Court of Appeal

*Profinance Trust SA *v* Gladstone

[2001] EWCA Civ 1031

2001 May 18; July 2

Schiemann, Robert Walker LJJ and Lloyd J

Company — Unfair prejudice — Conduct of affairs — Company's affairs conducted in manner unfairly prejudicial to minority shareholder — Majority shareholder ordered to purchase minority shareholding — Whether shares to be valued as at date of order — Whether court having jurisdiction to add sum equivalent to interest to price of shares if valued as at date earlier than order — Companies Act 1985 (c 6), s 461(1)(2)

The company was incorporated as a vehicle for a joint venture between the respondent and the managing director of the petitioner company. The petitioner provided the start-up capital, and the shares in the company were initially owned by the petitioner and the respondent in equal shares. Subsequently the shareholding was adjusted so that the respondent owned 60% and the petitioner owned 40% of the shares. As a result of serious disagreements with the respondent, the petitioner's managing director resigned as a director of the company in March 1997 and ceased to take part in the management of the company. In December 1997 the petitioner presented a petition under section 459 of the Companies Act 1985[1] for an order that the respondent purchase its shares in the company on the ground that the company's affairs were being conducted in a manner which was unfairly prejudicial to the interests of the petitioner. At the hearing of the petition the respondent conceded that the petition was well founded, and the parties agreed that the company's whole issued share capital should be valued at £82,000 as at April 1997, £80,000 as at the date of the presentation of the petition and £215,000 as at the date of the hearing of the petition. The petitioner contended that the shares should be valued as at the date of the order, while the respondent contended for an earlier valuation date. The judge made an order under section 461(1) of the Act that the respondent buy the petitioner's shares in the company in the sum of £46,400, being 40% of the value of the total share capital in December 1997, uplifted by 45% representing a sum equivalent to interest to compensate for the delay in the company receiving the money.

On appeal by the petitioner—

Held, allowing the appeal, (1) that an order for payment of the equivalent of interest was not beyond the powers of the court under section 461(1), but it was a power which should be exercised with great caution; that, if a petitioner seeking an order for the purchase of his shares contended that they should be valued at a relatively early date but then augmented by the equivalent of interest, he had to put forward that claim clearly and persuade the court by evidence that it was the best way to a fair result; that unless a petitioner was asking for no more than simple interest at a normal rate he should put before the court evidence on which the court could decide what amount, if any, to allow; and that since neither party had initially asked the judge to include the equivalent of interest and since the judge had little or no evidence to assist him he had erred in the exercise of his discretion when making an order for the payment of the equivalent of interest (post, paras 31–32).

In re Bird Precision Bellows Ltd [1984] Ch 419; [1986] Ch 658, CA and *Elliot v Planet Organic Ltd* [2000] BCC 610 considered.

[1] Companies Act 1985, s 459(1): see post, para 16.
S 461(1)(2): see post, para 17.

A (2) That the starting point in selecting the valuation date of the shares should be the general proposition that prima facie an interest in a going concern ought to be valued at the date on which it was ordered to be purchased, subject to the overriding requirement that the valuation should be fair on the facts of the particular case; that, although there were many cases in which fairness to one side or the other required the court to take a different date, in the circumstances the judge had erred in the exercise of his discretion in valuing the shares as at the date of the petition; and that the fairest B course would be to value the shares as at the date of the judge's order, making no order for the equivalent of interest (post, paras 59–62).

Dicta of Nourse J in *In re London School of Electronics Ltd* [1986] Ch 211, 244 applied.

Decision of Kim Lewison QC sitting as a deputy judge of the Chancery Division [2000] 2 BCLC 516 varied.

