the company be wound up. The Court of Appeal in a judgment delivered on 4 October 2023 agreed.

138. All these authorities must now be read in light of the illuminating judgment of Lord Richards in *Aquapoint LP (in official liquidation) v Fan* [2025] UKPC 56 ("*Aquapoint*"). In that case the Board

advised His Majesty that the appeal should be dismissed. The Board had some important things to write in respect of winding up petitions based on the just and equitable ground.

139. Lord Richards referred to Lord Wilberforce's speech in *Westbourne Galleries*, Lord Hoffmann's speech in *O'Neill v Phillips*, Lord Briggs' judgment in *Chu v Lau* and Martin JA's judgment in *Re Virginia Solution*.

140. Lord Richards at [57] felt that there were a number of important points which emerged from the speeches of Lord Wilberforce and Lord Hoffmann including the following:

(1) The choice of "just and equitable" as a ground for a winding up order is a deliberate choice to introduce equitable principles into what is an essentially statutory scheme.

(2) The application of equitable principles is not subject to a scheme of categories into which a particular case must fall. The width and flexibility of equity are not to be undermined by categorisation.

(3) In particular, the relevant circumstances are not restricted to cases where the parties have previously been in partnership or where the arrangement between the parties is in effect a partnership in corporate form (a so-called "quasi-partnership"). Lord Wilberforce's three particular characteristics (at page 379) which might bring equitable considerations into play were "typical" not "exclusive".

(4) The role of equity is more general. It is, as it always is, to enable the court "to subject the exercise of legal rights to equitable considerations; considerations that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way".

(5) At the same time, the commercial context and the fact that the parties have become shareholders in a company, governed by the companies legislation and by the articles of association by which they agree to be bound, means that in the great majority of cases the legislation, articles and any other agreements binding the shareholders will be a sufficient and exhaustive statement of their rights and expectations. As Lord Hoffmann said in *O'Neill v Phillips* at pages 1098-1099: "a member of a company will not ordinarily be

entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted."

141. Lord Richards at [52] referred to Lord Wilberforce's quote from Smith J in the Australian case of *Wondoflex* as follows:

> "It is also true, I think, that, generally speaking, a petition for winding up, based upon the partnership analogy, cannot succeed if what is complained of is merely a valid exercise of powers conferred in terms by the articles:... To hold otherwise would enable a member to be relieved from the consequences of a bargain knowingly entered into by him:... But this, I think, is subject to an important qualification. Acts which, in law, are a valid exercise of powers conferred by the articles, may nevertheless be entirely outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company; and in such cases the fact that what has been done is not in excess of power will not necessarily be an answer to a claim for winding up. Indeed, it may be said that one purpose of [the just and equitable provision] is to enable the court to relieve a party from his bargain in such cases."

142. Lord Richards at [58] stated that in *Aquapoint* the grounds for the just and equitable winding up order boiled down in truth to just one ground: in the light of the assurances given to Dr Fan to induce him to give up his rights as regards shares in Legend Nanjing and to become a limited partner in Aquapoint, Genscript was not entitled to exercise the power under the LPA to refuse consent to Dr Fan's request for the shares in Legend Cayman attributable to his interest in Aquapoint. Lord Richards at [59] added:

> "The attempt to separate the single ground into four separate grounds reflects the tendency of practitioners and courts to try to slot cases into categories, despite Lord Wilberforce's warning not to do so. Different catchphrases are used for this purpose – "quasi-partnership", "legitimate expectations", "a loss of mutual trust and confidence". Correctly understood and applied, these phrases may have some value but they must not disguise that, in cases like the present, the court's task is to conclude whether, on the facts and circumstances of the particular case (which do not involve breaches of the law or the articles of association or other contracts, where different considerations apply), there exist "considerations … of a personal character arising between one individual and another,

which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way." (*Westbourne Galleries* at p379 per Lord Wilberforce)."

143. Lord Richards at [61] accepted as "correct in the great majority of cases" where parties have expressly regulated their relationships in relation to the matter about which complaint is made, it is the contract which governs the relationship and any complaint must be adjudicated in accordance with the law of contract.

144. Lord Richards at [65] added "… the terms of the contractual provisions will be a highly relevant factor, but they cannot alone demonstrate that there is no room for equitable considerations, as *Westbourne Galleries* shows."

145. Lord Richards at [74] stated:

> "The Board regards it as important to acknowledge and repeat that, in a corporate context, equitable considerations as regards the exercise of legal rights will not generally apply, but nonetheless whether they do apply and the relevance of contractual arrangements between the parties are to be decided on the facts and circumstances of the case."

146. Lord Richards stressed:

> "80. It is in the Board's view a misreading of Lord Wilberforce's speech to treat the existence of a "quasi-partnership" as essential to the application of equitable considerations to the exercise of legal rights. On the contrary, it is clear from his speech that he gave the indicia of a quasi-partnership as examples, albeit common ones, of the circumstances in which equitable considerations will be applied.
>
> 81. The fundamental principle that Lord Wilberforce was applying was that the just and equitable provision enables the court "as equity always does" to subject the exercise of legal rights to considerations "of a personal character arising between one individual and another". This requires a close examination of the relationship between the individuals which led to or provides the context for their association as shareholders (or as partners in an ELP)."

147. Lord Richards at [83] added:

> "It is understandable that parties, in formulating their cases in petitions for a winding up order on the just and equitable grounds, have tended to focus their attention on the features which may go to make a "quasi-partnership". It is in such cases that the application of equitable considerations will most commonly arise. But "quasi-partnership" is itself a term of somewhat uncertain scope, and it is certainly not a term of art. In particular, the vice in focusing solely on "quasi-partnerships" is that it leads wrongly to the view that equitable considerations can only apply in those cases where it was agreed or understood that the petitioner would participate in the conduct of the business and that a winding up order is appropriate only where the petitioner has been excluded from participation in the business. Courts have made it clear over the years since *Westbourne Galleries* (see, for example, *Fisher v Cadman* [2005] EWHC 377 (Ch) at para 84) that this view is erroneous but the point has not always been heeded."

148. Each case depends on its own facts and circumstances.

149. Lord Richards was not dealing with the lack of probity ground in *Aquapoint* and I now turn to that ground in this case.

Lack of probity ground

150. Lack of probity in the conduct of a company's affairs can also be a basis for a winding up order on the just and equitable ground. There is ample authority to justify such statement.

151. Richards J in *Madera* at [48] referred to *Tianrui* and the Court of Appeal's position that "it is well settled that a company may be wound up on the just and equitable ground if it is established that there has been a justifiable loss of confidence in management. Examples of this include where there is established to be serious misconduct or serious mismanagement of the company's affairs by the directing or majority shareholders" ([23] of *Tianrui*). At [49] of *Madera* Richards J referred to the conclusion of the Court of Appeal that Tianrui had a statutory right to petition on the just and equitable ground "if the actions of the company, prompted by directors appointed at the instance of

a majority of its shareholders, have resulted in a justifiable loss of confidence in the management of the company."

152. Richards J in *Madera* having comprehensively reviewed the complaints, the evidence and the competing arguments, in a relatively short section entitled "Discussion" dealt with the specific questions arising from [228] to [261]. At [232] Richards J stated:

> "In considering the overall case I am mindful of the high threshold of seriousness which the Petitioner has to satisfy, if there is to be a finding that it is just and equitable that this successful and profitable company is to be wound up. The Petitioner's case is put on the basis of lack of probity in its wider sense. It is that management has acted improperly and in bad faith …".

153. At [234] Richards J commented "I think the focus has to be on the actions of the directors and the motives behind their actions. It is the director who is the fiduciary not the shareholder …".

154. At [246] Richards J says "I have found the conduct of the directors to be primarily for improper purposes and thus in breach of the proper purpose rule …".

155. At [247] Richards J says "The next question I ask myself is whether the conduct underpinned by the ulterior motives which I have concluded were in fact present, gives rise to a *justifiable* lack of confidence …".

156. At [252] Richards J stated: "The conduct in my view does amount to a visible departure from the standards of fair dealing."

157. At [253] Richards J concludes that "The directors acted for an improper bad faith purpose, that collectively the matters identified above evidence a lack of probity in the conduct of the affairs of the Company and that there is a justifiable lack of confidence in the conduct and management of the Company's affairs …".

158. At [254] Richards J adds "The next question I ask myself is whether this rises to a level of seriousness such that the Company should be wound up. I consider the entirety of the circumstances. Counsel for the Company submitted that possibly Mr Drankiewicz may have made

a wrong call in law but that there has never been any serious misconduct or mismanagement such as would justify the end of a successful and solvent company."

159. At [256] after balancing various factors Richards J concluded that "the balance is in favour of the making of a winding up order".

160. Richards J then considered alternative remedies and at [259] stated "Nothing has been identified which requires a wide-ranging and deeply probing financial investigation."

161. At [260] Richards J concluded that "the justice of this case can properly be met by the alternative remedy of the making of an order providing for the purchase of the Petitioner's shares."

162. In *FamilyMart* the lack of probity complaints were based on the allegations of breach of fiduciary duties by the majority directors ([31]). At [20] Moses JA stated that the petition identified the duties the directors owed the company as:

(1) a duty not to put themselves in a position where their interests were in potential conflict with the interests of the company;
(2) a duty not directly or indirectly to seek to make a profit out of their position or enable persons or companies related to them to do so without making full and frank disclosure thereof to the company;
(3) a duty not to deal with the company themselves directly or to do so with the companies or other entities with whom they were closely associated; and
(4) a duty to act *bona fide* in the best interests of the company.

163. Moses LJ at [25] referred to the fact that the petitioner relied on the majority directors' breaches of their strict obligations in respect of the "undisclosed related parties".

164. At [29] Moses JA stated that the basis on which the just and equitable winding up was sought in that case was two-fold: "first that the petitioner had a justifiable lack of confidence arising from the lack of probity in the conduct of the company's affairs and second, on the grounds of a breakdown in the fundamental relationship between the shareholders and the breach of the underlying understanding which had governed that relationship."

165. At [30] Moses JA added:

> "Lack of probity is well established as a basis for a just and equitable winding up (*Loch v John Blackwood* (22) ([1924] A.C. at 788) …"

166. Martin JA in *Tianrui* at [22] also referred to *Loch v Blackwood*:

> "It is well established that a company may be wound up on the just and equitable basis if it is established that there has been a justifiable loss of confidence in management, for example on account of serious misconduct or serious mismanagement of the affairs of the company by the directors or the majority shareholders: see *Loch v John Blackwood Ltd* (14) ([1924] A.C. at 788) ...".

167. In *Loch v Blackwood* the Privy Council dealt with an appeal from the West Indian Court of Appeal and Lord Shaw at 788 in an oft-cited passage stated:

> "It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up."

168. At 794 Lord Shaw stated that Mr McLaren (a director) "for reasons not unnatural, had come to be of the opinion that the business owed much of its value and prosperity to himself. But he appears to have proceeded to the further stage of feeling that in these circumstances he could manage the business as if it were his own." For reasons which I shall come to the Respondents appear to have been under a similar misapprehension as that suffered by Mr McLaren in *Loch v Blackwood*.

169. Lord Briggs (with whom Lord Hodge, Lord Leggatt and Lord Burrows agreed) in *Chu v Lau* referred to *Loch v Blackwood* and at [24] and [90] accepted that a minority shareholder could present a just and equitable winding up petition on the basis it had lost confidence in the probity of

the directors. Winding up orders may be made on the just and equitable ground on the basis that there was a lack of probity and a justifiable lack of confidence.

170. This lack of probity basis is available irrespective of whether there is a "quasi-partnership" type of relationship. In *Aquapoint LP v Fan* (CICA unreported judgment delivered 4 October 2023) the third ground for the winding up order was a loss of trust and confidence in the management of the partnership and *Tianrui* and *Lock v Blackwood* and lack of probity were referred to. When dealing with this lack of probity basis for a winding up order Field JA at [72] stated:

> "It is important to appreciate that the establishment of this just and equitable ground is not dependent on there being a relationship akin to partnerships in accordance with Lord Wilberforce's judgment in *Ebrahimi*."

171. Mr Wingrave placed some reliance on *Financial Technology* a 98-page judgment of the Court of Appeal of Jersey delivered by Jonathan Crow JA. Mr Wingrave did not take me to [303] where the court observed that "the task of the court below would have been considerably easier if the parties had taken a more streamlined approach, particularly in their pleadings". Instead, he relied on [272 b.] I set out the following extract of the judgment which appears under the heading "Justifiable loss of confidence & partiality":

> "271. For example:
>
> a. It has been found that such an order can be made where there has been a justifiable loss of confidence in the probity of the management of a company, particularly where the controlling director treats the business as his own: see for example *Loch v Blackwood Ltd* [1924] AC 783, at 788, cited with approval in *Westbourne Galleries*, at 367F – G and again more recently in *Chu v Lau* [2020] UKPC 24, at §24 and §90.
>
> b. It has also been held that a winding-up order can be made where a minority shareholder has justifiably lost confidence in the <u>impartiality or</u> probity of the company's management: see *Thomson v Drysdale* [1925] SC 311, at 315.

c. It has also been said that the conduct deliberately calculated to 'freeze out' a minority shareholder, driving him to sell his shares at an undervalue, is capable of justifying a winding-up order: see *Re Wondoflex Textiles Pty Ltd* [1951] VLR 458, at 468, citing *Re James Lumbers Co Ltd* [1926] 1 DLR 173, at 188.

272. We would add three observations on this line of authority which are relevant to the present appeal:

a. First, it is important to recognise that *Loch v John Blackwood* was not a quasi-partnership case, nor was it one in which there was any deadlock in management. Furthermore, although the facts of *Thomson v Drysdale* and of *Wondoflex Textiles* might have justified a finding that they involved quasi-partnership companies, that was not the basis on which they were decided. All of these decisions were based on entirely general statements of principle that any shareholder in any company is entitled to expect its affairs to be managed with probity and in accordance with basic principles of fair dealing: see also *Baird v Lees* (1924) SC 83, at 92, and *Re Sunrise Radio*, at §4.

b. Second, the use of the word 'probity' in *Loch v John Blackwood*, and its conjunction with the word 'impartiality' in *Thomson v Drysdale*, were both deliberate and significant. The courts did not confine their observations to cases involving actionable breaches of a director's duty, or of actual dishonesty: see also *Westbourne Galleries*, at 379C – E and 381H. A want of probity and a lack of impartiality are broader concepts than either breach of fiduciary duty or dishonesty, although they may well include both. In particular, the word 'probity' embraces concepts both of honesty and decency.

c. Third, the question whether any particular conduct constitutes a sufficient want of probity or lack of impartiality such as to justify a winding-up order on the just and equitable ground will always be context-specific: *Re San Imperial Corp Ltd (No 2)* (1980) HKC 463, at 467G – 468H. In other

> words, a plaintiff has no enforceable legal right to demand a winding-up order in circumstances where he has justifiably lost confidence in the probity or impartiality of management: but the court is entitled to take into account any such loss of confidence when exercising its judgment whether it is just and equitable to wind up the company." (internal underlinings)

172. It is clear from [23] that in *Financial Technology* the allegation was that a director (Mr Tuckwell) had "pursued a scheme designed to drive the Plaintiffs out of the Company at the lowest possible price" and attempts were made to achieve this by (i) leading the Plaintiff to believe that there would be a *pro rata* distribution of certain proceeds of sale; (ii) repeatedly postponing discussion of the issue of distribution of the proceeds of sale; (iii) securing the removal of independent directors who made it clear they wanted to ensure that all shareholders were treated fairly; (iv) unilaterally changing the business of the company after the sales were completed, leaving the plaintiffs locked in with little ability to deal with their shares and (v) making an offer to buy the Plaintiffs' shares at a discount. In this context Crow JA at [80] stated:

> "… we consider that there was ample justification for the Royal Court to reach the conclusion that, in pursuing the scheme as he did, Mr Tuckwell was acting in breach of his duty to act for proper purpose. If a director exercises his powers as such deliberately for the purpose of preferring the interests of one section of shareholders against the interests of another section of shareholders, a trial court is entitled to reach the conclusion that he has acted for improper purposes …".

173. Crow JA in providing the ruling of the Court of Appeal of Jersey under the heading "Loss of confidence in management" at [283] stated:

> "In our judgment, the Plaintiffs' arguments on loss of confidence are to be preferred. There was no dispute about the fact that they had in fact lost confidence in the probity and impartiality of Mr Tuckwell's management of the Company. Accordingly, the only question under that heading is whether their loss of confidence was (i) justifiable and (ii) sufficient to prompt a just and equitable winding-up order."

174. At [284] the conclusion was that it was for two main reasons (i) although not a precondition to the making of an order under Article 155 it was clear that Mr Tuckwell had acted in breach of his

fiduciary duties as a director of the company and (ii) even without those breaches of duty, "Mr Tuckwell's conduct in managing the business of the company as he has, with a view to forcing the Plaintiffs to sell their shares at a significant discount, is sufficient to justify the Plaintiffs' loss of confidence."

175. It is plain from [285] that the court took into account Mr Tuckwell's "conduct overall" and at [286] "the whole history of the parties' business relations."

176. Crow JA finished the judgment in *Financial Technology* at [305] with the following words, which I would commend to all attorneys:

> "Finally, we would observe that the convention of respecting professional courtesies has developed for good reasons. One of the many values in having legal professionals to conduct litigation is to ensure that disputes which might otherwise descend into unseemly rancour are conducted dispassionately and in a civilised tone. Irrespective of how strongly a lay client may disagree with the findings of a trial court, it is one of his lawyer's functions to ensure that his case is presented with professional respect. There is a distinction, which should always be observed, between (on the one hand) presenting an argument forcefully and (on the other) expressing an argument in language which is, frankly, offensive. We regret to say that the arguments presented on behalf of Mr Tuckwell failed to observe that distinction. This court is not assisted by being told that any findings of the court below are "*nonsense*", "*pure invention*", "*bizarre*" or "*extraordinarily petty*," nor does it advance a litigant's case for his legal representatives to suggest that the court below "*did a sloppy job*" or that it "*went off on a frolic of its own*" and was "*making it up as it went along*" and that it "*plucked its own figure from the air*". We do not expect to see that kind of language used again."

177. In *BAF Latam Credit Fund* (FSD unreported judgment 10 December 2021) ("*BAF Latam*") Parker J at [124] stated: "A "lack of probity" does not require dishonesty and may arise where there has been very serious mismanagement" and at [136] added: "A lack of probity in the conduct of the company's affairs may be shown by a persistent disregard of an obligation to act in the interests of the company."

178. Mr Wingrave stressed that the word "probity" embraced the concepts of honesty and decency and also serious misconduct or serious mismanagement and prayed in aid *Tianrui* at [22] and also *BAF Latam* at [124].

179. One of the earlier cases on oppression and lack of probity is *Elder v Elder Watson Limited* 1952 SC 49 in the Court of Session in Scotland. Lord President (Cooper) at 55 stated:

> "Where the "just and equitable" jurisdiction has been applied in cases of this type, the circumstances have always, I think, been such as to warrant the inference that there has been, at least, an unfair abuse of powers and an impairment of confidence in the probity with which the company's affairs are being conducted, as distinguished from mere resentment on the part of a minority at being outvoted on some issue of domestic policy … and the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely …"

180. Lord Keith at pages 58-60 referred to *Yenidje Tobacco Co* [1916] 2 Ch 426 and *Loch v Blackwood* emphasising Lord President Clyde's point that it was in that case "impossible that the minority should retain any confidence in the impartiality or probity of the company's administration." Lord Keith at page 66 added "… oppression involves, I think, at least an element of lack of probity or fair dealing to a member in the matter of his proprietary rights as a shareholder …". Lord Keith at pages 60 to 61 briefly dealt with oppression. He referred to the petition disclosing differences of opinion and some violence, but "no suggestion that anything that was done was designed to injure the petitioners in their rights as shareholders or did in fact do... there might well be circumstances which would justify a winding up as being just and equitable, which would not justify an application on the ground of oppression under section 210."

181. About 20 years later, Buckley LJ in *Re Jermyn Street Turkish Baths Limited* [1971] 1 WLR 1042 at 1059-1060 stated, in the context of section 210 of the Companies Act 1948 of the UK Parliament:

> "In our judgment, oppression occurs when shareholders having a dominant power in a company, either (1) exercise that power to procure that something is done or is not done in the conduct of the company's affairs or (2) procure by an express or implicit threat of an

> exercise of that power that something is not done in the conduct of the company's affairs, and when such conduct is unfair or … "burdensome, harsh and wrongful" to the other members of the company or some of them, and lacks that degree of probity which they are entitled to expect in the conduct of the Company's affairs … We do not say that this is necessarily a comprehensive definition of the meaning of the word "oppressive" in section 210, for the affairs of life are so diverse that it is dangerous to attempt a universal definition …"

182. I accept that the situations in which the just and equitable jurisdiction can be invoked on the basis of lack of probity are innumerable and each case must necessarily turn on its own facts and circumstances.