C The following cases are referred to in the judgment of the court:

Bird Precision Bellows Ltd, In re [1984] Ch 419; [1984] 2 WLR 869; [1984] 3 All ER 444; [1986] Ch 658; [1986] 2 WLR 158; [1985] 3 All ER 523, CA

Company (No 002612 of 1984), In re A (1985) 2 BCC 99,453; sub nom *In re Cumana Ltd* [1986] BCLC 430, CA

Company (No 00709 of 1992), In re A [1999] 1 WLR 1092; [1999] 2 All ER 961, HL(E)

D *DR Chemicals Ltd, In re* (1988) 5 BCC 39

Elgindata Ltd, In re [1991] BCLC 959

Elliott v Planet Organic Ltd [2000] BCC 610

Harrison (Saul D) & Sons plc, In re [1995] 1 BCLC 14, CA

Jermyn Street Turkish Baths Ltd, In re [1970] 1 WLR 1194; [1970] 3 All ER 57

London School of Electronics Ltd, In re [1986] Ch 211; [1985] 3 WLR 474

OC (Transport) Services Ltd, In re [1984] BCLC 251

E *Regional Airports Ltd, In re* [1999] 2 BCLC 30

Scottish Co-operative Wholesale Society Ltd v Meyer [1959] AC 324; [1958] 3 WLR 404; [1958] 3 All ER 56, HL(Sc)

Virdi v Abbey Leisure Ltd [1990] BCLC 342, CA

The following additional cases were cited in argument:

President of India v La Pintada Compania Navigacion SA [1985] AC 104; [1984] F 3 WLR 10; [1984] 2 All ER 773, HL(E)

Quinlan v Essex Hinge Ltd [1996] 2 BCLC 417

APPEAL from Kim Lewison QC sitting as a deputy judge of the Chancery Division

By a petition dated 30 December 1997, the petitioner, Profinance Trust SA, applied to the court under section 459(1) of the Companies Act 1985 for G an order that the respondent, Mr Paul Gladstone, buy the petitioner's shares in Americanino Ltd, on the ground that the affairs of Americanino Ltd were being conducted in a manner which was unfairly prejudicial to the interests of the petitioner. On 31 March 2000 Mr Kim Lewison QC sitting as a deputy judge of the Chancery Division ordered the respondent to buy the petitioner's shares in Americanino Ltd for the sum of £46,400 on or before 28 April 2000.

H By a notice of appeal dated 28 April 2000 and with the permission of judge the petitioner appealed. The grounds of the appeal were: (1) that the judge had erred in following an approach that amounted to selecting a historical date for valuation of the shares and then applying a rate of interest not based on any evidence but only on the judge's impression of what rate of

return could have been achieved by the petitioner elsewhere on the sum assessed as the value of the shareholding; (2) that as the court was ordering the sale of an asset, the petitioner's shareholding in April 2000, it should, save for a good reason, have provided that the consideration paid was its value as at or close to the date of transfer ordered.

The facts are stated in the judgment of the court.

Catherine Newman QC and *Paul Emerson* for the petitioner.
Pushpinder Saini for the respondent.

Cur adv vult

2 July. **ROBERT WALKER LJ** handed down the following judgment of the court.

Introduction

1 This is the judgment of the court on an appeal from an order made in the Companies Court on 31 March 2000 by Mr Kim Lewison QC, sitting as a deputy judge of the Chancery Division [2000] 2 BCLC 516. The appellant is a Panamanian company, Profinance Trust SA ("Profinance"). The order was made on the hearing of a petition under section 459 of the Companies Act 1985 presented by Profinance as a minority shareholder of Americanino Ltd ("the company"). The only respondent to the petition was Mr Paul Gladstone, the majority shareholder. The deputy judge ordered Mr Gladstone to purchase Profinance's 40% of the company's issued share capital for £46,400. But he ordered Profinance to pay half of Mr Gladstone's assessed costs of the petition. The deputy judge himself granted permission to appeal.

2 The background and history of sections 459 to 461 of the Companies Act 1985 are very clearly set out in Part 7 of the Law Commission's Consultation Paper No 142 on Shareholder Remedies (1996). The general purpose of these provisions is to provide a shareholder who has been unfairly prejudiced by the conduct of a company's affairs with a remedy more flexible and less drastic than a winding up on "just and equitable" grounds. The basic principles of law underlying the remedy have recently been analysed by Lord Hoffmann (with whom the rest of the House of Lords concurred) in *In re A Company (No 00709 of 1992)* [1999] 1 WLR 1092.