183. Mr Wingrave placed great reliance on *Meyer* a decision of the House of Lords and Mr Valentin sought to distinguish it. *Meyer* was another section 210 case. In 1946, just after the end of the Second World War, a co-operative wholesale society formed a subsidiary company to enable it to participate in the manufacture and sale of rayon materials and get licences to manufacture rayon cloth, the production of which was then controlled and remained controlled until 1952. The two respondents, who were unwilling to act merely as employees of the society (see page 337 of the judgment) were appointed joint managing directors of the company and so long as cotton control lasted their presence was necessary. The respondents together acquired 3,900 shares and the society 4000 appointing as directors three nominees who were also members of its own board. The company traded successfully for several years and earned substantial profits. In 1951 the society sought to purchase from the respondents their shares at less than their true value, but the suggestion was rejected. The society made some threats and although it dropped the attempt it then adopted a policy of transferring the company's business to a new department within its own organisation, thereby forcing down the value of the company's shares. The nominee directors, though aware of this policy, did not inform the respondents but promoted the society's plans. In 1953 the respondents presented a petition for a buyout order. It was common ground that at the date of the petition it was just and equitable that the company should be wound up. It was held that the society had acted towards the minority shareholders of the company in an oppressive manner, and that this conduct through the nominee directors of the company, who were also directors of the society, amounted to conduct of the affairs of the company, since the transactions of the two could not be separated. The inaction of the nominee directors amounted to a breach of their duties.

184. Viscount Simonds at page 338 noted that the plan for the company "demanded the utmost good faith on both sides". Viscount Simonds referred to the attempts by the society to acquire the respondent's share at in effect an undervalue and added:

> "It is impossible after reading the voluminous evidence in this case not to see that the society, thus foiled in their attempt to obtain a grossly unfair advantage of the respondents, determined to seize any opportunity of procuring for themselves the benefit of the trade which had been largely built up by their efforts."

185. Viscount Simonds at 339 stated "it could hardly be denied that to wind up the company would unfairly prejudice the respondents". It was held that the respondents were entitled to a buy out order since the purchase of the shares by the society would bring an end to the matters complained of, namely the oppression.

186. At page 340 Viscount Simonds referred to the fact that upon the removal of cotton control it became possible for the society "to divert to their own converting department the product of their Falkland Mill."

> "I have no doubt that at any rate by the end of 1952 it was the policy of the society by one means or another to destroy the company it had created, knowing that the minority shareholders alone would suffer in that process … He told them frankly that the society was out to destroy the company, that they had no chance against such a powerful organisation, and that they should make their peace with the society by offering to sell their shares …"

187. Viscount Simonds at page 341 recognised that the society's nominee directors on the company board were in a difficult and delicate position:

> "But in all the evidence I have not been able to find the least trace that they regard themselves as owing any duty to the company of which they were directors … It is, then the more incumbent on the parent company to behave with scrupulous fairness to the minority shareholders and to avoid imposing upon nominees the alternative of disregarding their instructions or betraying the interests of the minority."

188. At page 343 Viscount Simonds said his view could not be better stated than Lord President Cooper's words (Lord Keith also adopted the statement at page 362) and it appears to be the ratio of *Meyer* which although not binding upon the court appears highly persuasive:

> "The truth is that, whenever a subsidiary is formed as in this case with an independent minority of shareholders, the parent company must, if it is engaged in the same class of business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with the subsidiary."

189. Lord Keith at page 363 stated "… the society being majority shareholders in the company cannot claim that in diverting this production to itself and obstructing supplies to the company it was acting for itself and not conducting the affairs of the company in a manner unfair and oppressive to the minority shareholders."

190. Lord Denning referred at page 365 to the society setting up "a competing business" and was "all the time seeking to promote its own interests."

191. At page 367 Lord Denning said that it was plain that the three nominee directors of the society "could not do their duty by both companies, and they did not do so. They put their duty to the co-operative society above their duty to the textile company in this sense, at least, that they did nothing to defend the interests of the textile company against the conduct of the co-operative society. They probably thought that "as nominees" of the co-operative society their first duty was to the co-operative society. In this they were wrong. By subordinating the interests of the textile company to those of the co-operative society, they conducted the affairs of the textile company in a manner oppressive to the other shareholders."

192. Lord Denning at page 368 felt that a winding up order "would unfairly prejudice Dr. Meyer and Mr. Lucas because they would only recover the break-up value of their shares." Lord Denning felt that the appropriate remedy was a buyout. At page 369 he stated:

> "One of the most useful orders mentioned in the section – which will enable the court to do justice to the injured shareholders – is to order the oppressor to buy their shares at a fair price: and a fair price would be, I think, the value which the shares would have had at the date of the petition, if there had been no oppression."

193. At paragraph 34 of the Respondents' written closing argument the point is made that the misconduct must be serious, persistent and likely to recur in the future, and reliance is placed on *McPherson & Keay's Law of Company Liquidation (5th Ed)* at 270:

> "where fraud or breaches of duty have been serious and persistent and appear likely to recur in the future. It is essential, however, that the misconduct complained of should have reached virtually incurable proportions, for an order will not be made on account of a single insignificant breach of duty."

194. McPherson and Keay rely on a number of authorities to support those statements.

195. One of those authorities is *Re William Brooks & Co. Ltd.* (1961) 79 WN (NSW) 354; [1962] NSWR 142 ("*Re William Brooks*") where Hardie J at 157-158 stated:

> "I am satisfied that here have been serious and persistent breaches, over a period of years, by the managing director, with the concurrence or acquiescence of the other members of the board, of his fiduciary duty to act with honesty and probity … I am satisfied that here again the managing director persistently breached his fiduciary obligations. Those matters and those alone would, in my view, justify the granting of the relief sought on the petition [a winding up order on the just and equitable basis].
>
> However, there is an additional matter which, when thrown onto the scales, considerably strengthens the case made out by the petitioner. It is apparent that the managing director has managed and proposes to continue to manage the affairs of this company without consultation with, or without the benefit of the views of, the other members of the board … in a number of respects the managing director's somewhat unusual methods have borne fruit and have enhanced the profit-earning capacity of the company. This however, does not justify the course that has been pursued by the managing director in reference to and to the prejudice of the shareholders … The shareholders are entitled to rely upon the board of the company to control and manage it fairly and honestly and, after meeting all proper and reasonable expenses of the business, to give them the benefit of any increases in efficiency or profit-earning capacity of the company."

196. Another one is *Martello & Sons, Limited* [1945] 3 DLR 626 ("*Martello*") which was a case decided by the Ontario Court of Appeal on 9 May 1945. It was held that the company should be wound up on the just and equitable basis. The material in that case showed a justifiable and well-founded lack of probity in the conduct and management of the company's affairs, resting on the lack of probity in the conduct of its business (*Loch v Blackwood* was applied). Laidlaw JA was of the view that the "business of the company had not been carried on for the benefit of all shareholders, but on the contrary had been carried on in an improper, unfair and inequitable manner for the benefit and advantage of some of them to the detriment of the petitioner". Laidlaw JA at 628 added:

> "It appears to me likely that the company will never be able to carry on in an orderly, regulated and controlled manner, but on the contrary the affairs of the corporate body will be conducted in such a way as to cause injustice and inequity to the petitioner."

197. *Re The Newbridge Sanitary Steam Laundry Ltd* [1917] IR 67 ("*Newbridge*") is another authority relied upon by the learned authors. The relevant appellate court in that case considered the power of a court to order the winding up of a company on the just and equitable basis. In that case, Thomas J Llewellyn, the managing director of a laundry company, entered into contracts in his own name for work to be done by the company and kept some of the profits himself allegedly with the consent of his co-directors. Two shareholders brought an action against the company to compel an account of the profits so received and an order was made but no payment or account was made by Mr Llewellyn and no steps were taken by the company to compel him to account and a resolution of confidence in his management was passed by a majority of shareholders. A petition was presented to wind up the company on the ground that in the circumstances it was just and equitable to do so.

198. The Master of the Rolls felt that the plaintiffs could have no confidence in the company in the future as there was "a want of propriety in putting forward" the resolution: "I do not see how the petitioners can, with any confidence, allow their interest in the company to be controlled by Llewellyn and those who are associated with him, and who have such little sense of propriety as to adopt the resolution I have referred to. In the circumstances I see no course open to the petitioner for freeing themselves and their property from the vicious management from which it has suffered than to wind up the company." (page 75)

199. On appeal Sir Ignatius J O'Brien LC held that the court did have jurisdiction to wind up the company. He set out the facts and at page 85 stated "In these circumstances can it be said that the

company is carrying on its business in a way which is fair and just towards the dissentient shareholders?" At page 90 he added "…where, having regard to the established principles of courts of equity, justice, and equity require a company to be wound up, an order for its winding up ought to be made."

200. Ronan LJ agreed adding, in strong language, at page 92:

> "The evidence before us satisfies me that we are faced with a course of crime and fraud; we have a majority of the shareholders endorsing the action of those who were guilty of this crime and fraud, and passing a resolution of confidence in Llewellyn."

201. Molony LJ concurred.

202. The learned authors also rely on *In Re Shepherd's Bush Development Limited* (The Times Law Report 8 March 1909) ("*Re Shepherd's Bush*"). This involved an appeal from the judgment of Swinfen Eadys J. A winding up petition had been presented on the grounds that "the substratum of the company had vanished." There was also an allegation that Mr Imre Kiralfy (a director of the company) had dissuaded the company from acquiring an interest in the "side shows" held in connection with the exhibition at White City and the benefits of such consequently accrued to another company in which he was a large shareholder. The petition and the appeal were dismissed. According to the report the Master of the Rolls stated:

> "There might, of course, be a case where there were allegations of past fraud, present fraud, and the prospect of continued fraud, in which it might be right to put an end to this state of things by a winding-up order. That was not the case here. All that was alleged here was past misconduct, and, in his Lordship's opinion, it would be altogether wrong, in this state of affairs, to wind up a prosperous company when, if the petitioner's allegation was true, there was an adequate remedy open to him by an action at law."

Alternative remedies

203. On alternative remedies Lord Richards in *Aquapoint* at [85] put the position concisely as follows:

> "It is well established that the court may, and usually will, refuse to make a winding up order on a shareholder's petition where one or more alternative remedies are available to the petitioner and the petitioner is acting unreasonably in not pursuing them."

204. In *Tianrui* the company had four significant shareholders and the appellant held 28.16% of the issued share capital. The appellant petitioned for the winding up of the company on the just and equitable ground. The appellant complained that other competitor shareholders (which held respectively 26.72% and 25.09% of the issued share capital) had acted unfairly and/or oppressively towards it and/or the affairs of the company had been conducted with a lack of probity and that the appellant had justifiably lost confidence in the management of the company. The company applied for and obtained an order at first instance that the petition be struck out. At first instance the judge considered that there were alternative remedies available to the appellant (namely a writ action) which it was unreasonable for it not to pursue. The Court of Appeal allowed an appeal.

205. At [23] Martin JA stated:

> "It is also well settled, however, that a petition will not succeed if there exists an adequate alternative remedy which the petitioner has unreasonably failed to pursue …"

206. Martin JA continued:

> "34 This is not simply a case where a minority is unhappy with the actions of the majority. It does further than the situation described in the Canadian case of *Re Jury Gold Mine Devs. Co.* (12) (Ontario Supreme Ct.), in which Middleton, J.A. said ([1928] 4 D.L.R. at 736):
>
> > "He is a minority shareholder and must endure the unpleasantness incident to that situation. If he chooses to risk his money by subscribing for shares, it is part of his bargain that he will submit to the will of the majority. In the absence of fraud or transactions *ultra vires*, the majority must govern, and there should be no appeal to the Courts for redress. This is the situation here, and the application for winding-up is quite misconceived. If there is any misapplication of the assets the applicant is not without remedy for he can bring an action on behalf of himself and other shareholders, making the company and the directors against whom he charges wrongdoing parties defendant."

35. Similarly, the case goes further than what was contemplated in *Re Kitson & Co*. Ltd. (13), where Lord Greene, M.R. said ([1946] 1 ALL E.R. at 441):

"It is to be remembered that the winding up procedure does not exist for the purpose of keeping boards of directors in order, or indeed of preventing them from misapplying the funds of the company. It may very well be (I express no opinion) that in cases where directors have complete control of the company and are impossible to control, in those circumstances, coupled perhaps with others, may make it just and equitable for a company to be wound up, although in these days of minority actions it would not seem winding up proceedings in order to prevent that kind of thing are likely to be so necessary as before minority actions became common. But, apart from that, it seems to me that the winding up procedure ought not to be used for regulating the internal affairs of the company. If directors are misbehaving themselves, there lies a remedy to the shareholders to stop it, and it would be quite wrong to my mind that the partnership between shareholders, so to speak, should be dissolved merely because the persons carrying on the business on behalf of the company, namely the directors, are misbehaving themselves. It is for the shareholders to stop them. They can get rid of the directors. They can restrain them by means of an injunction if they are doing anything improper, and, therefore, I do not think it is putting it too high to say that in the ordinary way of things winding up is not the proper procedure for dealing with that type of situation."

36 If the allegations set out in the petition are true, it seems to us clear that they are capable of establishing that it would be just and equitable to wind up the company. Put simply, Tianrui's position as evinced by its petition is that it cannot be expected to remain in association with CNBM and ACC in light of their conduct towards it. None of the remedies identified by the judge deals with that underlying complaint.

37 The company suggests that if the underlying complaint is as we have identified, Tianrui can bring its association with CNBM and ACC, and with the company, to an end by selling its shares on the Hong Kong stock exchange. It accepts that Tianrui could only sell the shareholding it now has, and that a 21.40% shareholding might fetch proportionately less than the 28.16% shareholding that Tianrui originally had, since its former shareholding enabled Tianrui to block special resolutions; but the company says

that the effect of selling would be to crystallize a claim for damages which could then be pursued by means of an action for conspiracy. In our view, these assertions epitomize what is wrong with the company's position. If the actions of the company, prompted by directors appointed at the instance of a majority of its shareholders, have resulted in a justifiable loss of confidence in the management of the company, Tianrui has a statutory right to petition for the winding up of the company on the just and equitable ground. It cannot be deprived of that right merely because the company can point to other remedies which, alone or in combination, might arguably go all or some of the way to compensating Tianrui for what has occurred. In our judgment, Tianrui may legitimately take the view that it prefers the company to be wound up to having to pursue piecemeal a series of actions, by litigation or otherwise, or by a combination of litigation and other steps, that might be capable of redressing some, or even all, of its concerns. It is entitled to have the circumstances investigated in the context of a winding-up petition that it is entitled to bring; and if it succeeds in establishing its complaints it is entitled under the statutory scheme to have the court consider at the end of the investigation whether the appropriate remedy is winding up or another of the remedies set out in s.95(3) of the Law. The suggestion that Tianrui need not have all the contents of the petition determined upon evidence because it is obvious that a derivative action, or some other combination of actions, will provide substantial justice to Tianrui is untenable in circumstances where the range of facts, and of inferences from fact, to which the petition gives rise have not been determined."

Summary of relevant law

207. I endeavour to summarise the relevant law as follows:

Just and equitable

(1) a company may be wound up by the court if the court is of the opinion that it is just and equitable that the company should be wound up (section 92 (e) of the Companies Act);

Alternative relief – buyout order

(2) as an alternative to a winding-up order the court, provided the petitioner has established a *prima facie* case for winding up and the winding up threshold has been crossed, may make an order providing for the purchase of the shares of any members of the company by other members of the company (section 95 (3)(d) of the Companies Act; *Asia Pacific* at [39]; *Tianrui* at [14]; *Re Virginia Solution* at [61]; *Meyer* at page 369; *Financial Technology* at [62] and [169]; *Madera* at [260]; *Bird Precision Bellows*; *London School of Electronics* and *Grace v Biagioli*);

Equitable overlay

(3) in just and equitable winding up cases based on *Westbourne Galleries* grounds the court's task is to conclude whether, on the facts and circumstances of the particular case (which do not involve breaches of the law or the articles of association or other contracts [or I would add lack of probity cases], where different considerations apply), there exist considerations of a personal character between one individual and another which make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way (*Westbourne Galleries* at page 379 per Lord Wilberforce and *Aquapoint* at [59] per Lord Richards);

(4) in the great majority of cases where parties have expressly regulated their relationships in relation to the matter about which complaint is made, it is the contract which governs the relationship and any complaint must be adjudicated in accordance with the law of contract (*Aquapoint* at [61] per Lord Richards);

(5) the terms of the contractual provisions will be a highly relevant factor but they cannot alone demonstrate that there is no room for equitable considerations (*Aquapoint* at [65] per Lord Richards);

(6) the words "just and equitable" as a ground for a winding up order was a deliberate choice to introduce equitable principles into what is an essentially statutory scheme and the application of equitable principles is not subject to a scheme of categories into which a

particular case must fall. The width and flexibility of equity are not to be undermined by categorisation (*Aquapoint* at [57] per Lord Richards);

(7) correctly applied phrases such as "quasi-partnership", "legitimate expectations", "a loss of mutual trust and confidence" may have some value but they must not disguise the court's task (*Aquapoint* at [59] per Lord Richards). The court's task is to determine, applying well established legal principles, whether it is just and equitable to make a winding up order;

Lack of probity and justifiable loss of confidence in management

(8) lack of probity in the conduct of the company's affairs leading to a justifiable loss of confidence in management, for example on account of serious misconduct or serious mismanagement of the affairs of the company by the directors or the majority shareholders, can also be a basis for a winding up order on the just and equitable ground (*Tianrui* at [22] per Martin JA; *FamilyMart* at [30] per Moses JA; *Madera* per Richards J at [48], [49], [243], [252], [253], [254], [256] and [260]; and *Loch v Blackwood*);

(9) a winding up order can be made where there is a justifiable loss of confidence in the probity of the management of a company particularly where the controlling director or shareholder treats the business as his or its own (*Financial Technology* at [271a] per Crow JA; *Loch v Blackwood* at page 788 per Lord Shaw; *Westbourne Galleries* at page 376 per Lord Wilberforce and *Chu v Lau* at [24] per Lord Briggs and [90] per Lady Arden;

(10) a winding-up order can be made where a minority shareholder has justifiably lost confidence in the impartiality or probity of the company's management (*Financial Technology* at [271b] per Crow JA citing *Thomson v Drysdale* [1925] SC 311 at 315);

(11) conduct deliberately calculated to "freeze out" a minority shareholder, driving him to sell his shares at an undervalue, is also capable of justifying a winding up order (*Financial Technology* at [271c] per Crow JA citing *Re Wondoflex Textiles Pty Ltd* [1951] VLR 458 at 468);

(12) shareholders of a company are entitled to expect its affairs to be managed with probity and in accordance with basic principles of fair dealing (*Financial Technology* at [272a] per Crow JA citing *Baird v Lees* (1924) SC 83 at 92);

(13) a want of probity and a lack of impartiality are broader concepts than either breach of fiduciary duties or dishonesty, although they may well include both. In particular, the word "probity" embraces concepts both of honesty and decency (*Financial Technology* at [272b.] per Crow JA and *BAF Latam* at [124] and [136] per Parker J);

(14) whenever a subsidiary is formed with an independent minority of shareholders, the parent company must, if it is engaged in the same class of business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with the subsidiary (*Meyer* at page 343 per Viscount Simonds, at page 362 per Lord Keith and at page 367 per Lord Denning);

The serious misconduct usually needs to be persistent and likely to recur in the future

(15) the serious misconduct complained of usually needs to be persistent and likely to recur in the future (*Re William Brooks* at pages 157-158 per Hardie J; *Martello* at page 628 per Laidlaw JA applying *Loch v Blackwood*; *Newbridge* at page 75 per Master of the Rolls and *Re Shepherd's Bush* per the Master of the Rolls);

Alternative remedies

(16) the court may, and usually will, refuse to make a winding up order on a shareholder's petition where one or more alternative remedies are available to the petitioner and the petitioner is acting unreasonably in not pursuing them (*Aquapoint* at [85] per Lord Richards and *Tianrui* at [23] per Martin JA).

Determination

208. I now turn to the determination of the relevant issues raised in the lists of issues provided by the attorneys to the court, and those that arise on the pleadings.

"Quasi-partnership"/"legitimate expectations"?

209. The first issue to determine is whether in the circumstances of this case the legal rights of the parties as provided for in the legal documents should be subjected to an equitable overlay on the basis of a "quasi-partnership" or "legitimate expectations". In the words of Lord Wilberforce in *Westbourne Galleries* at page 379 do there exist "considerations … of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way?"

210. The Petitioner in its list of issues frames this issue as "Is the Company a quasi-partnership" (paragraph 1 (a)). The Respondents in their list of issues frame this issue as "Was the Company created as a quasi-partnership between the Respondents and the Petitioner and, if so, does it continue to operate as a quasi-partnership?" I will determine this "quasi-partnership" issue but note the comments of Lord Richards in *Aquapoint* in the Privy Council at [58 (iii)] that the application of equitable principles is not subject to a scheme of categories into which a particular case must fit. I note also [58 (v)] and [81].