3 It is well known among company lawyers that although sections 459 to 461 were intended to provide a fairly summary remedy for minority shareholders who have been unfairly prejudiced, proceedings under the sections often become bogged down in a mass of written evidence containing numerous accusations and counter-accusations reminiscent of petitions and cross-petitions alleging cruelty under the old divorce law. In *In re Saul D Harrison & Sons plc* [1995] 1 BCLC 14, 22 Hoffmann LJ spoke of the "notoriously burdensome nature of section 459 proceedings" (and one of the sections of his speech in *In re A Company (No 00709 of 1992)* [1999] 1 WLR 1092, 1104 is headed "No-fault divorce?"). This is one of the problems addressed in the Law Commission's consultation paper and in the Report on Shareholder Remedies (1997) (Law Com No 246) which followed it.

4 This case has unfortunately followed that all too common pattern. Even more unfortunately it has ended in an extraordinary procedural tangle.

A It is therefore necessary to describe the proceedings below in as much detail as can be derived from the recollections of Mr Paul Emerson and Mr Pushpinder Saini, who appeared below for Profinance and Mr Gladstone respectively. Except for one point which is not ultimately of much importance, their recollections are the same.

5 The petition was presented by Profinance on 30 December 1997 but was not heard until 27 March 2000. In the meantime the court file B accumulated points of defence and a considerable volume of written evidence, consisting partly of expert reports on valuation from accountants and partly of witness statements from Mr Domenico Serra, Mr Gladstone and others. (Mr Serra is an Italian citizen, resident in Panama, who is the moving spirit behind Profinance.) This volume of evidence raised numerous contentious issues of fact but in the event none of this evidence was C presented in open court.

6 The hearing was fixed to begin on a Monday. On the previous Thursday (23 March 2000) the two accountants who were to be expert witnesses signed a brief unreasoned report agreeing valuations of the whole of the company's share capital as at five different times (the earliest being April 1997, when Mr Serra had resigned as a director of the company, and the latest being March 2000, in other words at the time of the report). The D deputy judge was informed, on Friday 24 March, that there would be no witnesses. But at some stage (possibly during the weekend) he read all the papers. This court was not given a detailed account of the negotiations between the parties but it is clear that the partial compromise which they achieved was reached under severe pressure of time. That appears from (among other things) the original skeleton arguments prepared for the E hearing. Had there been more opportunity for reflection the parties' legal advisers would have realised that if there was not going to be a complete compromise, and the judge was going to be asked to perform his judicial function, he would have to have some factual basis (either agreed or determined by him) on which to act.

7 What happened on Monday 27 March 2000 was described in the deputy judge's judgment. After referring to the court's power under F section 461 he said [2000] 2 BCLC 516, 519:

> "However, the jurisdiction is a conditional one. It only arises if the court is satisfied that the petition is well founded. At the beginning of the hearing, Mr Saini for the respondent conceded that the petition was well founded. Mr Emerson for the petitioner conceded that the agreed valuations eliminated any element of depreciation of the shares G attributable to the alleged misconduct. Those two concessions gave me jurisdiction to proceed, without the need to identify which particular allegations in the petition were made out."

The concessions on their own gave the deputy judge jurisdiction, if he was satisfied that the concessions were properly made. But on their own they were the most meagre basis on which to exercise judicial discretion as to the H time at which Profinance's shares in the company should be valued.

8 Mr Saini did attempt to put some evidence before the court. He applied, at an early stage in the hearing, to put in further evidence from Mr Gladstone as to the recent history of the company's business and the reasons why (as appeared from the agreed experts' report) its value had

increased so much (the three competing valuations, after two had been discarded, being £82,000 in April 1997, £80,000 in December 1997, and £215,000 in March 2000). Mr Emerson opposed the application, partly because Mr Saini did not have any witness statement available. The deputy judge was willing to grant an adjournment on terms as to costs, but after considering the terms Mr Saini elected to continue without the new evidence.

9 So no new evidence was adduced. Furthermore the status of the witness statements and their exhibits (which the deputy judge had read before he came into court) was, most unfortunately, left in the air. Miss Catherine Newman (who led Mr Emerson in this court) has trenchantly criticised the judge for exercising his discretion by reference to matters on which there was no evidence before him. But that does not seem to have been how the matter was argued at the hearing on 27 March 2000. The facts which are set out at the beginning of the deputy judge's judgment (see paragraph 14 below) can safely be taken as a core of undisputed fact which was, either expressly or tacitly, accepted by both sides at the hearing.

10 The partial compromise which the parties reached at the last moment might be thought to have greatly simplified the deputy judge's task. But any such impression would be misleading. As has been acknowledged in this court, it presented the deputy judge with a very difficult task in exercising his discretion in relation to the narrow issue which he had to decide. Judicial discretion can be exercised only by reference to a particular set of facts, established either by agreement or by the judge's findings. Judges are naturally disposed to encourage parties to settle disputes, and where they cannot settle them completely to limit the number of issues in dispute. But in this case it might be said that the outstanding issue was presented to the deputy judge in a way which came close to denying him the material required for its determination.

11 It will be apparent that the price at which the deputy judge ordered a sale—£46,600—is not 40% of any of the three agreed sums mentioned in paragraph 8 above. The explanation of that is that it is 40% of £80,000 (the agreed value at the date of the petition) uplifted by 45% to compensate for the delay in Profinance receiving the money and being able to lay it out in some other investment opportunity.

12 Miss Newman, as well as criticising the deputy judge for exercising his discretion so as to take the value at the date of the petition, has also criticised him for an error of law in supposing that he could include an element of interest, or quasi-interest, in the purchase price. It appears that at the hearing both sides started off from the position that section 461 of the Companies Act 1985 did not authorise interest or quasi-interest (in respect of a period before the date appointed for the sale) but that Mr Saini modified his position once it became clear that the deputy judge was attracted by that possibility. In this court he has supported the deputy judge on both issues, that is what may be called the quasi-interest point and the date of valuation point.

The undisputed facts

13 In these circumstances the safest course is to restrict this court's awareness of the facts (although we, like the deputy judge, have read all the

witness statements and exhibits) to the core of undisputed fact summarised at the beginning of his judgment.

14 That summary is as follows [2000] 2 BCLC 516, 518–519:

"*The factual background*

"Americanino Ltd is a company whose shares are owned as to 40% by Profinance Trust SA and as to 60% by Mr Paul Gladstone. It was originally bought off the shelf by Mr Domenico Serra, with a view to setting up a trading venture in clothing. That venture never materialised and so the company became dormant. Profinance Trust SA is a Panamanian company whose attorney and representative is Mr Serra. Its business is that of a holding company making investments in property and businesses. In the summer of 1994 Mr Serra and Mr Gladstone agreed terms for the setting up of a business selling computer memory. The vehicle for the business was to be Americanino Ltd. Start-up capital was to be provided by Profinance Trust SA. Mr Gladstone was to manage the day-to-day running of the business. The shares in the company were to be owned by Profinance Trust SA and Mr Gladstone in equal shares. That arrangement was put into effect, and the company began to trade in September 1994 both under its own name and under the name of 'Mr Memory'. Mr Serra was Profinance Trust SA's representative on the board. The company was successful financially and during its first year of trading it repaid the start-up capital advanced to it by Profinance Trust SA. In 1996 the shareholding was adjusted with the result that the share capital of the company became (and remains) owned as to 60% by Mr Gladstone and 40% by Profinance Trust SA. Profinance Trust SA is, therefore, a minority shareholder. By the spring of 1997 serious disagreements had arisen between Mr Gladstone and Mr Serra. As a result, Mr Serra resigned as a director of the company on 28 March 1997.