211. In my judgment the arrangement between the parties in this case was simply a business financial commercial arrangement and nothing more.

212. There does not exist in this case considerations of a personal character between the shareholders on a "quasi-partnership" or "legitimate expectations" basis which make it unjust or inequitable to insist on legal rights or to exercise them in a particular way. Moreover this is not a case where the minority have been excluded from participation in management. The Company was formed by a group of experienced business people. A non-binding Term Sheet (B/9), a share purchase agreement (B/8), Articles of Association (B/1-4), shareholders agreement (B/5) and other documents, were discussed, negotiated and drafted containing provisions governing the legal relationship between the parties. Furthermore outside the legal documents there was no mutual understandings (or legitimate expectations) agreed upon between the parties. The agreement in this case was committed to writing, as many business and commercial agreements are.

213. In my judgment the Company is not a "quasi-partnership" and was not created as such and at no stage did it become a "quasi-partnership" type of relationship justifying the imposition of an equitable overlay on the parties' legal rights in the circumstances of this case.

214. In my judgment the evidence indicates that Mr Yu was impressed with Mr Stephens and his colleagues or at least regarded them as cash cows/money makers who could produce some good profit for him and the entities he worked for. After the Spigot buyout Mr Yu was concerned that Mr Stephens' talent for generating cash would be lost. Mr Stephens did not want to stay on as a "mere employee" to collect his "golden watch". When Mr Stephens suggested the mobile app venture, Mr Yu saw this as an opportunity to provide Mr Stephens and his colleagues with an incentive to stay involved, albeit in different capacities, and to produce some further value for the Respondents.

215. In an email from Mr Stephens dated 3 June 2019 (C/106/1) headed " Incentive Plans" to Mr Yu and Mr Lu at Genimous, Mr Stephens thanks them for "making the final earnout payment last week", and adds that " I'm extremely disappointed and saddened that we still don't have a meaningful management incentive plan in place for either the cash backstop agreement or the mobile business. We are at the beginning of June, almost halfway through the year and we still do not have the incentive plans finalised, for the year ... the senior managers of the company have relied on my promise that the company will implement a meaningful incentive plan for both the core business, as well as the mobile initiative ... the incentive plan for the core business has now been under discussion for approximately 9 months, and the incentive plan for the mobile business has been under discussion for approximately 18 months, and we still do not have either one completed... I regularly get questions from the team as to why the agreements are not yet completed, and I no longer know what to tell them."

216. At Day 2/66: 18-25, Mr Stephens suggests that Mr Lu speaks very little English so he is using "simple language so that he would understand it".

217. Mr Stephens, after being pressed, says " the mobile business that I am talking about is the papering over the business, the joint venture we agreed upon" (Day 2/68: 12 – 14).

218. It was put to Mr Stephens that the mobile business with Genimous was "actually, a management incentive plan" to which he responded " It was a joint venture" (Day 2/69: 13-16).

219. Mr Stephens stated:

> "I was frustrated at the time. I was speaking to someone that did not speak fluent English, and I tried to make it as simple and straightforward as I could" (Day 2/70: 7-10).

220. Mr Stephens in his email dated 3 June 2019 referred to the heading "Incentive Plans" in the plural. Mr Stephens' attempts to explain away this email as an effort to simplify his English were unimpressive.

221. At (D/60/418) is an email dated 17 January 2022 at 11:02 PM from Mr Jackson to various people at Spigot and Genimous including Mr Chen and Mr Yu, which makes "a formal complaint". Mr Jackson refers to "an incentive plan".

222. An email dated 19 January 2022 (C/436/1) from Mr Jackson to Spigot HR and PM Board of Directors was put to Mr Jackson, where he said " One thing I want to ensure was clearly conveyed in the complaint sent to the Board of Directors: on multiple occasions, Peter Wong threatened Danny and myself with termination if we did not sell our personal property (the shares we purchased and own in Technology Investment Consortium, LLC) to Genimous, for the price Peter specified and for his own personal gain. Again, it's troubling that an incentive plan- one presented by Genimous, and one which Danny I have delivered from our side is now being used as a weapon against our continued employment at Spigot".

223. Mr Jackson was asked about his reference to the words "incentive plan" and he responded:

> "... Position Mobile and the way that it was structured as being an independent company and was different than any other incentive plan that I have had in my career... I used the word "incentive plan" because that was, you know, a clean way to explain to Jenny Bortolini, who was the HR Department at Spigot". (Day 5/144:7–16).

224. Mr Jackson agreed that what he was referring to was the "Position Mobile TIC, 49% stake" (Day 5/144:20).

225. The Petitioner's case is that the quasi-partnership was created at a meeting in Beijing on 18 January 2018 attended by amongst others Mr Lu, Mr Yu, Mr Stephens and Mr Mahaffey (the "January 2018 Beijing Meeting").

226. It is important to note that the January 2018 Beijing Meeting was a quarterly board meeting of Spigot and Mr Stephens and Mr Mahaffey attended it as directors of Spigot.

227. In his 83 page witness statement dated 13 June 2025 Mr Stephens says that he was the individual who presented what he describes as the mobile business plan at the January 2018 Beijing Meeting.

228. Mr Stephens (at paragraph 17) says that the origin of the relationship between the parties derives from Genimous Group's acquisition of Spigot in or around August 2015. At that time Mr Stephens was President and a shareholder in Spigot. He adds that under the terms of the sale, approximately 47 per cent of the purchase price was paid by the Genimous Group up front, while the remaining 53 per cent was payable as an earn-out over a four-year period, contingent on Spigot's financial performance. The earnings targets in 2017 and 2018 were substantially exceeded. Mr Stephens said that as the earnout period began to come to a close Mr Yu and Mr Lu asked him what his plans were after the earnout period was over. Mr Stephens said that they expressed a desire to continue working together after the earnout period was over. Mr Stephens says he told them that he was not particularly interested in being an employee anymore and that he would rather focus on founding a new business. Mr Stephens says that Mr Yu and Mr Lu expressed interest in Genimous participating as an investor this new venture. Mr Stephens adds that he, Mr Mahaffey, Mr Lee and Mr D Miller started work on a pitch for the new business in late 2017. There are emails on 13 December 2017 with reference to "aspirational "Ryan Numbers"."

229. At paragraph 28 Mr Stephens says he delivered a presentation at the January 2018 Beijing Meeting. The proposal envisaged a 51/49 equity split in favour of the Genimous Group. The slides (C/21/1) are headed Spigot, Polarity, Eightpoint 2018 Budget & Strategic Plan 18 January 2018. There are 47 slides. They include slides dealing with the 2017 Financial Results, Strategic Growth Plan, "Part 2: New Business in New Ecosystem (Mobile)". The slide entitled "Mobile: Vision" includes the following statements –

> "Create a new, private company, focused on a proven mobile opportunity. Build earnings and sell to an interested acquirer within 3 years."
>
> "New company focused entirely on a proven Mobile opportunity
>
> Private ownership reduces growth barriers and aligns incentives

> Leverage existing expertise and services organization to accelerate growth in Mobile ecosystem
>
> Aim to build material earnings, then sell to interested acquirer within 3 years."

In the "Proposed Organizational Structure" there is reference to Spigot providing "Strategic Consulting, R&D Services, Distribution Services, Finance & Operations Services" to the "Independently Owned" Mobile New Co.

> "Mobile: Financial Outlook
>
> Leveraging existing expertise and know-how will enable rapid growth
>
> Expecting to reach $10MM profit annually within 3 years
>
> Aim to pursue acquirer once profitable scale is reached"
>
> "Mobile: Investment Opportunity
>
> Seeking a $5MM Investment Commitment in return for 51% ownership."

230. Mr Stephens (at paragraph 31) states that by the conclusion of the meeting the representatives of Genimous Group and the TIC members reached an oral agreement on the following key terms:

> "31.1 the business would be developed as a new and independent venture, separate from Spigot, for the benefit of all involved parties and on the basis of mutual trust and confidence;
>
> 31.2 Genimous Group would hold a 51 per cent equity interest and the TIC Members, through the Petitioner, would hold 49 per cent;
>
> 31.3 Genimous Group would provide the majority of the funding for the business, while the TIC members would lead its development and day-to-day operations;
>
> 31.4 the parties would share in management and decision-making responsibilities;
>
> 31.5 the business would maintain operational and financial independence from Spigot;

> 31.6 any and all services contracts required by the Company would be formally agreed and at arm's length; and
>
> 31.7 the TIC Members would have the opportunity to sell their equity interest to Genimous Group after approximately three years, once agreed financial performance targets had been achieved."

231. At paragraph 32 Mr Stephens adds "the arrangement between the parties, at this stage and subsequently, did not contemplate or impose any binding obligation on the Petitioner or TIC Members to sell their interest. Rather, the arrangement reflected an option to sell, providing the Petitioner with a right, but not a requirement to divest its equity."

232. That statement (which at paragraph 376 Mr Stephens says is true) must be contrasted with his evidence on oath (See Day 2/129:9-10). At Day 3/55:9-10 Mr Stephens stated: "And it's never been our position that they had to buy us out." This also goes against paragraphs 7(d) and 11 of the Amended Petition.

233. Mr Mahaffey in his 19 page witness statement dated 13 June 2025 provides very little evidence as to what was actually discussed at the January 2018 Beijing Meeting. At paragraph 17 he says "… my understanding of the terms discussed aligns with the account given in Mr Stephen's (sic) statement". At paragraph 18 Mr Mahaffey states:

> "From my perspective, the Beijing meeting confirmed a shared intention between the TIC Members and Genimous Group to form a genuine commercial partnership built on transparency and aligned interests. The core understanding was that TIC Members, who had the technical expertise and operational experience necessary to build a mobile app business for Western markets, would contribute the know-how, while Genimous Group would provide the capital needed to establish and scale the venture."

234. I should record that TIC had not been formed at this stage and Mr Mahaffey uses the term "TIC Members" as a shorthand reference to the current members of TIC.

235. This was plainly a "commercial" business relationship.

236. At paragraph 20 Mr Mahaffey says that he agrees with Mr Stephens's account of the key "commercial" terms orally agreed at the meeting, as set out in his statement: "His summary aligns with my own recollection and is reflected in the follow-up email he sent to Mr Yu on or around 24 January 2018 (C/24/1)".

237. A close inspection of that email reveals that very little appears to have been agreed at the January 2018 Beijing Meeting other than to consider the proposal further. The email does not record points of agreement. It refers to discussions, proposals and areas where agreement is sought and invites thoughts and questions. It does not reflect any "key commercial terms orally agreed at the meeting". The email is dated 24 January 2018 and it appears to be from Mr Stephens at Spigot to Mr Yu at Genimous. Mr Stephens says it was "great seeing you in Beijing last week". He does not confirm the terms of any agreement reached. I do not think that can be explained away by Mr Stephens being polite or as a matter of "Chinese culture" (as Mr Stephens often attempted to during his cross-examination). The simple explanation is that, contrary to the evidence of Mr Stephens and Mr Mahaffey, no agreement was reached on key commercial terms at the meeting. Mr Stephens in his email states "I wanted to send out a note to start working on next steps for the new mobile business initiative that we discussed during our strategy presentation last week. Here are the areas that I'd like to work together with you on in order to be able to move this project forward".

238. Point 1 relates to ownership structure. Mr Stephens does not say "We agreed" he says "we are proposing that the listed company commit to a $5M investment in return for 51% ownership in the new mobile business, with the remaining 49% available to incentivize the management and employees of the new business … If this commitment structure makes sense, then we can work together in order to come up with a funding schedule that meets the constraints and the needs of the listed company." It appears that the ownership structure and the funding was not agreed at the January 2018 Beijing Meeting. Point 2 contains a request not a confirmation of an agreement: "In addition to the equity funding commitment, we would also ask for a debt-funding commitment at market interest rates from the listed company, in the event it is required for TAC investment to scale the business. It is unlikely that we would need to draw on the debt funding in the next year or so, however we would like to just make sure that we are aligned on the concept up front." Plainly they were not already "aligned on the concept up front". Mr Stephens adds "We'd like to align on

something like $10M-$15M in debt-funding commitment at market interest rates for TAC buys from the listed company, so that the business has enough capital to scale once it is ready to do so".

239. Reflecting that no agreement had been reached Mr Stephens finishes his email off with: "Once we get these two points established, there are some relatively administrative and legal steps to paper over the structure, set up the entity, appoint a board, and begin working on the business in earnest. Would you please let me know your thoughts on the above? Also happy to have a call with you and/or you and Hongda to discuss in more detail if you have questions or additional thoughts." Mr Stephens was seeking "thoughts" not implementation of an agreement. Mr Stephens sends a chaser on 30 January 2018.

240. I have to state that I found Mr Stephens' and Mr Mahaffey's evidence as to what was agreed at the January 2018 Beijing Meeting difficult to accept. It was either grossly exaggerated or simply wishful thinking or a reconstruction of events to suit the legal framework. It was not supported by contemporaneous communications/documentation and it was contradicted by subsequent communications/documentation. Mr Stephens accepted that he had only come across the phrase "mutual trust and confidence" during these proceedings.

241. It is difficult to reconcile Mr Mahaffey's statement that various points were agreed at the January 2018 Beijing Meeting with Mr Stephens' email dated 24 January 2018 (which Mr Mahaffey prays in aid) and with Mr Mahaffey's email on 23 January 2018 to Mr Stephens copied to Mr Lee:

> "As I understand it, Mr Lee is open to our Mobile NewCo pitch. I presume that the next step to move this forward is to list them again with the pitch and get a funding commitment. I've pulled out the Mobile slides to the attached presentation to facilitate that discussion".

242. By email dated 28 February 2018 Mr Stephens communicates further with Mr Yu and Mr Lu. Again reference to discussions rather than agreements and the use of the words "potential" and "options":

> "I wanted to follow up with you on the discussions we had about a potential new mobile business that we can create."

243. Mr Stephens refers to "the capability to create a new mobile business, which is completely separate from the current Spigot business … In order to build this new business, there are two structural

options we discussed." Mr Stephens refers to two "structural possibilities". Firstly, "Create the new mobile business within a new company". Secondly, "Create the new mobile business within Spigot and/or Polarity" adding "… in this case there would be no concept of shares in the new business, however we can set up management incentives in the form of bonuses that would incentivize the creators of the company to build the company as quickly as possible to the $8-10M Net Income goal … the only disadvantage to the creators of the business is that bonuses are personally taxed at a higher rate …". Mr Stephens says that they can create the new business under either structure and asks "which structure you prefer?" He also enquires whether they have "other options that you prefer". Mr Stephens refers to the "potential new business" and asks for "thoughts?".

244. By email dated 19 March 2018 from Mr Yu to Mr Stephens at Spigot Mr Yu of Genimous states:

> "I'm sorry for not replying earlier. Regarding the New Mobile Business Structure, we generally agreed to your proposal to set up a new company to conduct such new business, and a more beneficial way could be that all of Fund, ListCo and management can be a part of that. Therefore, we have following counter proposal for your consideration."

245. Reflecting that no agreement on key commercial terms had been reached at the January 2018 Beijing Meeting Mr Yu set out various counter-proposals which Mr Stephens comments upon in detail in his response of 19 March 2018. At d. Mr Yu makes the point that Spigot, Eightpoint and Polarity should not be "affected adversely". These exchanges are all consistent with commercially minded individuals discussing and negotiating a potential commercial venture. They are not indicative of a "quasi-partnership" type relationship.

246. Also reflecting that no agreement on key commercial terms was arrived at during the January 2018 Beijing Meeting, discussions and negotiations continued until on 11 April 2019 when an "Agreement on Key Terms" (the "Term Sheet") was signed on behalf of Genimous Technology Co., Ltd, Genimous PE Fund and TIC.

247. Paragraph "a)" refers to "motivation for start-up by employees". There is reference to the parties establishing PM "to operate mobile in terms of advertisement business on the basis of voluntary,

equal, mutual benefits and trusts." There is reference to TIC being "established by the employees of Spigot". In "b)" there is reference to "TIC, as a start-up company established by employees of Genimous". There is reference to the terms "for the purposes of entering into a definitive agreement covering the relationships and transactions contemplated in this Term Sheet and other customary terms."

248. At "B Principles" it is recorded that "Genimous has already contributed funding, team, offices, technology, and will continue to provide key resources including funding, human resources, technology, customers and suppliers. Accordingly, it shall have the relevant control and management power on the corporate governance, finance, and operational matters of the company through board of directors."

249. Under "C Ownership and Capitalization" there is reference to capital contribution of US$52,000 by Genimous for 51% equity in PM and US$50,000 by TIC for 49% equity. It is agreed that the parties "shall develop a memorandum and articles of association (the "Operating Agreement") for PM "on mutually acceptable terms".

250. Under "D Debt Financing" provision is made for Genimous to provide up to US$15,500,000 in debt financing at market rates.

251. Section E concerns "Buy-out Target" and it is provided under 3 that "Genimous and TIC will discuss and reach a definitive agreement with all terms within six months after completion of this Term Sheet."

252. Section F concerns "Earn-out Targets".

253. Section G concerns "Corporate Governance" and provides that PM will have a board with 5 seats, with 3 of them appointed by Genimous and "The board shall have at least quarterly meetings to review the KPI of Position Mobile, including the progress of net income and the ROI." Paragraph 2 provides that "All transactions between Position Mobile and Genimous will be conducted at arm's length". Paragraph 3 provides that PM will maintain separate financial statements from Genimous "but Genimous and TIC will mutually agree upon the CFO of Position Mobile". Paragraph 4 provides that the appointment of the auditors of PM shall be "subject to the consent of Genimous".

254. Under Section H it is provided that: "Except for Section H, which shall be binding on the Parties, the Parties do not intend to be bound by the Term Sheet until they enter into definitive agreements regarding the subject matter of this Term Sheet". Paragraph 3 includes a Florida governing law clause and for arbitration in Hong Kong.

255. On the evidence before the Court it appears that all that was agreed at the January 2018 Beijing Meeting was that the parties would continue to work on the proposal. The evidence also establishes that after the January 2018 Beijing Meeting and before the Term Sheet was signed on 11 April 2019 "Genimous" had provided some "funding, team, offices, technology" to enable the mobile app project to progress for its benefit.

256. In my judgment the evidence reveals that Mr Yu was keen to keep Mr Stephens and some of his colleagues involved as they were regarded as a valuable resource for financial profit. Mr Stephens did not want to remain as an employee so Mr Yu agreed to consider the mobile proposal further as a way of keeping Mr Stephens involved for the financial benefit of Genimous. In general terms Genimous were open to the proposal as a way of incentivising Mr Stephens and some of his colleagues staying involved to the financial benefit of Genimous. It was a business relationship that had its genesis in an employment context. Of course, Genimous wanted to encourage Mr Stephens and his colleagues and show that they valued them whether by way of red ties or Genimous Partner awards or dinners or other social interactions. Such gestures are common place in the world of business. There was however in the circumstances of this case no "something more" in *Westbourne Galleries* "quasi-partnership" terms. There was no "quasi-partnership" type of arrangement in this case. It was a business financial arrangement, pure and simple. The relationship was reduced to various legal agreements arrived at following discussion, negotiation and legal advice. They were not as comprehensive as those in *Re Virginia Solution* but they did set out the legal relationship between the parties and there is no room in this case, on a *Westbourne Galleries* "quasi-partnership" basis, to superimpose equitable constraints or an equitable overlay on the parties' legal relationship.

257. Having considered the relevant evidence including the relationships between the parties and those connected with them prior to and subsequent to the January 2018 Beijing Meeting I have concluded that this is not a "quasi-partnership" type case. The agreements arrived at between the parties were commercial agreements between experienced people of business.

258. Moreover, the Petitioner has not made out a case on "legitimate expectations". The words "legitimate expectations" do not appear in the list of issues for determination by the court but as the issue is raised on the pleadings I should deal with it for the sake of completeness. I have referred above to paragraphs 11 and 12 of the Amended Petition and the way in which the Petitioner pleads its case on legitimate expectations. The Petitioner seeks to go further in its written closing submissions. I disapprove of the tendency of the Petitioner to seek to advance a case not available to it on its pleadings. This is not technical pleading point. It is an important point of substance. Pleadings circumscribe the issues in the case. Respondents need to know the case against them and a fair opportunity to answer it. The court needs to know which issues arise for determination on the pleadings. Parties should stay within the bounds of their pleaded cases.

259. At paragraph 252 of its closing written submissions the Petitioner refers to its case on legitimate expectations under the following headings: (1) independent ownership and operation; (2) participation in management; (3) transparency and regular reporting; (4) arm's length dealings and (5) fair exit opportunity. Insofar as these issues are not pleaded I disregard them. Moreover, the evidence does not support the Petitioner's pleaded or non-pleaded case on legitimate expectations and I do not decide this case on the basis of legitimate expectations. In particular, Mr Stephens was clear in his evidence that it was not the Petitioner's case that the Respondents were under a legal obligation to buy the Petitioner out (for example, see Day 3/55:9-10). It appears that the Petitioner, in its pleading, was simply trying to artificially slot its case into the "legitimate expectations" category.

260. There is no room on the basis of a "quasi-partnership" or "legitimate expectations" to superimpose equitable obligations over and above the legal obligations owed by the parties to each other.

261. In *Aquapoint* the petitioner was in effect seeking an equitable overlay to strict legal rights. Lord Richards at [59] commented that "in cases like the present, the court's task is to conclude whether, on the facts and circumstances of the particular case (which do not involve breaches of the law or the articles of association or other contracts, when different considerations apply), there exist "considerations … of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way" (*Westbourne Galleries* at p379 per Lord Wilberforce)." I have concluded that there are no such personal characteristics in this case.

262. Having dismissed the Petitioner's arguments on the *Westbourne Galleries* "quasi-partnership" and "legitimate expectations" basis I now turn to an area where different considerations apply, as anticipated by Lord Richards. For short hand purposes I describe it as the *Loch v Blackwood* lack of probity area.

Lack of probity and other allegations in the Amended Petition

263. The second issue for determination by the court, which is not dependent on acceptance of a "quasi-partnership" type of relationship or a successful case on "legitimate expectations", concerns lack of probity.

264. The Petitioner frames this issue in its list of issues as follows: "**Want of probity, etc** … Irrespective of whether the Company is a quasi-partnership, has there been a lack of probity and/or impartiality leading to a justifiable loss of confidence in management or majority ownership" (paragraph 1 (c)).

265. I note that nowhere in the Amended Petition does the word "impartiality" appear and there is no pleading under a heading "Lack of impartiality" giving particulars.

266. The Respondents frame the "lack of probity" issue in their list of issues as follows:

> "**Justifiable loss of trust and confidence in the Company's management**
>
> 4. Irrespective of whether the Company is a quasi-partnership, is the Petitioner entitled to a winding-up order based on its pleaded case that it has justifiably lost all trust and confidence that the assets and affairs of the Company are being properly managed, stemming from a lack of probity on the part of the directors nominated to the Company's Board by the Respondents?"

267. At paragraph 286 of its written closing submissions the Petitioner says that the Respondents (either through their wholly owned subsidiaries or their nominee directors of the Company) have made a sustained and concerted effort to injure the business of the Company in a manner that lacks probity and is oppressive to the Petitioner's minority shareholding. The Petitioner, without any cross-

referring to any relevant paragraphs in its pleadings, says that this has been done in the following ways:

(1) the Respondents have breached an undertaking to the court not to cause the transfer of any property from the Company for the duration of the winding up proceedings;

(2) the Respondents have impermissibly engaged in competition against the business of the Company and/or caused their nominee directors to act in conflict with the interests of the Company;

(3) the Respondents have caused and/or failed to prevent the misappropriation of the Company's intellectual property, aggravated by the use of that misappropriated property by a direct competitor owned by the Respondents while simultaneously crippling PM's ability to compete;

(4) the Respondents pursued coordinated schemes to impermissibly force the transfer or acquisition of the Company's core applications and associated intellectual property; and

(5) the Respondents have caused and/or failed to prevent the misappropriation of the Company's 'know-how' and legal frameworks.

268. At paragraph 293 of the Petitioner's written closing submissions it is stated that the Respondents "took to compete and/or act in conflict with the business of the Company", there was a failure to investigate and/or protect the interests of the Company following credible allegations that the Company's intellectual property was being misappropriated, and Spigot was caused to lower marketing spend on each PM app timed to coincide with the release of each EET copycat app. At paragraph 307 the Petitioner says that the court does not need to make positive findings of intellectual property misappropriation as it is enough to find that credible and serious allegations of misappropriation were raised with the Respondents' nominee directors and they repeatedly failed to investigate and/or protect the Company.

269. Save and except where such grounds are pleaded and it is otherwise appropriate to have regard to them, I disregard them.

270. I have to say again that the Petitioner adopts a somewhat unhelpful scattergun/kitchen sink and, to a certain extent, a somewhat narrative approach in its pleadings. In *Financial Technology* (an authority relied upon by the Petitioner) Crow JA was considering an appeal in respect of an "unfair prejudice" claim under Article 141 of the Companies Law. Crow JA at [46] commented that "The concept of 'unfair prejudice' is notoriously protean". I would add that the concept of "just and equitable" in section 92(e) of the Companies Act is also protean. Crow JA added that because the concept of "unfair prejudice" is protean:

> "… it is all the more important in these cases that it should be pleaded with absolute clarity, so that both the parties and the court are entirely clear as to precisely what acts or omissions are said to be prejudicial, and precisely why that prejudice is said to be unfair."

Crow JA stressed that a party should not plead a claim based on unfair prejudice "in the form of an extended narrative … A claim under Article 141 should be set out with all the rigour, in terms of precision and concision, of any other pleading." The same can be said in respect of winding up petitions, especially those based on the just and equitable ground.

271. The Petitioner's pleadings are not easy to follow. Doing the best I can, I think the main pleaded complaints (at paragraph 7 of the Amended Petition) in respect of lack of probity and justifiable loss of confidence in the Company's management can be summarised as follows (and the majority of these also appear to be relied upon in respect of the Petitioner's case on oppression):

(1) exclusion from management and suspension of quarterly meetings of the board;
(2) accounting processes being carried out by Genimous entities;
(3) refusing to allow the Petitioner's appointed directors access to financial information;
(4) GGDs obfuscated and frustrated Petitioner's attempts to sell its shares;
(5) the making of threats and the scheme to neglect the Company in favour of the Respondents' wholly owned subsidiaries
(6) "terminating" Mr Jackson and Mr D Miller from executive positions in Spigot;
(7) Spigot being "overpaid millions of dollars for its services";
(8) breaches of various service agreements;
(9) caused one of the GGDs to resign and be replaced by Mr Lash;
(10) misappropriation of intellectual property belonging to the Company;

(11) amending the contractual relations of the Company with Spigot to remove certain anti – competition covenants previously restricting Spigot without corresponding benefit to the Company and in furtherance of the overall scheme of the Respondents to redeploy intellectual property belonging to the Company under "other Genimous owned or controlled entities, as Eightpoint and/or EET and/or ACS";

(12) GGDs have failed to act against "the above-mentioned misappropriation or to protect the best interests of the Company in any or any adequate manner."

272. I am not persuaded that items (1), (2), (3), (4), (8), (9) have been proved to the extent that they could properly be said to amount to lack of probity or oppression. I deal with (6) in the context of (5), (11) and (12) below.

273. In relation to (7) (allegations of Spigot overcharging) and (10) (allegations of misappropriation of intellectual property belonging to the Company) these allegations are squarely raised in the Writ Action and it is undesirable and unnecessary for me to reach any conclusions on them in the winding up proceedings presently before the court. I think Mr Wingrave eventually acknowledged that in his submissions and by way of the undertakings he belatedly gave to the court on behalf of the Petitioner.

274. During his oral closing submissions, Mr Wingrave indicated (Day 9/13: 13 to 20) that the Petitioner undertakes:

"to discontinue the writ action, if the result of this trial is a buyout order. Now, that's not a buyout order in a defined sum such that might be the subject of a further trial. If the relief granted by the court is a buyout order at a price to be determined, that will be sufficient to engage the undertaking, and it would mean that the defendants in the writ action are not vexed with it beyond that point.

Justice Doyle: Yes, I think the way you have expressed it before: "discontinue the writ action, if the result of this trial is a buyout... Now that's not a buyout order in a defined sum such that might be the subject of a further trial. I think what you are saying. I - need to be clear on the undertaking.

Mr Wingrave: Yes.

Justice Doyle: And if I've got this wrong, tell me I have got it wrong, but I think you are saying the Petitioner undertakes to discontinue the writ action if the result of this trial is a buyout order, and that would mean a buyout order on a sum to be determined.

Mr Wingrave: My Lord, yes, because I think both sides accept that if that is my Lord's order, there would have to be directions for valuation of those shares.

Justice Doyle: So you discontinue the writ action and you don't recommence a fresh action? I just need to understand where this is going and how precise this undertaking is.

Mr Wingrave: Yes, my Lord, we won't re-engage the action.

Justice Doyle: Or commence, a fresh action.

Mr Wingrave: Well, my Lord, in reality, if a buyout order is made, Genimous will come to own 100% of PM's shares and will be able to drop it for themselves.

Justice Doyle: Well, that's one of two plaintiffs.

Mr Wingrave: Yes, the Petitioner will—

Justice Doyle: TIC is also a plaintiff.

Mr Wingrave: Yes, it will discontinue that aspect of the writ action--all aspects of the writ action and not recommence it.

Justice Doyle: Not recommence it and not commence afresh?

Mr Wingrave: Not commence afresh.

Justice Doyle: If I've learned anything during my time in this jurisdiction, it is very important to get the precise terms of the undertaking before the court ... just let me digest that. Because it's news to me..."

275. On the last day of the hearing Mr Wingrave handed in the following undertaking on behalf of the Petitioner:

> "START
>
> Technology Investment Consortium LLC (the Petitioner) undertakes to discontinue its claim (asserted on its own behalf and derivatively on behalf of Position Mobile Ltd SEZC) in FSD 164 of 2024 if the Court in its judgment in FSD 79 of 2022 makes an order requiring Genimous Investment (Hong Kong) Co. Limited and Genimous Holding (HK) Limited (the Respondents) to purchase the Petitioner's shares at fair value, with quantum to be determined at a subsequent hearing in FSD 79 of 2022.
>
> The Petitioner further undertakes not to commence fresh proceedings arising out of the same or substantially the same facts against the current defendants in FSD 164 of 2024 or any other persons not currently defendants to the proceeding, if a buyout is ordered on the foregoing described basis.
>
> For the avoidance of doubt, the undertaking shall not apply if the buyout order described previously is successfully appealed, varied or set aside.
>
> END"

276. In respect of item (1) I am not persuaded that the PDs have been excluded from management. They remain as directors and could take action to arrange for meetings of directors to be conducted. They seem to have no real desire to do that, presumably because they could be outvoted.

277. In respect of item (2) I am not persuaded that the accounting processes support winding up on the just and equitable ground.

278. In respect of item (3) the directors appointed by the Petitioner have had access to certain financial information. In respect of the request made in early 2021 (C/425/2) for detailed financial information in order to enable the Petitioner to provide management information to a third-party

competitor of the Company the refusal to give a competitor access to such information was entirely understandable and does not provide a basis for a winding up order.

279. In respect of item (4) there is nothing here that supports winding up on a just and equitable basis. The evidence is insufficient to establish the allegation that the GGDs wrongly obfuscated and wrongly frustrated the Petitioner's attempts to sell its shares. The GGDs were understandably and justifiably unwilling to provide information to a potential third-party purchaser who was a competitor. There is evidence before the court that the Petitioner was, where appropriate and subject to suitable safeguards, provided with information and assistance in respect of the disposal of its shares. This included the entering into of a non-disclosure agreement with a potentially interested party and providing an adequate level of financial information for onward provision to that party (C/466). There was also evidence before the court that a sale to a third party may be difficult to achieve in any event due to the size of the Company's outstanding accounts payable to Spigot and its constant need for marketing spend in order to drive user acquisitions (C/726). Furthermore as the Respondents submit the Amended and Restated Articles provide that any transaction involving the sale of all the Company's shares required the Respondents agreement given that it concerned a sale of the Respondents' majority shareholding.

280. I refer below to items (5) and (6), and also the "termination" of Mr Peterson which is a relevant piece (albeit a small one) of the overall jigsaw.

281. In respect of item (8) I am not persuaded that the alleged largely unparticularised breaches of "various service agreements" amount to a valid basis to make a winding up order. I deal with the amendment to the R & D Agreement separately under item (11).

282. There is nothing in the allegations at item (9). It was a matter for the Respondents as to who they wanted as their "nominee" directors and the appointment of Mr Lash (agreed to by the Respondents) was necessary to satisfy American regulatory requirements.

283. It is necessary for this court to deal in some detail with the remaining items listed above and I do so as follows:

(1) the amendment to the R & D Agreement (item (11) above);

(2) the "termination" of Mr Jackson, Mr D Miller and Mr Peterson (item (6) above);

(3) the lack of independent investigation and a failure to protect the best interests of the Company (item (12) above); and

(4) the threats and the Respondents' scheme and the failure to protect the best interests of the Company (items (5) and (11) above).

The amendment to the R&D Agreement

284. At paragraph 23j ii. of the Amended Petition the Petitioner complains that the GGDs continued "their threats to appropriate the assets of the Company and took steps to misappropriate those assets for the benefit of other Genimous entities and for the wider benefit of the Genimous HK Companies by"

> "ii. causing, permitting or allowing the Company to enter into or purport to enter into an Amended Research and Development Agreement with Spigot, which amended agreement had not been shown to or discussed with the PDs and which purported to permit Spigot to provide services to competitors of the Company, without any corresponding benefit."

285. At paragraph 127 of its opening skeleton argument the Petitioner stated that the Company derived no benefit from the amendments to the R&D Agreement and added that the only beneficiaries were "Spigot and other Genimous entities."

286. The Research & Development Service Agreement "effective as of October 1, 2019" between PM (described as the "Client" in the agreement) and Spigot (described as the "Developer" in the agreement) was signed on 21 October 2019 by Mr Mahaffey as Director of PM and was signed on 28 October 2019 by Mr Stephens as President of Spigot (the "unamended R&D Agreement"). In the recitals it is specified that PM is the owner of certain intellectual property related to and used in its internet advertising business and it wishes to have such intellectual property further developed by Spigot. Under Article 4.1 Spigot agrees that it will take all steps reasonably necessary to hold PM's proprietary information (including software code) in trust and confidence that it will not disclose or use the proprietary information in any manner or for any purpose not expressly set forth

in the agreement and will not disclose any such proprietary information to any third party without first obtaining PM's express written consent on a case-by-case basis provided that Spigot has the right to disclose PM's proprietary information under obligations of confidentiality no less restrictive than the obligations in the agreement to the extent necessary to perform the services defined in Schedule A.

287. Article 4.3 of the unamended R&D Agreement provided:

> "4.3. No Conflict of Interest.
>
> Developer agrees not to accept work or enter into a contract or accept any obligation, inconsistent or incompatible with Developer's obligations under this Agreement or the scope of services to be rendered for the Client."

288. Article 8.1 is a choice of Delaware law as the governing law.

289. The Amended & Restated Research & Development Agreement (the "Amended R&D Agreement") is stated "to be effective as of January 1, 2022" between PM as Client and Spigot as Developer and was signed on 1 February 2022 by Mr Chen as Director of PM and Mr Wong as CEO of Spigot. It added an important sentence to Article 4.3 of the unamended R & D Agreement:

> "Client [PM] acknowledges that this Agreement does not restrict Developer [Spigot] from engaging in competing business activities."

290. It appears that Mr Chen and Spigot felt that Article 4.3 of the unamended R & D Agreement unduly restricted Spigot and an amendment was desirable.

291. The following is an important extract from Mr Wingrave's cross-examination of Mr Chen in respect of the sentence added to Article 4.3 (Day 6/87:14-25, 88-93):

> "Q. Thank you. Can we have a look, please, at the research and development agreement, and that appears at {C/138/1}. I'm not going to ask you to interpret

the document, I'm just going to take you to a particular clause, and that's clause 4.3, {C/138/4}, where the:

"Developer agrees not to accept work or enter into a contract or accept an obligation, inconsistent or incompatible with Developer's obligations under this Agreement or the scope of services to be rendered [to the] Client.

JUSTICE DOYLE: Do you want to define "Developer" and "Client" for the witness.

MR WINGRAVE: I'm sorry, my Lord?

JUSTICE DOYLE: Do you want to define the term "Developer" and "Client" for the witness so he can understand 4.3.

MR WINGRAVE: My Lord, yes. "Developer" for these purposes is Spigot and "Client" is Position Mobile.

JUSTICE DOYLE: And your question (inaudible)?

MR WINGRAVE: That clause came to be altered, didn't it, in the amended version of the agreement? And that document is at {B/53/1}.

JUSTICE DOYLE: Did we get an answer?

MR WINGRAVE: Sorry, I thought I heard one. I apologise –

A. Was that the date January 1 of 2022?

Q. The amended is January 1, 2022. The original was in October 2019.

A. Yes.

Q. Yes. So if we can move to clause 4.3 of this document, which I think will be on {B/53/4}, you can see there is a sentence added in the amendment, isn't there, at the end of clause 4.3?

A. Yes.

Q. Why was it added?

INTERPRETER: So the witness is asking the interpreter to interpret the last sentence.

A. Because this was actually the original criteria, except we just re-emphasised here.

MR WINGRAVE: So you say you added language to confirm the original position?

A. Yes.

Q. Why?

A. Because from the very beginning, there was no requirement for exclusivity.

Q. You understand that taking on business for a competitor might be a conflict on Spigot's part; yes?

A. There -- there's no conflict for Spigot, whether servicing PM or any other clients, they are just simply serving clients.

Q. What do you say precipitated the insertion of this language? What was the flashpoint?

A. Because we already had the -- the principle or the basis or the standards in place. Here, Spigot would just like to re-emphasise their requirement

Q. So Spigot wanted to re-emphasise the requirement?

A. Yes.

Q. Did you consult the other directors of the board before accepting that proposal? I mean -- I apologise – did you consult the directors of Position Mobile before you submitted to that change?

A. No.

Q. You are a director of Spigot, as well as a director of Position Mobile, correct?

A. Yes.

Q. And you were at the date of this amended agreement when it was signed, weren't you?

JUSTICE DOYLE: What is the date of this agreement?

MR WINGRAVE: I believe it is signed on February 1st, effective from January 1st.

A. January 1st of 2022.

JUSTICE DOYLE: You mentioned a February date. Where do we get that from? Page

10?

MR WINGRAVE: It's at the bottom, my Lord. Yes, {B/53/10}.

JUSTICE DOYLE: So is your question: were you, on 1 January 2022 and on 1 February 2022, a director of Spigot and also a director of Position Mobile?

A. Me? Yes.

JUSTICE DOYLE: Thank you.

MR WINGRAVE: There's no evidence that you consulted any of the other directors of Position Mobile about this, is there?

A. Yes, I believe this was a great outcome for Position Mobile because, at the time, Position Mobile was facing great risks. So that's why for Spigot, if they take over all the debt and then Position Mobile would lose its source of funding, which could have problems. So that's why I agree with such a standard amendment, which is, I think -- is conducive to Position Mobile. And I also consider from the Position Mobile's perspective and, in the end, it has also proven this have given Position Mobile more income because, at the time, they were like -- debt was like in the tens of millions.

Q. Well, you say that there was a problem with debt. Can you point to any demand letter from Spigot pre-dating the amendment?

A. There's no such demand letter because they have also put forward this, and I thought this amendment to this article does not have much impact. In addition, I believe my decision have brought a positive benefits, which is beneficial.

Q. Did you secure on behalf of the company, Position Mobile, advice as to the effect of this change at Delaware law?

INTERPRETER: I'm sorry, I don't understand your question.

MR WINGRAVE: I think it is on the penultimate page of the document, there is a governing law provision in favour of Delaware. One further up, please.

JUSTICE DOYLE: Let me try, if I may. The point counsel was putting to the witness, he was asking whether Position Mobile -- whether the witness caused Position Mobile to take legal advice on Delaware law as to the effect of this change, the addition of that one line into the clause.

INTERPRETER: Okay, thank you, my Lord.

A. No.

JUSTICE DOYLE: Thank you.

MR WINGRAVE: So you signed this amended agreement without checking whether any of the other directors of Position Mobile would have a difficulty with it? Correct?

A. I did not. However, I believe it was within my power. I was doing something beneficial to PM and so I think also my decision was correct, and the outcome has also proven this.

Q. Two more questions then, my Lord, if I say -- to finish off this line. I'm grateful. Given that you were a Spigot director at the same time that you signed this document on behalf of Position Mobile, you were in a conflicted position, weren't you?

A. I made this decision from the perspective of Position Mobile, and this existed already. I was just making some amendment. There is no major adjustment.

Q. It was an amendment proposed by Spigot, and you should have called a board meeting of Position Mobile, shouldn't you, to have discussed it?

A. I believe I have the power to make decision on such a small matters and then the outcome has also proven my decision was correct."

292. Mr Wingrave in his written closing submissions deals with this Article 4.3 amendment point from paragraphs 299-305 and I note all that is written there and all that Mr Wingrave put before the court in his oral submissions on this important point. Mr Wingrave in effect submitted that Mr Chen was in a plainly conflicted position and did not consult the other directors of PM or take advice on Delaware law and this evidences lack of probity.