"*The petition*

"On 30 December 1997 Profinance Trust SA presented a petition under section 459 of the Companies Act 1985. The ground on which the petition was based was an allegation that the affairs of the company are being conducted in a manner which is unfairly prejudicial to the interests of Profinance Trust SA. The relief sought by the petition was an order that Mr Gladstone should buy its shares in the company for £320,000 with interest at a commercial rate from 4 April 1997 or for such other sum as the court thinks fit; and that such other order be made as the court thinks fit. Mr Gladstone had in fact offered to buy Profinance Trust's shares at a meeting in early April 1997, but the price which he offered was not acceptable to Profinance Trust. A further offer to buy those shares was made by Mr Gladstone's solicitors in a letter dated 3 March 2000. That letter stated that the substantial issue of valuing the shareholding should be left to the trial. In the meantime both sides had instructed accountants to report on the correct value of the company. Ultimately the accountants reached an agreement recorded in a joint report dated 23 March 2000. The agreed values are: (1) April 1997—£82,000; (2) December 1997—£80,000; (3) October 1998—£80,000; (4) March 1999—£146,000; (5) March 2000—£215,000."

15 As appears later in the deputy judge's judgment the offer made by Mr Gladstone in April 1997 was to purchase Profinance's shares for £20,000; and the valuations as at October 1998 and March 1999 were agreed to be irrelevant. So the task which the parties asked the deputy judge to undertake, and which he did undertake, was to choose (on the basis of the core of undisputed facts) which of the three remaining valuations he should use in order to arrive at the fair value at which to order a purchase. That is the date of valuation point. But it is better to start by considering the quasi-interest point, both because it is the shorter point and because it is logically anterior (the judge could not properly exercise his discretion under section 461 unless he knew the extent of his powers).

The quasi-interest point

16 Section 459(1) of the Companies Act 1985 (as slightly amended by section 145 of and paragraph 11(a) of Schedule 19 to the Companies Act 1989) provides:

> "A member of a company may apply to the court by petition for an order under this Part 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 its members generally or of some part of its members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."

17 Section 460 relates to applications by the Secretary of State and is not material. Section 461(1) and (2) provide:

> "(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.
>
> "(2) Without prejudice to the generality of subsection (1), the court's order may—(a) regulate the conduct of the company's affairs in the future, (b) require the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do, (c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct, (d) provide 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, the reduction of the company's capital accordingly."

The other subsections of sections 461 are not directly material.

18 There is a good deal of authority as to the circumstances in which section 459 is engaged and as to the wide nature of the powers conferred on the Companies Court by section 461 if it is satisfied that a section 459 petition is well founded. Many of these cases are concerned with the circumstances in which the court should direct a purchase of shares under section 461(2)(d) and with the basis on which the shares (almost invariably a minority holding) should be valued. In a "quasi-partnership" case where the petitioner is not at fault the court tends to favour an undiscounted share of the value of the company as a whole: see *Virdi v Abbey Leisure Ltd* [1990] BCLC 342, 350, and also the last part of the speech of Lord Hoffmann, not

A necessary to the decision, in *In re A Company (No 00709 of 1992)* [1999] 1 WLR 1092, 1105–1108. It was common ground that an undiscounted basis was appropriate in this case.

19 The decided cases on the appropriate valuation date recognise that the court has a wide discretion: see in particular the decision of this court in *In re Cumana Ltd* [1986] BCLC 430, 436 (Lawton LJ), 437 (Glidewell LJ) and 445 (Nicholls LJ). But even a wide discretion to do what is fair must (as B Lord Hoffmann said in *In re A Company (No 00709 of 1992)* [1999] 1 WLR 1092, 1098) be exercised judicially and on rational principles.

20 At the hearing the deputy judge raised the question whether, if he thought it right to select an early valuation date, he could award interest on the purchase money as from that date. Neither side had argued for that but once the point had been raised Mr Saini submitted that that would be C within the court's powers. Mr Emerson argued that it would not be, and Miss Newman (having had more time to prepare submissions on the point) has repeated and reinforced that argument.

21 She has argued, as Mr Emerson did below, that the point is concluded by authority, that is this court's decision upholding Nourse J in *In re Bird Precision Bellows Ltd* [1984] Ch 419; affirmed [1986] Ch 658. D In that case the petition was presented on 12 October 1981. On 23 November 1981 Vinelott J made an order by consent that the respondents should purchase the petitioners' shares "at such price as the court shall hereafter determine". The consent order gave liberty to apply for directions as to the payment of the purchase price and "interest (if appropriate)". The main hearing was in June and July 1983, and on 28 October 1983 Nourse J gave judgment. He ruled that the petitioners' E shares should be valued without a discount, and he fixed the price at £18·25 each. He did not state in terms the date of valuation, but in *In re London School of Electronics Ltd* [1986] Ch 211, 224 he commented that it was no doubt implicit in the terms of the consent order that the shares were to be valued as at the date of that order.