293. Mr Valentin in effect says that there is nothing to see here and no lack of probity. He deals with the point at paragraph 213 of his written closing argument as follows:

> "213 The Amended Research and Development Agreement: Reliance is placed on the amendment made to this agreement. This allegation is comprehensively addressed at Chen 1, paragraphs 152- 155 [A/13/41]; see also Mr. Chen's evidence under cross-examination at Day 6, p.89, line 2 – p.93 line 4, including where Mr. Chen confirmed that there was no requirement for exclusivity for Spigot as a third party service provider[206] and that executing the Amended Research and Development Agreement was within Mr. Chen's power to do as a director of Position Mobile. [207]
>
> [206] Day 6, p.89, line 6-7.
>
> [207] Day 6, p.92, line 7-25 – p.93, line 4."

294. Mr Chen at paragraphs 152-155 states:

> "The Amended and Restated Spigot Services Agreements dated 1 January 2022
>
> 152 As at 1 January 2022, the Company was indebted to Spigot for the amount of around US$22 million, of which around US$11 million was overdue. Rather than exercise its contractual rights to enforce the debt and/or terminate the Spigot Services Agreements by providing 30 days' written notice, Spigot required the Spigot Services Agreements to be amended and restated primarily to change the interest rate payable on the overdue amount from LIBOR to a fixed 5.45% per annum commencing from 1 January 2022. The context to this was that from 1 January 2022, the use of US Dollar LIBOR in contracts was restricted and would be phased out over time. Spigot provided an analysis on why a 5.45% per annum interest rate was deemed to be an appropriate market rate of interest, which was supported by a third-party transfer pricing analysis.

153 The interest paid by the Company to Spigot was US$478,663 in 2022 and US$111,701 in 2023. As the Company became cash-flow solvent for the first time in May 2023 no further interest accrued after that date.

154 It is not accepted that the intent and effect of the Amended and Restated Spigot Services Agreements was in furtherance of a plan by the Respondents to misappropriate the Company's intellectual property. Whilst clause 4.3 included an additional statement that the Company acknowledges that the agreement does not restrict Spigot from engaging in competing business activity, that simply recorded the position which had applied from the outset. There was no exclusivity of services and Spigot acted as a contractor on terms which allowed it to terminate the agreement on 30 days' notice. In any event, Spigot's obligations to the Company in relation to the Company's proprietary information arises under clause 4.1 of the Spigot R&D Agreement and that clause remains intact and was not amended under the Amended and Restated Spigot R&D Agreement.

155 The Company's options were to accept the amended and restated terms or to risk having the service agreements terminated and being required to repay the substantial debt it owed to Spigot. In circumstances where the Company was heavily indebted to Spigot, could not pay that debt and the Company's ability to continue operating was dependent upon Spigot forbearing its right to enforce the debt and continue providing services, the Company was receiving a significant corresponding benefit for agreeing to the amendment and restatement of the Spigot Services Agreements and the Company did not suffer any loss as a result of the amended and restated agreements."

295. Mr Valentin's oral submissions on this point appear on the transcript of Day 10/169:12, 186:14. Mr Valentin refers to B/21 resolutions of the board of directors of the Company signed on various dates in October 2019 by Mr Lu, Mr He, Mr Yu, Mr Stephens and Mr Mahaffey authorising the entering into of amongst others the R&D Agreement "with such changes therein and additions thereto as any Director or any officer of the Company (each an "Authorized Officer") executing the same may, in the Authorized Officer's discretion, deem necessary or appropriate …". There is also a resolution authorising each of the Authorized Officers individually to "approve, execute and deliver from time to time as appropriate, the documents referred to herein or any amendment thereto, with

such further changes, revisions, or modifications thereto as the officers executing the same shall, as evidenced by their exclusion thereof, deem appropriate …". The unamended R&D Agreement was dated 19 October 2019 and the Article 4.3 amendment was in February 2022. Mr Valentin submitted that the resolutions gave Mr Chen authority to execute the amendment to Article 4.3. "The second question is: was it appropriate to do that without consulting the other members of the board … That obviously engages the question of what were the amendments and how significant were they. And what was the context in which the amendments were being made. Now, the first version of the agreement doesn't contain an exclusivity clause. It provides for Spigot to provide services as a contractor to the company, and the conflict - - the no-conflict of interest provision at clause 4.3 isn't an exclusivity clause. Mr Chen, in his written statement at paragraph 84, says at the time of the original agreement being entered into, the parties were aware that Spigot already provided research and development services of Eightpoint …"

296. Mr Valentin refers to an agreement in 2017 (C/588/1) and says "the IAPA, pursuant to which Position Mobile acquired the mobile assets of Eightpoint, expressly provides that nothing in the agreement shall prevent Eightpoint from acquiring additional users or related assets. There is no provision in that agreement which restrains Eightpoint from competing with Position Mobile for a specific period or at all" (Day 10/175:1-8).

297. Mr Valentin submitted that to consider the lack of probity point in this context the court "has to consider, among other things, what is said to be the impact of this change … What is the impact of this last sentence being added? And in my submission, it's simply an acknowledgement that the agreement does not restrict the developer from engaging in competing business activity. In other words, it does nothing. It's simply confirming something that is already apparent from the remainder of the agreement. Now, there may be a question: if it does nothing, why has it been added? And the answer to that is it's not clear on the evidence why it was added." (Day 10/177:20-25; 178:1-7). This submission in respect of the impact of the improper conduct had echoes of the comments of Crow JA in *Financial Technology* at [58c.] where the Jersey appellate judge stressed that the answer to whether there has a been a justifiable loss of confidence in management because of prejudicial conduct "will always be context specific and it will almost invariably depend on a combination of factors" such as the cumulative effect of the misconduct "together with the financial impact on the company or the shareholders of that" misconduct "and the resultant loss of confidence in management."

298. Mr Valentin referred the court to an email (C/444/1) dated 31 January 2022 from Mr Newell stated to be "Senior Director & Counsel, Legal & Tax" at Spigot:

> "Attached are the draft amended agreements between Spigot and Position Mobile incorporating the revised interest rate of 5.45% which have Pete signing for Spigot and Tony signing for Position Mobile (I also did a general review of the agreements and made a couple minor tweaks, e.g., clarifying that Spigot is not prohibited from competing with Position Mobile). If Tony and Mr He are comfortable proceeding, I can have the agreements sent out in DocuSign for signature by Thursday so that the Accounting team has enough time to book the entries for January close.
>
> Let me know of any questions/clarifications."

299. It is interesting to note that a Spigot lawyer, Mr Newell, felt that Article 4.3 of the R&D Agreement required amendment to "clarify" that "Spigot is not prohibited from competing with Position Mobile". It is also interesting to note that Mr Newell seems focused on whether Mr Chen and Mr He (Genimous appointed directors of PM) are "comfortable proceeding" but he makes no reference to the TIC appointed directors of PM (Mr Stephens and Mr Mahaffey) being "comfortable proceeding" and they are not copied into the email or forwarded the draft amendments for their consideration and confirmation that they are "comfortable proceeding".

300. It is also interesting to note Mr Wong's response on 1 February 2022 "Looks fine Ben. Am copying Tony here. I'll also call him to give more context." Mr Wong does not copy Mr Stephens or Mr Mahaffey. He does copy Mr Yu, Bart Bullock of Spigot, Cody Miller of Eightpoint and Mr Chen of Genimous. Mr Valentin says that Cody Miller was at that time Treasurer of PM. Mr Valentin uses this in effect to undermine "the idea that it's being hidden from Position Mobile" adding "So if we look at that email, you can see that it is – certainly nothing underhand going on here, in the sense that the Treasurer of Position Mobile is copied in, who is appointed by the board, and acts in that role, reporting to the board of Position Mobile. Mr Chen and Mr He, Mr He is a director at this stage, I think I'm right in saying, of Position Mobile as well. So it isn't Mr Chen doing it behind the scenes. Clearly legal counsel is involved …".

301. The main issue is not whether the amendment to the R&D Agreement was necessary. The main issue is whether the manner in which it was arrived at evidences a lack of probity. I think it does.

Mr Chen was in a plainly conflicted position. He was a director of PM, Spigot and Eightpoint. I think it is also evidence of the fact that the Respondents were taking action to assist them in furtherance of their improper scheme to run down PM and to ensure that future business went to PM's competitors such as EET. Eightpoint holds 100% of the issued shares of EET and the First Respondent holds 100% of the issued shares of Eightpoint. I shall come to the improper scheme later in this judgment.

302. Mr Wingrave submitted that the amendment to the R & D Agreement was "the linchpin of the plan to compete" and in effect improperly divert business from PM to EET. He added that if the original agreement did not cause a problem in respect of competition why was it necessary to change it and to "do it behind closed doors?" (Day 10/199:19-20) and he rightly emphasised "when it was done, it was done in conflict of interest which adds to the lack of probity" (Day 10/200:12-13).

303. On the evidence before the court I am unable to accept the Respondents' submission that there is "nothing underhand going on here" in respect of the amendment to the R&D Agreement. True it is that Cody Miller was appointed Treasurer of PM by Board resolution dated 8 October 2021 and served in that capacity from 8 October 2021 to 3 June 2025. However, looking at him through the eyes of TIC he was in the Respondents' team, on their side and part of the problem. He was not there to protect and assist TIC. So rather than a point in favour of the Respondents, it is a point against them. Furthermore, the emails were not copied to Mr Stephens and Mr Mahaffey, the other directors of PM and nor were they consulted. No one copied them in. They were excluded. For example, Mr Chen did not respond by saying in view of the amendments being made in favour of Spigot (the increase in the interest rate and the "clarification" of the competition point) "I am uncomfortable in proceeding this way. I am concerned over my position and possible conflict and I think we should notify Mr Stephens and Mr Mahaffey and seek their views". Mr Chen as a director of Spigot and PM, at the relevant time, just went ahead and signed it on behalf of PM. Mr Chen was plainly in a position of conflict. He had fiduciary duties to both Spigot and PM. In proceeding without consultation with Mr Stephens and Mr Mahaffey (other directors of PM) he was acting in an "underhand" way. This is an example of Mr Chen displaying a lack of probity. I found the explanations he offered for not consulting with his fellow directors of PM unsatisfactory and unacceptable. Mr Chen did not appear to appreciate his seriously conflicted position.

304. It appears that the Amended R&D Agreement was first brought to the attention of the Petitioner by way of service of Mr Chen's Second Affidavit sworn on 29 August 2023 in response to the

Petitioner's second attempt to have joint provisional liquidators appointed. At paragraph 7 (f) Mr Chen refers to "a research and development agreement entered into between Spigot and the Company on 1 October 2019 and amended 1 January 2022 (the "R&D Agreement")". Footnote 3 refers to Tabs 1 and 4 of Exhibit "TC-2". Mr Chen does not explain that the R&D Agreement was amended without consultation with Mr Stephens and Mr Mahaffey. Mr Yu in his affidavit sworn on 14 April 2022 at paragraph 17 refers to Service Agreements dated 1 October 2019 and exhibits the R&D Agreement effective as of October 1, 2019 (without the amendment to Article 4.3) but makes no reference to the Amended R&D Agreement signed on 1 February 2022. Mr Yu at paragraph 17 says "Mr Stephens signed the Service Agreements on behalf of Spigot in his capacity as President and Mr Cody Mahaffey, another member of the Petitioner, signed on behalf of the Company in his capacity as a director of the Company."

305. The "unilateral" amendment of the R&D Agreement without consultation with Mr Stephens and Mr Mahaffey was an example of the Respondents through Mr Chen in effect treating PM as a 100% owned subsidiary and riding rough shod over the interests of TIC who held 49% of the shares in PM. It involved lack of probity. There are other examples and I refer to some of them below.

306. The Respondents submitted that the contractual arrangements between the parties did not include any provision which restrained them or their affiliated entities from competing with PM. They refer to a question from Mr Jackson to Mr Stephens (C/431/3) 17 January 2022 3.44 PM and 3.58 PM, not 3:07 PM as specified at footnote 31 of the Respondents written closing argument):

> "Is there anything in the operating agreement around a non-compete so Genimous can't boot up new mobile products in other business units?"

to which Mr Stephens, who is not a lawyer, responds:

> "I don't believe so."

307. That however misses the *Meyer* point. The amendment to the R&D Agreement without consultation with the directors appointed by the Petitioner was underhand and lacked probity in a plainly conflicted situation. Whether necessary or not, it was all part of the improper scheme of the Respondents to try and get all their ducks in a row and to progress their plan to divert business away from PM and towards EET in clear breach of *Meyer* principles and crossing the threshold for a winding up order. The R&D amendment incident was not an isolated incident. It was indicative

of the way in which the Respondents wished PM to be run. They wanted it run as in effect their wholly owned subsidiary without proper regard for the interests of the Petitioner, a minority 49% shareholder.

The "termination" of Mr Jackson and Mr D Miller

308. The Petitioner at paragraph 7h of its Amended Petition refers to the "termination" of Mr Jackson and Mr D Miller, both members of the Petitioner, from their executive positions in Spigot and says that such was in retaliation for the Petitioner's refusal to accept the offer to purchase the Petitioner's shares in PM and to reduce the Petitioner's visibility into the actions of Spigot and other subsidiaries of the Respondents. The Petitioner adds at paragraph 23.i. of its Amended Petition that such terminations damaged the revenue streams of PM. At paragraph 60 of its written closing submissions the Petitioner says in effect that the "termination" was "a product of the Respondents' scheme to oust the Petitioner from Position Mobile."

309. The Petitioner at paragraphs 33 to 37 of its opening skeleton argument refers to its rejection of the 2021 Offer and the subsequent termination of Mr Jackson and Mr D Miller. The Petitioner refers to Mr Wong's threats.

310. At paragraph 18.25 of their written closing argument the Respondents stated that in January 2022 Spigot terminated the at-will employment of Mr Jackson and Mr D Miller (as was Spigot's right). They add that it was evident from messages at the time (C/430/2) that they intended to resign in any event.

311. I do not accept Mr Chen's evidence that the timing of the "termination" of Mr Jackson and Mr D Miller from their positions at Spigot on 19 January 2022 and the signature of the Amended R&D Agreement on 1 February 2022 was purely coincidental. The following is an extract from Mr Wingrave's cross-examination of Mr Chen on the point from Day 6/94:3-96:3:

> "Q. I would like to ask you a question concerning the date on which it was signed, 1 February 2022. We see that from the final page of B/53, {B/53/10}.
>
> A. Okay.

Q. You are aware, aren't you, that Nicholas Jackson and Daniel Miller were terminated from their positions at Spigot on 19 January 2022?

A. I'm aware.

Q. Yes. And then, what, 14 days later, maybe not even that long after, there's an amended research and development agreement that allows Spigot to compete with Position Mobile. That's correct, isn't it?

A. I completely disagree your statement. The – the termination of Miller and Jackson was decided by the management team of Spigot. It has direct correlation with this amended agreement.

Q. I'm sorry, I am not sure I understood the answer. It may be that I missed it. Would you mind repeating it, please.

A. My answer is that these two issues are not related at all as Miller and Jackson are employees of Spigot. Their termination was the decision made by the management team of Spigot. If you want to ask this question, maybe you should ask the HR department of Spigot. Please also allow me to add another piece of information. I have also had meetings with Miller and Jackson. However, since Peter Wong came on board, two of them had become very confrontational.

JUSTICE DOYLE: Can I just clear something up. The transcript shows that the interpreted response is that, "The termination of Miller and Jackson was decided by the management team of Spigot. It has direct correlation with this amended agreement."

INTERPRETER: It does not.

JUSTICE DOYLE: That's what I heard you say, but have you missed a "not" out?

INTERPRETER: It does not.

JUSTICE DOYLE: It does not have a direct correlation?

INTERPRETER: Yes, your Honour.

JUSTICE DOYLE: Because you then add something else which seemed to indicate that that wasn't the correct version of it, thank you.

MR WINGRAVE: Thank you, my Lord. You told us it was Spigot's idea to amend this agreement, didn't you?

A. Yes.

Q. I suggest that they wanted to amend it because Miller and Jackson were now out of the way and they could start competing with Position Mobile?

A. I think this is just your assumption. The truth is completely different."

312. I find that the "termination" of Mr Jackson and Mr D Miller and the underhand amending of the R&D Agreement were indeed correlated and not purely coincidental. They all formed part of the Respondents' improper scheme which I shall come to later in this judgment.

The "termination" of Mr Peterson

313. The "termination" of Mr Peterson is evidence that the Respondents, through Ms Strand, were treating PM as a wholly-owned subsidiary. It is also evidence of the Respondents' high-handed and cavalier treatment of TIC and its appointed directors. This was not just lack of consultation, it also evidenced the improper way in which the Respondents felt they could deal with TIC and its nominated directors. The failure to consult is not excused by the subsequent ratification. I do not lose sight of the fact that the board minutes of PM in respect of a meeting held on 18 March 2021 at item 7 states that the "resignation" of Chase Peterson as President and Secretary of PM was ratified as were indeed the appointments of Ryan Dinyer as Treasurer and William Tracy as Secretary.

314. There was however a stark failure to consult with Mr Stephens and Mr Mahaffey in respect of Mr Peterson's position at the relevant time.

315. In cross-examination Mr Wingrave put various emails to Mr Chen including an illuminating email dated 5 February 2021 from Ms Strand at Spigot to Mr Yu cc'd to Jenny Bartolini at Spigot. The email was headed "Position Mobile 2021 Budget and Strategic Plan Update". Ms Strand says that she spoke with Mr Peterson, who then had the title of "President" of PM "about producing a draft before sending to the board so we can vet it out. I told him I just wanted to have eyes on it before

it sent to Genimous so that we verify strategy and accuracy. He indicated that he would be unable to do so without producing it to the entire board". Ms Strand expresses frustration and adds:

> "I said this kind of interaction is making it very difficult to work with him. I said it was hard to tell who he was working for, he said he was working for the PM board, so I indicated he should have no problem sending it for peer review when genimous (sic) has empowered me to guide the SPE/PM companies …"

Ms Strand finished her email with the following:

> "At this point Scott, I am not sure where to go from here. It is very clear that he is struggling with the position and understanding his role and failing to be a team player to benefit the business as a whole. I think we should sleep on it this weekend, but we should discuss next week if it makes sense to keep chase in his role and what are options are going forward."

316. Ms Strand says she was appointed by "Genimous" to "guide" PM. On the evidence placed before the court, it was more likely to "control" PM, in effect treat it as a wholly subsidiary of the Respondents, and make sure it was operated for the benefit of the Respondents. Ms Strand had no position with PM, as Mr Chen acknowledged.

317. Mr Chen accepted that Ms Strand had no role within PM and that Mr Peterson was the President of PM at the time.

318. Mr Chen was asked whether "an executive at Spigot has authority to tell the president of Position Mobile what to do with Position Mobile's financial information". Mr Chen responded (Day 6/99:24-25/100:5:1) "I think, as the most important partner, and from her perspective, she could put forward such proposal with people from Position Mobile."

319. In another illuminating communication Mr Yu responded to the email on Monday 8 February 2021:

> "If he cannot work with the team and executives, then we cannot keep him in the team as well. I would suggest Jenny and Ben check his contract again carefully. To the extent we have the right to terminate it without liabilities (other than normal severance), and we have a replacement for him, we should proceed. I love Chase and appreciate his contribution to the company, but we should act in the best interests of the institution."

320. The message was clear if you cannot work in the best interests of "the institution" which in the absence of any evidence to the contrary I read as "Genimous" the Respondents in this case, then you will be terminated. This in itself may not be surprising in the corporate world but it is nevertheless a clear insight into the thought processes of Mr Yu who was not called to give evidence.

321. The Respondents in their written closing argument at paragraph 107.3 says that Mr Yu "the individual perhaps most centrally implicated in the allegations contained in the Petition, is no longer employed by the Genimous group and was therefore under no compulsion to give evidence." At paragraph 107.4 the Respondents add that there is no property in a witness and the Petitioner could have called Mr Yu.

322. Mr Chen in his witness statement at paragraph 6 says that a number of individuals employed within the Genimous group (including Mr Yu and Mr Wong whose names appear in the petition) "who may have been called to give evidence on behalf of the Respondents have left their employment for reasons unrelated to this litigation, and are no longer available as potential witnesses." At paragraph 7 Mr Chen says that prior to their respective departures he discussed matters concerning the Company with, amongst others, Mr Yu and Mr Wong both before and after the filing of the petition. At paragraph 8 he adds that he has "agreed to give evidence on behalf of the Respondents given my positions as director of both the Company and Genimous Investment."

323. Mr Chen, in cross-examination, was asked if it was "the Respondents' choice not to explore whether these people could be brought as witnesses" (Day 6/7:8-10). Mr Chen responded "I believe it's their own decision whether they are willing to come as witnesses or not. So I do not explore whether they are willing to testify or not" (Day 6/7:11-13). Mr Chen accepted that "I did not reach out to them. Therefore I'm unsure whether they are willing to testify or not" (Day 6/6:25). Mr Chen was asked whether there was any reason "Mr Lu couldn't be here to give evidence" (Day 6/10:25; 11:1). Mr Chen's somewhat surprising response, was:

> "Because he's a very busy man, and he has another listed company, called GEC, so he has a lot of business he needs to attend to, so I think there's a conflict of schedule. Then, secondly, as he is no longer a director of the company, so maybe that's why he thought he didn't need to be here." (Day 6/11:2-7)

324. Mr Chen was asked whether he was "aware of any reason why Ben Newell, John Lash or Cody Miller could not give evidence" and Mr Chen responded "I do not know of any reasons" (Day 6/17:5-8).

325. Mr Chen was asked whether Mr Yu was suggesting that Mr Peterson should be terminated and he responded (Day 6/100:11-12):

> "Yes. Yes, because Peterson's performance no longer allowed the co-operation to be conducted smoothly, which would also damage Position Mobile itself. Karetha has also wrote to me, saying that in addition to Peterson role at Position Mobile, he has also spread some rumours judgmental to the team."

326. I have to say on the face of the email Mr Peterson's position that he was working for the PM board and in effect saw no good reason why he should share the PM information with Genimous before sharing it with the PM board appears a perfectly proper position for him to adopt in his capacity as President of PM. This legitimate position however clearly irritated those engaged to protect the best interests of the Respondents.

327. By email dated 25 February 2021 Ms Strand communicated to Mr Chen and Mr Lu as follows:

> "I wanted to let you know that today we terminated Chase Petersons (sic) employment as President of Position Mobile. There have been considerable issues with Chase in the previous months including sharing of confidential information to Jr staff and non-employees, demoralizing staff with toxic work environment and questioning Genimous and the parents (sic) intention. Additionally his overall performance as President has been sub-par."

328. Ms Strand indicates that "Chase's role" will not be replaced but Ryan Dinyer and Bill Tracy will assist. Ms Strand ends her email with the following words:

> "While we didn't want to take such an extreme action, we felt strongly that it was necessary for the business and for the SPE and PM teams working in that office."

329. Ms Strand does not say that there was consultation with Mr Stephens and Mr Mahaffey before "we terminated Chase Petersons (sic) employment as President of Position Mobile." "We" is not

defined in the email. It appears to be a reference to Ms Strand or to Spigot or Genimous but none of them had authority to "terminate" a PM employee. It seems clear that Mr Peterson was not towing the Genimous party line. His loyalty was appropriately to the PM Board. Genimous could not tolerate that, so he was terminated. This incident reflects badly upon Mr Yu and the Respondents. They should have consulted with TIC and with Mr Stephens and Mr Mahaffey. They did not. That was not part of their game plan.

330. Mr Chen accepted that Ms Strand did not have authority to terminate the President of PM (Day 6/101:8-12). Mr Chen said that PM "relied heavily, completely, on Spigot to fulfill its implementation. Therefore from the very beginning, it lacked independence". The following revealing exchange in cross-examination took place (Day 6/102:9, 103:1-25, 104:1):

> "Q. With respect, Position Mobile is a company with an independent minority shareholding, isn't it? It's not a Genimous wholly-owned sub?
>
> A. Factually speaking, you can see that Position Mobile, it's simply a shell company.
>
> Q. Do I take that to mean that the Respondents regard PM as a shell that they can do as they wish with?
>
> A. They cannot do as they wish because we have a board of directors. We have to follow the process of the board of directors. However, when it comes to the operation, it heavily relies on Spigot to do everything, including products operation and promotion.
>
> Q. I think you might be trying to agree with me. Position Mobile is under the command of its board, isn't it, not under the command of Spigot?
>
> A. I agree.
>
> Q. Yet we have the president of Spigot terminating the president of Position Mobile. That should have been done by the board if there needed to be a termination, shouldn't it?
>
> A. This email cannot illustrate that -- the termination of the president. It simply shared with us that he was not suitable for this position.

> Q. With respect, that wasn't my question. My question is -- what I'm putting to you - that where one has an independent company, another company's executives shouldn't be doing the terminations, should they?
>
> A. Correct.
>
> Q. And the fact that that is what happened demonstrates, doesn't it, that Spigot was attempting to exert control over Position Mobile?
>
> A. You cannot simply put it like that, because we have a board of directors. It is for the board of directors to decide the direction of the company.
>
> Q. I agree. I think you are agreeing with me, that's not what happened here, is it?
>
> A. As I have just explained, the operations of both companies are closely tied and, therefore, the president of Spigot knew very well the issues that PM was facing. Therefore, the outcome that she has put forward was in line with the position of the board. And Chase Peterson was originally from Spigot. Quite a few executive all came from Spigot."

331. You can see Mr Chen's view that PM was "simply a shell company" but "we have to follow the process of the board of directors". Mr Chen agrees that the PM board is "not under the command of Spigot". It was put to Mr Chen that the termination of Mr Peterson, if there needed to be a termination, should have been "done by the board". Mr Chen's initial response was unsatisfactory. Mr Chen then added "It is for the board of directors to decide the direction of the company." But Mr Chen and Mr Lu on behalf of the Respondents were acting behind the back of the PM board of directors and were again not involving Mr Stephens and Mr Mahaffey in any decision as to what action if any to take in respect of Mr Peterson in his role as President of PM. That was underhand conduct. It evidences a lack of probity on the part of Mr Chen, Mr Lu and the Respondents. They were wrongly treating PM as a wholly owned subsidiary of the Respondents. It was not. TIC held 49% of its shares and their representatives on the board should have been consulted. Mr Chen says that "the outcome that she [Ms Strand] has put forward was in line with the position of the board." It is difficult to see how Mr Chen could have reasonably come to that conclusion. The issue had not been referred to the board. Mr Stephens and Mr Mahaffey had not been consulted. There was no board resolution, prior to Mr Peterson's termination, confirming the position of the PM board

in respect of Mr Peterson. It is nothing to the point that Mr Stephens and Mr Mahaffey could have been outvoted. They should have been consulted and their voices should have been heard.

332. The Respondents say that there were good reasons for the removal of Mr Peterson (and I have considered the relevant evidence and emails including the email of 17 February 2021 at (C/784) but that misses the point. The Petitioner should have been consulted prior to the "termination" of Mr Peterson as President of PM and it was not. That is evidence of lack of probity, lack of decency and lack of fairness. The Respondents arranged the removal of Mr Peterson in an underhand manner without reference to the Petitioner. The Respondents also say that the board resolution recording his "resignation" (B/33/1) was in due course signed unanimously and ratified unanimously at the board meeting on 18 March 2021 (B/14/3) but that was all after the event. It is the lack of consultation and the initial underhand way in which the Respondents disposed of Mr Peterson without reference to the Petitioner which is of relevance in putting together the jigsaw on the lack of probity point in the context of the just and equitable ground for a winding up order.

333. In their written closing argument the Respondents at paragraph 190.3 say that it is evident, from an email (C/733) sent by Mr Strand on 25 February 2021 to Mr Chen and Mr Lu informing them of the decisions to terminate Mr Peterson's employment as President of PM, that Ms Strand had consulted with Mr D Miller and Mr Jackson and that collectively they had come up with a plan for coverage and that "TIC members were consulted at the time". Ms Strand did not give evidence and the evidence of Mr D Miller and Mr Jackson was not to the clear effect that they and the Petitioner had been properly consulted in respect of the termination of Mr Peterson's employment as President of PM and agreed with it at the relevant time. I find, on the evidence, that Ms Strand on behalf of the Respondents, without any proper consultation with the Petitioner at the relevant time arranged for the termination of Mr Peterson as President of PM, as that was perceived as suiting the best interests of the Respondents.

334. The Respondents submitted that the turnover in various executives and employees at PM, Spigot and Eightpoint was not supportive of any grounds relied upon by the Petitioner. They say Mr Peterson resigned as PM's President for reasons that were documented (C/784) and they add that Mr Stephens and Ms Mahaffey endorsed his departure at Board level (C/298). They say that Mr Jackson and Mr D Miller were terminated as Spigot employees, in accordance with their employment contracts which were terminable at will and they intended to resign in any event. Again, these submissions miss the real point. The manner of the termination of Mr Peterson

supports the reality that the Respondents were wrongly treating PM as a wholly owned subsidiary and the termination of Mr Jackson and Mr D Miller supports the existence of the threats and the lack of probity, decency and fairness in the Respondents' dealings with PM and the Petitioner, and the existence of the Respondents' improper scheme, as does the underhand amendment to the R & D Agreement.

Lack of independent investigation and a failure to protect the best interests of the Company

335. On behalf of the Petitioner it was submitted that the intellectual property ("IP") misappropriation allegations were not independently investigated and that amounts to a lack of probity on behalf of the Respondents and a failure to protect the best interests of the Company. On behalf of the Respondents it was submitted that the IP misappropriation allegations were independently investigated by Mr Ferrara. I do not accept that the production of an expert report from Mr Ferrara was sufficient to amount to a robust independent investigation into the serious allegations of IP misappropriation. Moreover, it was also inappropriate to in effect permit Spigot to mark its own homework, albeit a report was also commissioned from Mr Ferrara. Some evidence in respect of the IP misappropriation allegations was put to Mr Chen.

336. Mr Wingrave (Day 7/17:2) put to Mr Chen a document (C/528/1) dated 12 November 2022 said to be a record of communications between Liviu Jianu, a developer at Spigot. Mr Chen said "I know of Mr Marshall but not the other person" but he accepts that the other person has a Spigot email address. Mr Marshall attaches "2022 11 10 Apps Comparison Overview pdf (3MB) and says "this is what we got from TIC" "take a look at this and let me know if you think there is a way they can get all this information without having access to our source code, can you get all this information from a simple decompiling application? … we definitely need to approach this differently as a team, this strategy & deployment was sloppy and not executed correctly. We really need our own code, with no overlaps, so that we cannot accused of stealing code …". Liviu Jianu responds: "Yes. It's valid what they sent there. They touched on all the things they could – App Packages Backend Privacy Policy".

337. Mr Chen said that Spigot did have its own code (Day 7/20:5). Mr Chen accepted that TIC was not involved in the investigation into Spigot's use of codes "For this investigation, if I recall, there was

Spigot who took the initiative and then gave us a feedback, and TIC was not involved" (Day 7/21:11:13). In effect, Spigot marking its own homework and no independent investigation although Mr Ferrara was engaged to consider Dr Malek's opinions. Mr Chen was reminded that at the relevant time he was a director of Spigot, Eightpoint, EET and PM and Mr Wingrave said (Day 7/22:13-16):

> "… what I'm suggesting is that you put the interests of Spigot and Eightpoint above the interests of Position Mobile when you refused an independent investigation."

338. Mr Chen responded (Day 7/22:17-21):

> "I'm completely against the statement you have just made. I would consider from the perspective of the Position Mobile, and all the work I have done later on was also take consideration of Position Mobile. Otherwise, the Company would not be this – beneficial."

339. In respect of July 2023 and another round of alleged IP misappropriation it was put to Mr Chen (Day 7/23 and 24) that "the directors of PM are not doing anything to investigate it independently?" Mr Chen responds "I think we did conduct investigation." It was put to Mr Chen "… there was no independence about that investigation. Again it was Genimous and Spigot investigating Spigot". Mr Chen's rather unsatisfactory response was:

> "As I have said, the objective of Ryan Stephens at the time was to make his own assumption and, however, we have done relevant investigation, and the findings did not have much damage to Position Mobile. I think that's the most important thing. The key is to solve the problem as soon as possible but not to waste a lot of time. As I have pointed out, the final finding realised on the review of the Apple. Which should be final."

340. For reasons previously stated, I make no findings in respect of the allegations of misappropriation of IP. What I do say however is that material evidence in respect of alleged IP violations was put to the PM board but the directors the Respondents had placed on the PM board failed to properly and independently investigate such allegations. It appears that they failed to do that because it involved Spigot. If the alleged culprit had been an outside company there can be no doubt that there would have been a thorough investigation. The lack of an independent investigation into the allegations of IP misappropriations are further examples of lack of probity on behalf of the Respondents and the directors they had appointed to the PM board.

341. Although not raised in the Amended Petition in the clearest of terms I think the lack of independent investigation ground comes within paragraph 7 p of the Amended Petition namely "The GGDs have failed to act against the above-mentioned misappropriation or to protect the best interests of the Company in any or any adequate manner" and paragraph 23 j iv the GGDs "refusing and failing to take steps to hold Spigot and/or EET and/or Eightpoint and/or ACS [Advanced Commerce Solutions, Inc, a wholly owned subsidiary of Spigot] accountable for the misappropriation and use of the Company's intellectual property, despite the provision of independent expert evidence to support the Petitioner's allegations, allowing these entities to profit from the misuse while harming the Company's commercial position through unfair or improper competition" and arguably paragraph 23 j vii "causing or permitting the business of the Company to suffer in favour of other Genimous HK Companies-owned entities and taking no action to further the commercial best interests of the Company."

342. I should add that even if this lack of independent investigation ground was not available to the Petitioner on the pleadings or on the evidence, the threshold for a winding up order would still have been crossed on the Petitioner's other grounds which have been upheld in this judgment.

The threats and the Respondents' improper scheme and the failure to protect the best interests of the Company

343. In the Amended Petition the Petitioner at section C paragraph 7g there is a complaint that the Respondents by their representatives "have made repeated threats to transfer the intellectual property belonging to the Company to other entities so as either to drive down the price of the shares of the Company or to obviate the need to purchase the Petitioner's shares. Other threats were made to terminate certain of the Petitioner's shareholders that were employed at Spigot if the offer of the [Respondents] was not accepted" and at paragraph 7.l. it is pleaded that this conduct, and other conduct, "developed in more detail below, has justifiably led the Petitioner to lose all trust and confidence in the Company's management and represents oppression of the Petitioner as minority shareholder." At paragraph 7 there is reference to the "furtherance of the overall scheme" of the Respondents.

344. At paragraph 18 it is in effect pleaded that Mr Yu in December 2020 stated to Mr Stephens by telephone that if the 2020 Offer was not accepted the Respondents would use their "leveraged

position within the Company to appropriate its assets without compensating the Petitioner." The 2020 Offer was in fact accepted by the Petitioner but not proceeded with by the Respondents.

345. In respect of the 2021 Offer stated by the Petitioner to be communicated by Mr Wong to Mr Stephens in "early November 2021" it is pleaded at paragraph 21.c. and d. that at a meeting between Mr Wong and Mr Stephens on 18 November 2021 Mr Wong stated, amongst other things that if the 2021 Offer was not accepted Mr D Miller and Mr Jackson would be terminated from their executive positions in Spigot, "in order to remove the Petitioner's operational visibility and influence over the Company" (c) and the Respondents "would strip assets from the Company and transfer them to other entities owned or controlled by them" "and remove funding from the projects in development for the Company" (d). The Petitioner rejected the 2021 Offer on 7 December 2021.

346. The Petitioner at paragraph 23.j.ii. pleads in effect that the GGDs caused or permitted "the Company to enter into or purport to enter into an Amended Research and Development Agreement with Spigot, which amended agreement had not been shown to or discussed with the PDs and which purported to permit Spigot to provide services to competitors of the Company, without any correspondent benefit."

347. The Petitioner at paragraph 23.h. pleads that the GGDs "terminated or caused the termination of Mr Miller and Mr Jackson from their executive positions at Spigot on or about 19 January 2022" and at i. adds "damaged the revenue stream of the Company". There is at 23.j. reference to continued "threats to appropriate the assets of the Company." At 23.j.vi. it is pleaded that the Respondents reduced or completely ceased "marketing and research and development spending on the Company's apps coinciding with the release of apps based on the Company's intellectual property by other entities owned or controlled by [the Respondents] – damaging the Company's interests and commercial position" and at 23.j.vii. it is pleaded that the GGDs caused or permitted the business of the Company to suffer in favour of other entities owned by the Respondents and took "no action to further the commercial best interests of the Company".

348. At paragraph 27 it is pleaded that these instances represent "unreasonable and oppressive conduct against the Petitioner" and such "conduct represents serious mismanagement of the Company on the part of the GGDs."

349. In the Amended Defence it is denied that the Company or the Respondents' nominated directors have acted or failed to act (as the case may be) in the manner complained of (paragraph 10 (c)). Paragraphs 7 (g) and (l) of the Amended Petition are denied. As to paragraph 18 it is denied that Mr Yu stated that if the offer was not accepted the Respondents "would use their debt leveraged position within the Company to appropriate the Company's assets without compensating the Petition (sic)." Paragraph 21 (c) is denied and it is added "although Mr Wong did convey concerns about the continued employment of Daniel Miller and Nicholas Jackson, who are members of Petitioner, by Spigot in light of the possible conflict arising between the Petitioner, the Company, the … Respondents and Spigot" (paragraph 50(d) of the Amended Defence). It is interesting that the Respondents are acknowledging potential difficulties with possible conflicts. Paragraph 21 (d) is denied. Mr Wong was not called to give evidence in support of these denials. As to paragraph 23 (h) it is denied that Mr D Miller and Mr Jackson were terminated or caused to be terminated. It is pleaded that they were "lawfully made redundant by Spigot." Paragraph 23 (j) is denied. Paragraph 27 is denied.

350. At paragraph 150 of Mr Stephens' witness statement dated 13 June 2025 he says that in respect of the 2020 Offer over the phone "in or around December 2020":

> "Mr Yu made a series of threats which I understood to be intended to pressure the Petitioner into accepting the offer. Specially, he threatened that if the offer was not accepted, the Genimous Group would: (i) withdraw further funding from the Company, (ii) strip the Company's assets and/or (iii) cause the Company to become insolvent, leveraging SPE's position as a substantial related party creditor to force the Company into insolvency."

351. At paragraph 151 Mr Stephens adds:

> "These threats were overheard by Mr Jackson in a telephone conversation between Mr Yu, Ms Strand and an unknown law firm which took place on or around 17 December 2020. The fact this conversation occurred is noted in my draft email which I penned to the Genimous-appointed directors the same day (TIC.00001076[C258/1]). I noted that it appeared Genimous Group was developing a strategy to seize control of the Company's assets to advance Genimous Group's commercial interests at the expense of the Petitioner's. I requested that a shareholders meeting be convened to address the matter and

that the Genimous appointed directors cease all steps that might adversely impact the Petitioner's interest in the Company."

352. Mr Stephens was cross-examined in respect of paragraph 150. The following exchange took place (Day 2/150:16-20) :

"Q... Now, I don't want to debate with you whether the threats were made. I just want to look at what the threats were and ask you for your view on them. Do you understand the difference?

A. Yes, I mean they were made, so go ahead."

353. Mr Stephens accepted that Genimous was free to withdraw further funding from PM and to call in its debts, in particular the Spigot debt and to force the company into insolvency (Day 2/150:21-25; 151:1-8).

354. Mr Stephens stressed "These threats were very important. You are kind of brushing over them, but they are very, very important." (Day 2/151:25; 152:1).

355. Mr Stephens was also cross-examined in respect of paragraph 152 and the draft email. Initially, he was uncertain whether he had sent the draft email:

"Justice Doyle: Why didn't you send, was the question

A. I don't recall. I'm sorry, I don't recall why. And it-- I may have sent it, I don't know." (Day 2/155:2-4).

356. Later on in the cross-examination Mr Stephens gave "an additional recollection" (Day 2/171: 10):

"The reason I didn't send the email is because we were trying to work collegially with them on a sale and because the team had voted for it, I didn't see a reason to inflame things further. They were ready to just move on at that point.

Justice Doyle: So your recollection, now is that you did not send that email?

A. Yes, I don't believe I sent it.

Justice Doyle: Thank you. (Day 2/171; 18-25: 172: 1-2).

357. Later on in his cross- examination Mr Stephens stated "I'm telling you that Mr Yu called me and made the threats that I say in [150]." (Day 2/170: 21 to 22).

358. Mr Stephens stated: "I don't like being threatened." (Day 2/173: 8)

> "And yes, again, apologies if I sound emotional. This was, you know, as an entrepreneur who builds companies, it's really hard to have somebody threaten and take away 5 years of your life's work..." (Day 2/175: 16-19)
>
> "They said language that I can't use here in the courtroom and, like, we're taking this whether you like it or not." (Day 2/176: 14-16.)

359. In an email dated 17 December 2020 from Mr Stephens to Mr Jackson, Mr Lee, Mr Mahaffey and also sent to Mr D Miller, Mr Stephens communicated a draft email to Mr Yu, Mr He and Mr Sun (the GGDs at the time). There is reference to members of the minority shareholder overhearing a telephone conversation today involving Xingang Yu, discussing "taking control of the assets of Position Mobile". In this draft which was never sent complaint is made in respect of oppression and violation of fiduciary duty and majority shareholders "may be undertaking actions to unjustly benefit themselves at the expense of the Minority Shareholder". The convening of a shareholder meeting was demanded.