22 When judgment was given counsel for the petitioners raised the F question of interest under the liberty to apply, and there was further argument. Nourse J recorded the arguments of counsel for the respondents that the court's powers to award interest in respect of a period before judgment are limited, and of counsel for the petitioners that the court's powers under section 75(3) of the Companies Act 1980 (now section 461(1) of the Companies Act 1985) are very wide. Nourse J continued [1984] Ch 419, 437: G

> "On analysis, it appears that what [counsel for the petitioners] is really saying is that the court has power under section 75(3) to award something equivalent to interest. That must, I think, be damages for loss of the use of the purchase moneys during a period when they ought to have been in hand. As will appear, the view which I take of this case makes it unnecessary for me to express a view on that point and I do not do so. In H the present case there was an agreement that the respondents should buy out the petitioners on a certain basis, i e, at such price as the court should determine. That price was held to be a sum equivalent to the fair value of the shares. There was no agreement that the price should bear interest from some date prior to its determination or, indeed, from any date. An

agreed liberty to apply for directions as to the payment of interest, if appropriate, is not an agreement that the price should bear interest." A

23 The point was raised again on appeal but it was rejected in even plainer terms. Oliver LJ said [1986] Ch 658, 677:

"It seems to me as plain as can be that the liberty to apply for directions as to payment of interest on the purchase price was simply inserted for the purpose of enabling the court, when it fixed the terms of the purchase, to provide, if the purchase price was not paid, for interest to be paid on it as from a certain date. It seems to me that the judge was perfectly right in refusing to allow any question to be ventilated as to the payment of interest, as it were, in lieu of damages." B

24 In *In re DR Chemicals Ltd* (1988) 5 BCC 39, 54 Peter Gibson J referred to *In re Bird Precision Bellows Ltd* as authority for the proposition that a petitioner is unable to obtain an order for interest running from a date before the purchase order is made. But there cannot have been any argument on the point, since if it had been in issue Peter Gibson J would have given fuller reasons for the view which he expressed. C

25 The judge [2000] 2 BCLC 516 regarded the point as untrammelled by authority and decided it on his view of the wide scope of section 461(1), at pp, 524–525: D

"The order which the court makes is a genuine exercise of discretion, whose object is to do what is fair as between the parties. I see no reason why, if the court comes to the conclusion that a historic valuation date is appropriate, it should not inflate the price to be paid over and above the market value at that historic date to reflect the delay in payment." E

26 In attacking that conclusion Miss Newman submitted that the court's inability to award interest (or its equivalent) has since been confirmed by the decision of Jacob J in *Elliott v Planet Organic Ltd* [2000] BCC 610. That case had some similarity to *In re Bird Precision Bellows Ltd* in that the petition and cross-petition had already been heard by another judge, Lloyd J. On 29 January 1999 Lloyd J ordered Mr Dwek to sell his ordinary shares to Mrs Elliott "at a fair price to be agreed between the parties or determined by the court as hereinafter provided". The valuation date was to be the date of his judgment. The purchase price was to be paid within 28 days of its determination. The parties' appointed valuers could not agree and Jacob J was faced with a range of valuations (for the whole company) of between £2·27m and £6·34m. He decided that the right figure was £3·38m. F G

27 That was the context in which Jacob J considered an application for interest (or the equivalent of interest) on the money payable to Mr Dwek. He referred [2000] BCC 610, 616 to *In re Bird Precision Bellows Ltd* [1984] Ch 419, citing not Nourse J's conclusion but the immediately preceding passage, at p 437: H

"in a normal section 75 case, where there has been no agreement of any kind, I cannot see how there can be any question of interest being payable before a purchase order is made. Until that stage is reached there is no obligation to pay any sum at all, either quantified or unquantified. I have

never heard of interest being payable before there is an obligation to pay principal."