360. Mr Jackson in his 11-page written statement dated 13 June 2025 at paragraph 39 states:

> "On or about 17 December 2020, I overheard telephone call between Mr Yu and an unknown individual. During the course of that conversation, Mr Yu made various threats against the Petitioner. Specifically, if the Petitioner did not accept the offer made for its shares in the Company, Genimous would withdraw funding, strip the assets of the Company and/or cause the Company to fall into insolvency, using Spigot's position as intercompany creditor. I repeated what I heard to the other members of the Petitioner. The threats I overheard matched the threats made by Mr Yu during his negotiations with Mr

Stephens concerning the December 2020 offer. What I overheard was serious enough to cause Mr Stephens to draft an email of the same date …"

361. On Day 5/48:20-24 Mr Jackson said:

"So the threat was there and then, on the 17th, when I overheard the phone call with Mr Scott Yu, and whoever he was talking to, that's when I realised, oh, these guys really are going to try and destroy this business if we don't sell them our shares."

362. Mr Jackson added:

"... in the entire negotiations of the offer in 2020, there were threats associated with that offer that, it's this number or we are going to shut you down, and maybe not as --not as explicit as that, but the insinuations were there. And then on 17 December, when I overheard that phone call, that's when I realised that they were actively trying to make good on their threats". (Day 5/49: 20-25; 50: 1-2).

363. Mr Jackson stated:

"The way I remember 2020 is it was a high-pressure—like, there was pressure from Genimous, they were making threats and you know, Danny and I had spent our time building this company building Position Mobile. And my personal—like, what I was feeling at the time was I want to do what's right for the company and not see this company we built get destroyed, versus the alternative, what was presented as the alternative was: we are going to destroy the company, and it's all going to go away". (Day 5/55:18-25; 56:1-2).

364. Mr Jackson stated:

"... and the weirdness...this is December 16th-- is the threat from Genimous about: to take this 5 million or whatever number they were making up or we shut down the business". (Day 5/62: 17-20).

365. Mr Jackson stated:

> "... I'm an owner of Position Mobile. They are attempting to destroy the value in Position Mobile. So yes, that is the weirdness and the threats and, you know, the high-pressure negotiations that they have approached us with rather than, you know, the debt was a problem. They could have easily said, let's figure out a way to reduce spend so the company can you know, but it was: this offer, 7.5 million minus whatever they made up or the business gets destroyed tomorrow." (Day 5/63: 3-11).

366. Earlier in his cross-examination Mr Jackson had stated that PM's "apps didn't all just shut off one day. They shut off in a waterfall effect only on the days that East End tech released a copycat app." (Day 5/40 : 3-6).

367. Mr Jackson stated:

> "...there were multiple threats made by Pete [Wong] to me about – he even put it in the slides that they were going to move the assets... Made good on their threats, so I'm referencing the threats previously made." (Day 5/ 130 : 10 - 17)
>
> So threats had been made about moving it. I see Pete reviewing a strategy on how to technically do it. And that's what, yes, so that's when I was-- I realised that, oh, they are actually going to try to do this again. Deja vu all over again." (Day 5/131: 6-10)

368. Mr Jackson stated:

> "I was told by Peter Wong that I was going to get fired, and then they were going to steal the assets... several times..." (Day 5/148: 10-13).
>
> "I saw him reviewing a slide that said "Transferring assets from Position Mobile to Eightpoint"." (Day 5/149:16-17).

369. In his email dated 17 January 2022 at 11:02pm (D/40/418) it is stated "Since December 2020, Genimous has made repeated threats to appropriate intellectual property from Position Mobile Limited SEZC into a wholly owned subsidiary, so that they would not need to purchase shares from TIC".

370. There was reference to "additional threats were made to appropriate intellectual property from TIC by first firing Danny and me from Spigot and then shifting Position Mobile assets to a wholly owned subsidiary". The following words also appear "What began as an incentive plan to create a new business for Genimous has become a point of contention... They would rather intimidate and bully two of the founders in an attempt to appropriate what we've spent the last 4 years of our lives building for them."

371. In his email dated 19 January 2022 Mr Jackson referred to threats made against himself and "Danny" [D Miller] by Mr Wong on multiple occasions.

372. The Respondents submitted that the evidence adduced by the Petitioner in respect of alleged "threats" was overblown, contradictory, at odds with documents and when considered overall highly unpersuasive.

373. I have carefully considered the written and oral evidence in respect of the threats and the documents and the willingness of the Petitioner to accept the 2020 Offer and have reached the conclusion that I should accept the Petitioner's evidence in respect of the threats. It has a ring of truth about it and the evidence adduced by the Respondents has not convincingly contradicted it. The burden is, of course, on the Petitioner to prove the existence of the threats and in my judgment, it has done that. The threats are an important part of the picture justifying the crossing of the winding up threshold on a just and equitable basis.

374. The Respondents did not call Mr Yu to rebut the Petitioner's evidence in respect of the threats.

375. At paragraph 43 of his statement, Mr Jackson stated:

> "I have touched on the threats made in support of Genimous' offer made in November 2021, via Mr Wong. On 15 November 2021, I saw Peter Wong reviewing a presentation (GHK00018795 [C394/1]) about moving assets from the Company to Eightpoint. I was sure they were going to follow through on their threats …"

376. In his oral evidence Mr Jackson corrected "15 November" to read "11 October".

377. At paragraph 44 Mr Jackson says that on 17 January 2022 he sent an email to Position Mobile's Board of Directors with the subject line "Concerns with Position Mobile Intellectual Property" (C/433), "outlining the threats Mr Miller and I had received …". The email includes the statement "what began as an incentive plan to create a new business for Genimous has become a point of contention" and added "Finally, if they [Genimous] would like to wholly-own any and all intellectual property of Position Mobile, we expect they would do so legally". Mr Jackson sent a follow up email on 19 January 2022 referring to "it's troubling that an incentive plan – one presented by Genimous … is now being used as a weapon against our continued employment at Spigot." Mr Jackson says that on 19 January 2022 "I was abruptly terminated from my role as CMO of Spigot. Mr Danny Miller, myself and one staff-level employee were fired that day".

378. Mr Stephens at paragraph 178 says that on or around 18 November 2021 he met with Mr Wong for lunch at a restaurant in Florida. He says that during the meeting Mr Wong presented a slide deck and conveyed Genimous Group's offer to purchase the Petitioner's shares for US$5.5 million. Slide 3 is headed "Limitations and Restrictions":

> "
> - TIC, as a minority shareholder, has limited rights
> - No external buyer will show interest for TIC holdings
> - Any divestiture requires Genimous approval
> - Genimous has first right to acquire
> - Genimous can dictate buy out terms
> - PM growth limited to existing portfolio only
> - Any new mobile initiative will like live under SPE"

379. At paragraph 179 Mr Stephens said that Mr Wong:

> "Informed me that going forward, no new apps or initiatives would be developed for the Company; instead, such development work would be assigned to a new, wholly owned entity within the Genimous Group. With respect to the apps that were already under development at Spigot for the Company, he made it clear that Genimous would not proceed with development under the Company, regardless of Spigot's obligations under the Original R&D Agreement."

380. The Respondents did not call Mr Wong to rebut this evidence.

381. At paragraph 180 Mr Stephens states that "Mr Wong's approach closely mirrored that of Mr Yu in December 2020. The stated position was that if the Petitioner did not agree to a sale of its shares at the proposed price, Genimous would effectively render the Petitioner's interest in the Company worthless. This was to be achieved by removing the development of the new IP from the Company and transferring that work to other Genimous entities."

382. At paragraph 181 Mr Stephens adds: "Mr Wong made a further threat during the meeting: that Genimous would bring about Mr Daniel Miller and Mr Jackson's termination from their executive roles at Spigot if the Petitioner did not agree to the proposed share sale."

383. The Respondents did not call Mr Yu or Mr Wong to rebut the evidence of Mr Stephens and Mr Jackson in respect of the threats and in absence of any evidence to the contrary I accept the thrust of the Petitioner's evidence in respect of the threats.

384. Mr Valentin during his oral closing submissions, recognising no doubt the strength of the Petitioner's case on the threats and lack of probity, referred to various documents and communications in a bold attempt to support a submission that at no stage were the members of the Petitioner acting under "duress" (see for example Day 10/16:19, 21:32, 42:20, 138:25, 139:6, 23, 142:1 and 188:5). Nothing that Mr Valentin said or referred to persuaded me not to accept the Petitioner's case on the various threats that were made against it. The threats and the other evidence of misconduct all support the Petitioner's persuasive case on lack of probity leading to a justifiable loss of confidence in management.

385. I referred above to the R&D Amendment issue. It is not an isolated example of lack of probity, lack of decency and lack of fairness. Another example is provided, by the way of the evidence from Kyle Matis ("Mr Matis") which also independently supports the existence of an improper scheme by the Respondents to run down PM and to ensure that future business went to PM's competitors such as EET.

386. The Petitioner at paragraph 7 o. of the Amended Petition refers to the "overall scheme" of the Respondents. At paragraph 57 of the Amended Reply the Petitioner refers to "the deliberate

conduct of the GGDs, acting at the behest of the Respondents, which has operated to dissipate the Company's property to other Genimous Group entities and destroy its business operations."

387. Mr Matis says that he came to be employed by Spigot in December 2019 initially as a media buyer. His evidence was brief but important. The Respondents tried to dismiss part of his evidence as "opinion" evidence. A lot of his evidence however contained simple facts. Mr Matis was involved in developing the marketing campaigns for PM's apps. He says he began to hear more and more about EET in late 2022. He was told that the new apps would be released under EET. He adds that "we were being told that the new versions of the Company's apps would be released under EET, and that we would have to essentially clone, the existing Company marketing campaigns to each app under EET." He says "The instruction that I was given by Ryan Marshall was to copy over the marketing campaigns used for the apps of the Company [PM] and start them again for EET. It wasn't exactly "copy and paste", but the campaigns were to be almost exact recreations or copies of the campaigns used for the Company's apps." Mr Matis states at paragraph 25 of his witness statement "...during an all-hands meeting of Spigot staff, 15 September 2022, it was announced that there would be rewards for growing EET from Mr Lu. Similarly, all internal financial spending budgets showed EET ramping up and the Company winding down. I received the firm impression that Spigot was not simply working for EET, but that the target was to cause EET to dominate the Company and, essentially, to shutter the Company's operations. By December 2022, the culture was well entrenched in Spigot, and the Company was essentially regarded as a rival because Spigot's loyalty was to EET."

388. Mr Matis left Spigot in April 2023 to pursue other opportunities. Although he acknowledged that he was acquainted with Mr Jackson and Mr D Miller, he was not a member of the Petitioner and was not employed by the Petitioner. It appeared that he had no axe to grind. He came across as an honest and open witness. He was not effectively challenged in cross-examination. In cross-examination, Mr Matis accepted that he did not know at the time the reasons why EET had been established or why he was directed to work on marketing campaigns for EET (Day 5/167 :23 – 25; 168: 1 – 4). Mr Matis also accepted that he did not know at the time that a winding up petition in respect of PM had been filed in April 2022.

389. The evidence of Mr Matis corroborated the existence of the Respondents' improper scheme.

390. Mr Wingrave referred to the apps being released by EET and put it to Mr Chen (Day 7/28) that "… the release of these apps that are similar to Position Mobile's apps, demonstrate that Genimous had opened up a wholly-owned subsidiary in competition with Position Mobile?" Mr Chen responded:

> "Because, first of all, there was no exclusivity in place while there's a conflict, when there is unstable situation and there could be also risk in further invest in Position Mobile."

391. Mr Chen was asked whether he agreed that "EET was in competition with PM, yes?" to which he responded:

> "As there are many similar type of products, developed by many companies on a daily basis, so there – there's no – undoubtedly a relationship of competition in this field. So I can agree with your point of view."

392. Mr Wingrave asked for clarification as to whether that was "I can't agree". The interpreter said "I can". To ensure nothing was lost in translation on this important point, I endeavoured to seek further clarification as follows:

> "JUSTICE DOYLE: The question was: do you agree, was EET in competition with PM? The answer is?
>
> A: Yes, it was in competition.
>
> JUSTICE DOYLE: Thank you."

393. Mr Wingrave continued his cross-examination (Day 7/29:10-25, 30: 1-12):

> "MR WINGRAVE: And do you agree with me that the board of directors of PM took no action to protect PM from that competition?
>
> A. I think the board has taken the maximum action to protect Position Mobile. If Spigot wants to do anything with the debt, and then Position Mobile will get nothing.
>
> Q. There's no record of the board taking any action to protect PM against this competition, is there?

A. As a director, I believe we have done a lot of work to protect Position Mobile. That's why it has a lot of cash asset with the company. If we withdraw the loan at the time, the Position Mobile would get nothing. If I remember correctly, at the time, it still owned over US$10 million. And without profit.

Q. Spigot didn't take that step, though, did it? It didn't call the debt?

A. Because they do have the right to do that. However, I told them not to do that, not to stop.

Q. I suggest that all of this conduct that I have been speaking to you about is in furtherance of the Respondents' decision, Genimous Investment's decision, to allow PM to die and to spin up a similar business in EET; that's correct, isn't it?

A. I disagree with your statement because they are not directly correlated. Because the instability of the Position Mobile at the time, so we need to reduce its investment so it can pay the debt and reduce its risk."

394. The Petitioner also refers to chats from October 2023 recording what it describes as practical stops to lower bids on PM's weather campaign so "EET Weather" could take its place (C/633/2). Shortly thereafter, PM's app dropped and EET's app rose in the rankings. I agree with the Petitioner that this is not managing the Company "conservatively whilst the Petition has been pending" (Mr Chen's witness statement at paragraph 126.3) but rather is consistent with the Respondents' scheme to run down PM and divert business to EET, one of its competitors. In internal chats between Spigot employees Bruce Lee (C/633/2) noted that "we slowly lower the bid on PM Weather to let EET Weather take over its placement and it works …". Jasmine Smith "Weather dropped to #15 with Weather EET at #14" in the Play Store weather category. These messages show the Spigot employees celebrating the demise of the Company's weather app expressing their pleasure through fire and rocket emoji reactions. The fire emoji generally represents something that is excellent, exciting, or a great performance. The rocket emoji generally represents rapid growth in the context of excitement about new ventures or projects. It is a symbol of success and something that has

taken off well. The evidence paints a picture of Spigot employees gloating at the success of EET at the expense of PM, no doubt because this would please the Respondents.

395. A further glimpse into what was happening behind the scenes, and the desire of the Respondents and those engaged on their behalf to keep the Petitioner and the Petitioner's appointed directors of PM out of the picture, is provided by an email sent by Mr Newell to Carey Olsen on 3 December 2021 (C/415) where Mr Newell is seeking advice as to whether a non-unanimous written resolution could be used in respect of an attempt to arrange for PM to accept an offer for the exchange of all of its assets in exchange for the resolution of its outstanding debt to Spigot. That communication hints at a desire to proceed without having the Petitioner's directors on board. Advice was received and that plan, as it happens, came to nothing.

396. Mr Stephens at paragraph 209 of his witness statement says that Mr Wong in consultation with Mr Newell orchestrated a "plan for Position Mobile" in early November 2021 which involved leveraging the Company's indebtedness to Spigot under various service agreements to orchestrate a sale of the Company's assets to Spigot in satisfaction of its debts, so that Spigot would be able to carry the mobile business forward without the involvement of the members of TIC. Mr Stephens says that this approach reflected the threats that had previously been made by Mr Yu in relation to the 2020 Offer and by Mr Wong in respect of the 2021 Offer. Mr Stephens refers to an email dated 4 November 2021 (C/385/2) Mr Newell sent to Mr Wong noting that Mr Newell had started executing this plan and needed to obtain a valuation of the Company's assets to "support the Position Mobile board's decision to accept an offer to exchange all of its assets in exchange for the resolution of all its outstanding debt". In that email Mr Newell referred to "our plan for Position Mobile". Mr Newell thought it "makes most sense for a Position Mobile board member who will remain on the Position Mobile board to sign this particular engagement letter". The email and attached engagement letter was sent to Deming He and copied to Mr Wong, Mr Yu, Bart Bullock and "liu jamin". It was not copied to the Petitioner or any members of the Petitioner. In its written closing submissions, the Petitioner (at paragraph 52) states "Thereafter, the scheme became the migration of development and marketing resources to entities wholly owned by the Respondents, including EET."

397. In my judgment the Petitioner has established that threats were made against it on behalf of the Respondents. Some of these threats were to the effect that if things did not work out in favour of the Respondents (including its acquisition of the Petitioner's shares in the Company at a price

satisfactory to the Respondents even if such did not reflect fair value) then the Respondents would stop spending on the Company's apps and would arrange for new apps to be launched via competing subsidiaries wholly owned by the Respondents rather than via the Company in which the Respondents only had a 51% interest. In effect the Respondents would abandon or deflect the business of the Company and ensure that new business was launched through wholly owned subsidiaries such as EET which was in direct competition with the Company. Numerous threats were made against the members of the Petitioner. These were not idle threats. Some of these threats were carried out.

398. The evidence establishes that the Respondents engaged in an improper scheme to run down PM and to ensure that future business went to PM's competitors such as EET, ultimately a wholly owned subsidiary of the First Respondent.

399. The conduct engaged in by the Respondents lacked probity and was oppressive to the Petitioner. It is all well and good to say, as the Respondents appear to do, that even with no new apps being launched by the Company it was now in a solvent state with US$32 million. Who knows what the value of the Company would have been absent the lack of probity and oppression.

400. The Petitioner says that the US$32 million cash pile reflects the run-off of existing user cohorts while growth and ranking were siphoned to EET and ACS. The Petitioner adds that the same period shows copycat launches and bid-lowering to let EET "take over placement" (C/633/2). The Petitioner says that, on any view, PM did not become stronger as a business; it simply became leaner as a cash box while the commercial engine migrated to the Respondents' wholly-owned entities. The Petitioner says that all decisions concerning PM's decisions to reduce marketing were taken by the Respondents and their appointed directors, without consultation with the Petitioner or its directors, any board meeting or any board resolution having been passed.

401. I find on the evidence that the Respondents were engaged in an improper scheme designed to run down PM and to enable future business to be progressed through the Respondents' wholly owned subsidiaries to the detriment of PM and its minority shareholders.

402. In *Meyer* terms the Respondents' conduct in respect of the threats and the improper scheme and in respect of the underhand amendment of the R&D Agreement (which was part of the advancement of the scheme), amongst other matters, is sufficient to cross the just and equitable winding up

threshold and to justify a buyout order. Despite his considerable eloquence Mr Valentin has been unable to persuade me not to rely on these aspects of the Petitioner's case.

403. The Respondents were in effect seeking to treat the Company as a wholly owned subsidiary without any proper regard for the 49% interest of the Petitioner.

404. The cavalier attitude of the Respondents to PM, a partly owned subsidiary, is confirmed in an English translation of what is described by the Petitioner (at paragraph 297 of its written closing submissions) as a "formal Shenzhen Stock Exchange announcement" dated 23 April 2024 from the "Board of Directors of Genimous Technology Co., Ltd." (C/782/4), which in the agreed dramatis personae is described as the "Ultimate parent company of Genimous Investment", the First Respondent. It is evidence that the Respondents were unduly preferring its wholly owned subsidiaries such as EET over and above PM.

405. In that formal public announcement, it is stated that Genimous Tech had agreed "to liquidate its overseas subsidiary" PM. There is reference to the 51% holding in PM and it is stated that "In recent years in the field of mobile traffic and advertising business, the Company [Genimous Tech] has actively nurtured its wholly owned subsidiary, East End Technologies Ltd (hereinafter referred to as "EET Company"), supporting EET Company in developing innovative and technology-driven mobile products ... Based on different underlying technologies, EET Company and PM Company each develop different mobile terminal products. In January 2024, the revenue of EET Company surpassed that of PM Company, and it is expected that this trend will continue, and the gap between the two will further widen in the future. Considering the rapid development of EET Company, the Board of Directors believes that at the current stage, it is appropriate to liquidate PM Company to better optimize resource allocation and focus efforts on enhancing the Company's [Genimous Tech] overall business management efficiency...In the field of mobile traffic and advertising business the Company has actively cultivated the EET Company on both product development and revenue fronts, which has shown a strong growth trend and continuously expanding user base. The Company will continue to support EET Company in launching more intelligent and optimized products, increasing investment in intelligent product development. In the long-term, the Company's 100% ownership will ensure that EET Company's management and operations are more stable and efficient... Since January 2023, PM Company has gradually stopped investment and promotion of its own app products, and its total number of active users has ceased to grow, indicating that PM Company possesses the necessary conditions for liquidation...

Therefore, the liquidation of PM Company will not have a significant impact on the overall business development and sustainable operating capacity of the Company and is in the best interests of all shareholders and the Company".

406. The Petitioner (at paragraph 298 of its written closing submissions) says that the formal announcement is "best described as a confessional. It quite clearly states that the Company [PM] and EET are in the same competing business, and that it is appropriate to liquidate the Company in order to 'better optimize resource allocation' to the EET business. The statement is (in and of itself) more than sufficient evidence to show that the Respondents were acting with a lack of probity *vis a vis* Position Mobile". Whether you describe the announcement as a "confessional" or a "smoking gun" or something else, what is clear from it and the other surrounding evidence is that the Respondents had made a decision to abandon PM, their 51% owned subsidiary, and wind it down while at the same time as favouring, "actively nurturing", "actively cultivating" EET, its 100% wholly owned subsidiary at the expense of PM, its 51% owned subsidiary.

407. It is accepted that EET and PM were competitors. Mr Chen admitted that EET was in competition with PM (Day 7/29: 8). This places this case plainly in *Meyer* territory. The Respondents were not acting with "scrupulous fairness" to the minority shareholders of PM. The Respondents did not deal fairly with PM. In a position of plain conflict, the Respondents preferred, for obviously self-serving commercial interests, EET a wholly owned subsidiary over PM, their 51% subsidiary. The Respondents diverted the business progression from PM to EET, a competitor. That showed a lack of probity and was unfair to the minority shareholders of PM. The Respondents focused on developing EET, a competing business, and simply promoted their own interests at the expense of the Petitioner.

408. At paragraph 44 of their written closing submissions, the Respondents attempt in vain to distinguish *Meyer* for 3 main reasons:

(1) they say that the evidence in *Meyer* established that the majority shareholder had illegitimately set out to destroy the business of its subsidiary. Mr Wingrave says, "that's not a distinction, that's our case." (Day 10/197:20). Although there was no legal obligation on Spigot to continue to extend credit to PM, the evidence reveals that the Respondents in effect preferred EET over PM and in effect prevented PM developing its business as the

parties had originally intended. There was as much a destruction of the business in PM as in *Meyer*;

(2) they say that in *Meyer*, it was established that the failure of the nominee directors of the subsidiary, in breach of their duties, to prevent the conduct complained of had resulted in severe harm being caused to the company (and the minority). Mr Wingrave again says "that's not a distinction, it's our case" (Day 10/198:1). Mr Wingrave says that the directors of the subsidiary in breach of their duties failed to prevent the conduct complained of which resulted in severe harm to PM and the minority. The Respondents say in the present case that PM was heavily insolvent on 1 April 2022 but now holds approximately US$31 million in cash reserves. Who knows, however, what the financial position of PM would have been if the Respondents had not wrongly and unfairly preferred EET over PM?

(3) the Respondents also say that the business "plan" in *Meyer* had involved a high degree of cooperation and the utmost good faith on both sides. They add that in the present case, the mobile business was simply set up as an incentive scheme designed to persuade the Petitioner's members to remain involved and the Genimous group extended very significant unsecured credit to PM. I do not think that this is a distinguishing factor which would lead to the conclusion that the court should not in this case, apply the principles outlined in *Meyer* to the facts of this case. I also note Mr Wingrave's closing oral submissions on this point: "Well, we say that's a false distinction because even if my Lord is against me on it being an incentive scheme, there was clearly a high degree of cooperation. So none of these three attempted distinctions from *Meye*r apply [I]n our respectful submission ... this is one of those cases where my Lord can simply look at the effect of the behaviour of this group of companies. It couldn't have happened without a plan. We say *Meyer* governs in this case and we have established all that we must to demonstrate that this was oppression on the part of the respondent as the shareholder and lack of probity on the part of the directors of Position Mobile to prevent and protect PM from that plan" (Day 10/198:5-23).

409. Mr Wingrave had fairly and squarely put the following to Mr Chen in cross-examination:

"I suggest that all of this conduct that I have been speaking to you about is in furtherance of the Respondents' decision, Genimous Investment's decision, to allow PM to die and to spin up a similar business in EET. That's correct, isn't it?" (Day 7/30;4-8).

410. Mr Chen responded "I disagree with your statement because they are not directly correlated. Because the instability of the Position Mobile at the time. So we need to reduce its investment so it can pay the debt and reduce its risk" (Day 7/30: 9-12).

411. The evidence reveals that the desire and objective of the Respondents for PM to be run without reference to the best interests of TIC and without proper consultation with Mr Stephens and Mr Mahaffey (the TIC directors appointed to the PM board). The Respondents wanted to get as much out of Mr Stephens and Mr Mahaffey as possible but wished PM to be run solely for their benefit and deliberately flouted and disregarded the position of the Petitioner as a minority shareholder.

412. It is impossible after considering all the evidence in this case not to reach the conclusion that the Respondents wished to run PM as a wholly owned subsidiary, and yet they only held 51% of it. The Respondents hatched an improper scheme to endeavour to buy out the Petitioner on terms favourable to the Respondents, and if that could not be achieved, then to wind down PM and divert the business to wholly own subsidiaries such as EET. The Respondents ran PM as if it were entirely their own when it was not. For examples, the amendment to the R&D Agreement and the removal of Mr Peterson. The Respondents made their position crystal clear with the threats that were made and they carried out some of the threats. The Respondents displayed a lack of probity. They did not deal with PM or the Petitioner in a fair and decent way. The evidence reveals that the threshold for the making of a winding up order on the just and equitable basis was crossed. In a nutshell the Respondents failed to deal with its 51% owned subsidiary fairly.

413. The misconduct is sufficiently serious and likely to recur in the future. There is nothing to suggest that the Respondents will desist from treating PM as its wholly owned subsidiary and acting unfairly in respect of PM. Mr Chen was the only factual witness fielded by the Respondents in an attempt to defend the serious allegations of lack of probity and oppression made against them. Far from apologising for their misconduct, Mr Chen doubled-down and attempted in an unconvincing and unsatisfactory way to justify their position. Mr Chen gave no undertakings as to future conduct. He endeavoured to give the impression that the conduct of the Respondents was fully justified and there was no misconduct or mismanagement to be seen in this case.

414. Having considered the evidence I accept the Petitioner's submission that the steps taken by the Respondents to compete and act in conflict with the interests of the Company are clear evidence

that the Respondents (and some of their nominee directors) were subordinating the interests of the Company for those of the Respondents in a manner that lacked probity and fair dealing towards the affairs of the Company.

415. In my judgment the Petitioner has established that there has been a lack of probity leading to a justifiable loss of confidence in the Respondents and the directors appointed by the Respondents. Based on its pleaded case (in particular paragraphs 7 g. (threats), 7 o. (amendment to the R & D Agreement and furtherance of an overall scheme) and p. (failure to protect best interests of PM), paragraph 23 j.ii. (amendment to R& D Agreement), iv. (harming the Company's interests and commercial position and failure to independently investigate alleged use of the Company's intellectual property) and vii. (causing or permitting the business of the Company to suffer in favour of Genimous HK Companies – owned entities and taking no action to further the commercial best interests of the Company), paragraph 27 (serious mismanagement of the Company on the part of the GGDs)), the Petitioner has justifiably lost all trust and confidence that the assets and affairs of the Company are being properly managed, stemming from a lack of probity on the part of the directors nominated to the Company's Board by the Respondents and the misconduct of the Respondents.

416. The lack of probity has led to a justifiable loss of confidence and is sufficient to cross the threshold for a winding up order on the just and equitable basis.

Oppressive conduct

417. There is plainly an overlap between lack of probity and oppressive or unfairly prejudicial conduct and I do not consider it necessary to make separate determinations under the heading of "Oppression" in the lists of issues. Many of the findings in respect of lack of probity would also fall within the definition of oppression.

Need for an investigation?

418. In *Seahawk China Dynamic Fund* (FSD unreported judgment delivered 9 August 2022) from paragraph 63 onwards I reviewed the local Cayman authorities and left open the answer to the question as to whether the need for an investigation a self-standing safe ground for a winding up

order in the affirmative. At [80] I stated that "I am not presently convinced that my fellow first instance judges in *GFN*, *Parmalat*, *Paradigm*, *Madera, ICP* and *Washington* were plainly wrong on this point."

419. I am not persuaded in the particular circumstances of this case, there is a need for court supervised independent liquidators to investigate the Company's affairs at this stage. The Petitioner sensibly did not appear to strongly pursue this ground at trial and I say no more about it.

No abuse of process

420. The issue of abuse of process was not raised in the list of issues for determination by the court and did not heavily feature in the closing submissions (albeit it was briefly referred to it paragraph 229.8 of the Respondent's written closing argument). For the avoidance of doubt, however, I do not accept the averment at paragraph 68 of the Amended Defence that the petition is in effect being presented with the ulterior motive of seeking to pressure the Respondents to acquire the Petitioner's shares in the Company at an inflated price. The evidence does not support that pleading.

421. The Respondents referred to various pieces of evidence in an attempt to support their overly ambitious submission that the winding up petition was an abuse of process but all that evidence showed was, not unnaturally, that the Petitioner from time to time was simply keen to exit at the right price for it. There is nothing abusive about that.

422. The Petitioner's somewhat clumsy attempts to excite the interest of the local and international media, in part perhaps in the hope of putting some pressure on the Respondents and not solely to engage sunlight as a disinfectant in open justice terms (see for example Lord Neuberger at paragraph 12 of a lecture at the Hong Kong Foreign Correspondents' Club on *Judges, Journalists and Open Justice* 26 August 2014), were unimpressive but insufficient to amount to abusive conduct preventing it from obtaining relief.

423. I am satisfied that the winding up petition was filed and progressed in good faith (albeit slowly and with wasteful and misguided tactical attempts to have provisional liquidators appointed from time to time). It was filed and progressed because the Petitioner had genuine grievances which it wished to properly pursue through the legal process.

Alternative remedies

424. In my judgment, in all the circumstances of this case, the Petitioner does not have one or more adequate alternative remedies which it has unreasonably failed to accept or pursue.

425. It accepted the 2020 Offer of $5 million but the Respondents decided not to proceed.

426. It rejected the 2022 Offer and such rejection was not unreasonable. It genuinely believed that the 2022 Offer was too low and there was no guarantee that the Respondents would have promptly followed through with the 2022 Offer even if it had been accepted based on their prior conduct in respect of the 2020 Offer. Furthermore, the Respondents now accept (paragraph 229.76 of their written closing argument) that, with the passage of time and the Company's financial position, the 2022 Offer has been superseded by the voluntary liquidation offers which I now turn to.

427. The Respondents proposals in May 2024 and July 2025 for a voluntary liquidation of the Company under court supervision were not unreasonably rejected by the Petitioner as such proposals would not have provided the Petitioner with the relief it reasonably sought namely a buyout at a fair price, and neither would the Writ Action.

Summary of findings

428. I endeavour to summarise my findings as follows.

Winding-up threshold crossed

429. I have concluded that the threshold for the making of a winding up order on the just and equitable ground has been crossed.

Not a "quasi-partnership" or "legitimate expectations" case

430. I am not, however, satisfied that this case falls into the category of "quasi-partnership" or "legitimate expectation" cases. I note the observations of the Privy Council in *Aquapoint* against reducing these just and equitable winding up cases into categories.

431. The arrangement between the parties in this case was simply a business, financial, commercial arrangement and there is "nothing more" in *Westbourne Galleries/Aquapoint* terms. This is not a "quasi-partnership" or "legitimate expectations" type of case. There is no room for an equitable overlay in *Westbourne Galleries/Aquapoint* terms.

Lack of probity, threats and improper scheme

432. I do, however, find that there was a lack of probity in the conduct of the Company's affairs on behalf of the Respondents and their appointed directors from time to time which has led to a justifiable loss of confidence in the proper management of the Company. There has been serious and persistent misconduct and serious mismanagement of the affairs of the Company by the Respondents and directors appointed by the Respondents to the board of the Company as outlined above and such misconduct is likely to continue into the future. Elements of the lack of probity in this case also fall within the definition of oppression.

433. I find that the Respondents have wrongly treated the Company as their own. The Petitioner, the minority shareholder, has justifiably lost confidence in the probity of the Company's management. The Respondents have not dealt with the Company or the Petitioner decently or fairly.

434. The Respondents (through Mr Chen and others) caused PM to agree to the Amended R&D Agreement which was not in the best interests of PM. Moreover Mr Chen (a director appointed to the board of PM by the Respondents) did this in an underhand way and in a clear position of conflict being a director of PM, Spigot and Eightpoint. Mr Chen deliberately did not consult with the other directors of PM appointed by the Petitioner. He wanted to keep them in the dark. Mr Chen acted with a serious lack of probity.

435. Moreover, the "termination" of Mr Jackson, Mr D Miller and Mr Peterson was all part of the Respondents' improper scheme. The manner of Mr Peterson's "termination" was also evidence of the Respondents treating PM as a wholly-owned subsidiary.

436. I find that the Respondents (through directors they appointed to the board of PM) were wrongly treating PM as if it were their wholly-owned subsidiary when together they only owned 51% of the shares. The manner of the amendment to the R&D Agreement is also evidence of this.

437. Furthermore, the Respondents and the directors appointed by them to the board of PM wrongfully failed to independently investigate the IP misappropriation allegations. This is further evidence of the lack of probity on behalf of the Respondents and the directors they had appointed to board of PM.

438. I find that in December 2020 Mr Yu indicated a threat to Mr Stephens to the effect that if the 2020 Offer was not accepted the Respondents would take adverse action in respect of the Company's assets and its future to the detriment of the Petitioner. I find that Mr Yu was acting on behalf of the Respondents in making such threat. I find that this threat was carried out.

439. I find that on 18 November 2021 Mr Wong indicated a threat to Mr Stephens to the effect that if the 2021 Offer was not accepted, amongst other things, Mr D Miller and Mr Jackson would be terminated from their executive positions in Spigot and the Respondents would take adverse action in respect of the Company's assets and its future to the detriment of the Petitioner. I find that Mr Wong was acting on behalf of the Respondents in making such threat. I find that this threat was carried out.

440. I find that after the 2021 Offer was not accepted steps were taken by those under the effective control of the Respondents to "terminate" Mr D Miller and Mr Jackson. Steps were also taken by those under the effective control of the Respondents and directors appointed by them to the board of PM to ensure that future business would be directed to and developed by the wholly owned subsidiaries (such as EET) for the Respondents' benefit and to the detriment of the PM and the Petitioner.

441. I find that on 18 November 2021 Mr Stephens met with Mr Wong and that Mr Wong in effect indicated to him that no new apps or initiatives would be developed for the Company and instead such would be assigned to a wholly owned entity within the Genimous Group.

442. I find that the Respondents engaged together, also alongside directors they had appointed to the board of PM and others, in an improper scheme to in effect run down PM and to ensure that future business went to their wholly owned subsidiaries such as EET, a competitor to PM.

443. This was misconduct which seriously lacked probity and was oppressive.

444. Taking into account all the evidence before the court, I find that at all material times Mr Chen, Mr Yu, Mr Wong and Ms Strand were acting to advance the best interests of the Respondents. They were not on frolics of their own, unapproved by the Respondents. They were acting for the Respondents. The Respondents are responsible for their acts and omissions.

445. There has been a justifiable loss of confidence in the probity of the management of PM's affairs by the Respondents and by directors appointed by the Respondents to the board of PM. There has been sustained serious misconduct and serious mismanagement which is likely to continue into the future. The Respondents have in reality treated the business of PM as their own. They have treated PM as a wholly own subsidiary when they only own 51% of it. I find that an improper scheme was put in place by the Respondents to endeavour to secure the removal of the Petitioner as a 49% shareholder on terms favourable to the Respondents, and when that was unsuccessful, a decision was made at high level within the Respondents to in effect run down the business of PM and to ensure that the business and any new opportunities would progress through its wholly owned subsidiaries (such as EET) who were in direct competition with PM.

446. In *Meyer* terms, the Respondents failed to act with scrupulous fairness in their dealings with its partly owned subsidiary, PM. They did not deal fairly or decently with the Petitioner or PM. The Respondents put their interests over and above the interests of the Petitioner and over and above the interests of PM.

447. There was a serious failure by the directors appointed by the Respondents to arrange for an independent investigation in respect of serious allegations of misappropriation of the Company's IP.

448. The directors of PM appointed by the Respondents did not take adequate steps to protect and promote the best interests of PM. There was a visible and evidenced departure from the standards of fair dealing. The Respondents did not deal with their subsidiary fairly. The Respondents engaged in oppressive conduct.

449. In arriving at these conclusions, I have considered all the evidence and in particular the evidence in respect of the threats and the improper scheme, the amendment to the R&D Agreement and the underhand way in which it was made (without reference to the Petitioner or the directors the

Petitioner had appointed to PM), the "termination" of Mr Jackson and Mr D Miller from executive positions in Spigot, and the " termination" of Mr Peterson as President of PM, and the way in which it was achieved (again without any reference to the Petitioner or the directors the Petitioner had appointed to the PM board, albeit with subsequent ratifications after the event), and the lack of independent investigation into the allegations of misappropriation of IP.

450. These are all important pieces of the jigsaw which, once completed, reveals the serious and sustained misconduct and mismanagement of PM controlled and driven by the Respondents and their appointed directors. The evidence establishes a plain lack of probity, a lack of decency and fairness, and the existence of oppressive conduct which leads to a justifiable loss of confidence in the Respondents' involvement in PM.

451. There was in this case a justifiable loss of confidence in the probity of the management of PM, especially where the Respondents were treating the business of PM as their own business without proper regard to the position of the Petitioner. The Petitioner has justifiably lost confidence in the probity of the Respondents and their appointed directors in respect of the proper management of PM.

452. The Petitioner was entitled to expect that the affairs of PM be managed with probity, and in accordance with basic principles of fair dealing. The word "probity" embraces concepts both of honesty and decency. The Respondents were not simply engaging in sharp business practices. They were engaging in improper business practices which lacked probity and fairness.

453. Lord Richards at [59] of *Aquapoint* stated that phrases like "a loss of mutual trust and confidence" may have some value but care must be taken to focus on the real task before the court. In the case presently before the court the main task of the court is to determine whether, on the facts and circumstances put before the court, the threshold for a winding up order on the just and equitable basis has been crossed and if it has what the most appropriate and just remedy is.

454. Having made an assessment of the circumstances of this case as a whole, I have determined that the just and equitable threshold for the making of a winding up order has been crossed.

455. Based on the evidence and arguments presented to the court it has been established that the just and equitable hurdle has been jumped. I will now turn to the appropriate form of relief.

Form of relief

456. In the circumstances of this case I have reached the conclusion that the Petitioner should be permitted to pursue a buyout order as an alternative to winding up under section 95(3) of the Companies Act. The buyout order is the fairest and most appropriate remedy to meet the circumstances of this case. The buyout order enables the court to do justice to the injured shareholder. It was not until the Petitioner's written closing submissions that the Petitioner referred to its position on a valuation date. Under the heading "Valuation Date" at paragraph 389 of the Petitioner's written closing submissions it is stated that the date the petition was filed (1 April 2022) is "a fair date". At paragraph 394 (b) the Petitioner seeks an "order under section 95(3)(d)) requiring the Respondents to purchase the Petitioner's shares at fair value as at 1 April 2022, with quantum to be determined at a subsequent hearing and procedural directions to be agreed between counsel (or failing agreement, to be set by the Court)". It may be the Respondents will agree to the 1 April 2022 date being the appropriate valuation date, but if they do not, I will have to consider submissions in respect of the same as such needs to be determined before any hearing to determine the appropriate figure at which the Petitioner's shares should be purchased.

457. The Petitioner is entitled to an order requiring the purchase of its shares in the Company at a figure to be determined if not agreed. The attorneys should file within 28 days of the delivery of this judgment draft directions (agreed if possible, if not then separately) leading to a hearing if a figure cannot be agreed. I have given an extended period to enable positive and constructive discussions to take place between the parties to see if an agreement can be reached.

Ancillaries

458. If the position of costs cannot be agreed then any applications for costs should be made by filing and serving concise (no more than 5 pages) written submissions within 28 days of the delivery of this judgment and any concise (no more than 5 pages) written submissions in reply to be filed within 14 days thereafter. If agreement is not reached on the price then the parties should within 28 days of the delivery of this judgment file draft directions (agreed if possible, if not then separately) for

a further hearing to determine the price. I am minded to determine any ancillary issues (such as directions for a further hearing and costs, if necessary) on the papers without a further hearing.

Draft Order

459. The attorneys should within 7 days of the delivery of this judgment file a draft order (agreed as to form and content) reflecting the determinations contained in this judgment.

Apologies

460. Practice Direction No 1 of 2012 refers to the established practice that reserved judgments arising from cases in the Financial Services Division, Civil and Family Divisions of the Grand Court "will be delivered within two to three (2-3) months". It is noted that whilst the established practice "shall be maintained, it must also be recognised that counter-vailing circumstances will sometimes arise". The aspirational desirability of striving to deliver reserved judgments as soon as possible and within such periods as are specified in the Practice Direction or as may from time to time be prescribed by the Chief Justice is also referred to in the Practice Direction and is duly noted. It is plainly of fundamental importance to the administration of justice that judgments are delivered within a reasonable period of time, whenever possible.

461. The 10-day hearing in this case finished on 6 November 2025 and further written submissions were received on 10 and 11 December 2025. I had other cases to deal with in November and December 2025 and January 2026 was a busy month. I also took some time off over the Christmas and New Year break. I apologise to the parties and their attorneys for the length of time it has taken to deliver this judgment, and thank them for their respectful patience.

David Doyle

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THE HON. JUSTICE DAVID DOYLE

JUDGE OF THE GRAND COURT

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