28 Jacob J continued [2000] BCC 610, 616:

"*In re Bird Precision Bellows Ltd* was a case in which there had been an agreement for a buy-out at a price to be decided by the court. [Counsel for Mr Dwek] says things are different when there is a court ordered buy-out. Then, in doing what it 'sees fit', the court can order interest or an element of interest on the price. Moreover if that is not so, then there is an inherent unfairness, the seller is deprived of his capital whilst the court procedure grinds through to working out the price and the buyer gets the free use of the capital. I have sympathy with [counsel for Mr Dwek's] argument. But I do not accept it. In this case Lloyd J ordered Mrs Elliott to pay within one month of determination of the price. Mr Dwek has no entitlement to any money until that date. And indeed he is entitled to and owner of the shares until the sale goes through. There is simply nothing upon which interest should run. This forced sale is not like a case where damages have been caused and interest runs on the damages. So I do not include any interest element in my order."

29 We do not read that as stating the general proposition that the court could never award the equivalent of pre-judgment interest under section 461(1), though Jacob J's blunt comment, "And indeed he is entitled to and owner of the shares until the sale goes through" gives a good reason why the court should normally be slow to make such an order. In our view Jacob J rightly saw the scope of his discretion as restricted by the order of Lloyd J, just as Nourse J in *In re Bird Precision Bellows Ltd* [1984] Ch 419 had rightly seen his discretion as restricted by the consent order of Vinelott J. (We will come back to Miss Newman's separate submission that the deputy judge's discretion was similarly restricted by the parties' agreement to limit the issues in this case.)

30 We have described the issue of quasi-interest as logically anterior to the exercise of discretion as to the choice of the valuation date. But in practice the two cannot be completely separated, because the circumstances in which it may be fair for the court to take an early valuation date (or in which it is simply not possible to take a more recent date) may also be highly relevant to the petitioner's claim for the equivalent of interest. If (to take an extreme example) a majority shareholder had used his control to misappropriate a company's staff, customers and goodwill so as to make the company's shares virtually worthless by the time of the hearing, the only fair valuation date may be the date of presentation of the petition (and there will probably also be a notional adjustment to allow for the misappropriation, a course specifically approved, in relation to section 210 of the Companies Act 1948, by the House of Lords in *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, considered further below). But in the meantime the petitioner has (in an extreme case of that sort) been receiving no benefit of any sort from his membership of the company, either in the form of dividends, or in the form of director's remuneration, or otherwise. He has been locked into an investment which has been made worthless as a result of the majority shareholder's oppression. It would be different if he had been continuing to receive a stream of dividends and director's remuneration and

his complaint was limited to excessive remuneration and benefits enjoyed by the majority shareholder. In the latter case there would be obvious force in Jacob J's observation that he should not be entitled to interest or the equivalent of interest so long as he owns the shares. But in a case of that sort there would probably be no good reason to select an early valuation date anyway.

31 In our judgment the deputy judge was right in his view that an order for the equivalent of interest is not beyond the powers of the court under section 461(1) of the Companies Act 1985. The court has repeatedly emphasised the width of the discretion conferred by that subsection, which is not limited to the particular powers enumerated in subsection (2). The House of Lords has (in relation to the court's closely comparable powers under section 210 of the Companies Act 1948) approved the making of adjustments in the valuation process which mean that the court is actually valuing shares, not as they are, but as they would have been if events had followed a different course; and that practice is regularly followed by the court in orders under section 461(1). In these circumstances a denial of the court's power to award the equivalent of interest would come close to straining at a gnat.

32 It is however a power which should be exercised with great caution. Miss Newman has rightly drawn attention to the need for lawyers to be able to advise their clients as to the likely range of outcomes of section 459 proceedings, in order to encourage compromise in an area in which litigation can be cripplingly expensive. If a petitioner seeking an order for the purchase of his shares contends (either as his only claim or in the alternative) that they should be valued at a relatively early date but then augmented by the equivalent of interest, he must put forward that claim clearly and persuade the court by evidence that it is the only way, or the best way, to a fair result. It should not be a last-minute afterthought (as it may have been, to some extent, in *In re Bird Precision Bellows Ltd* [1984] Ch 419 and *Elliott v Planet Organic Ltd* [2000] BCC 610). Unless a petitioner is asking for no more than simple interest at a normal rate he should also put before the court evidence on which the court can decide what amount (if any) to allow. The exercise which the deputy judge undertook, as described in the last paragraph of his judgment, does not appear to have had a solid evidential basis.

The date of valuation

33 The authorities show that there are two main considerations which the court has to bear in mind in deciding what valuation date is fair on the facts of the particular case. One is that the shares should be valued at a date as close as possible to the actual sale so as to reflect the value of what the shareholder is selling. This is clearly expressed in the judgment of Nourse J in *In re London School of Electronics Ltd* [1986] Ch 211, 224:

> "If there were to be such a thing as a general rule, I myself would think that the date of the order or the actual valuation would be more appropriate than the date of the presentation of the petition or the unfair prejudice. Prima facie an interest in a going concern ought to be valued at the date on which it is ordered to be purchased."

A But Nourse J continued: "But whatever the general rule might be it seems very probable that the overriding requirement that the valuation should be fair on the facts of the particular case would, by exceptions, reduce it to no rule at all."

34 In that case City Tutorial College Ltd, the majority shareholder in London School of Electronics Ltd, had through its directors diverted the latter company's BSc students to itself for the 1983–84 academic year. B Nourse J directed a valuation at the date of the petition (which was presented during that academic year), with appropriate adjustments. He declined to take a later date, on the grounds, at p 225, that the directors of City Tutorial College Ltd "have now been able to acquire a greater academic standing for the course in this country. I find that has been entirely due to their own efforts and owes nothing to the petitioner and, moreover, that it is C unlikely that it would have been achieved if the petitioner had remained with the company."

35 The rival consideration was stated by Vinelott J in *In re A Company (No 002612 of 1984)* (1985) 2 BCC 99,453, 99,492–99,493. After referring to *In re London School of Electronics Ltd* he said:

> D "I would respectfully agree with Nourse J that there is no rigid rule applicable to all circumstances, though I would at least incline to the view that the date of the petition is the correct starting point, the valuation of course being adjusted to take account of unfair conduct which has depreciated the value of the shares (as in *Meyer*), and that a departure from this date must be justified on the ground of some special circumstance. The date of the petition is the date on which the petitioner E elects to treat the unfair conduct of the majority as in effect destroying the basis on which he agreed to continue to be a shareholder, and to look to his shares for his proper reward from participation in a joint undertaking."

The reference to *Meyer* is to the decision of the House of Lords in *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324 (a case on F section 210 of the Companies Act 1948, under which a petitioner had to establish oppression rather than unfair prejudice).

36 *Scottish Co-operative Wholesale Society Ltd v Meyer* was an early case under a little-used jurisdiction. The co-operative society had formed a 51% owned subsidiary to manufacture rayon at a time of strict post-war controls. The other shares were owned by two outside directors with skill G and experience in the trade. When these directors declined to sell their shares to the society it began switching its business to a new department within its own organisation. The subsidiary's business declined and its shares fell heavily in value. On the directors' petition the Court of Session ordered the society to buy the directors' shares (see p 364) at "what would have been the value of the shares at the commencement of the proceedings had it not been for the oppressive conduct of which complaint was made". H The House of Lords dismissed the society's appeal. Most of the argument turned on points on section 210 which are no longer material, but Viscount Simonds, Lord Keith of Avonholm and Lord Denning all specifically approved a valuation which was both backdated to the presentation of the petition and adjusted to compensate for the past oppression. It must be

borne in mind that in this case the agreed valuations are acknowledged to incorporate an adjustment of that sort.

37 The clearest reason for selecting an early valuation date is that there has been a major change (whether for the better or for the worse) in a company's capital structure and business. An early example is *In re OC (Transport) Services Ltd* [1984] BCLC 251, in which the majority shareholder had used his control to increase the company's issued capital by 750% and to make it a partly-owned subsidiary of another company of his. Mervyn Davies J said, at p 258: "on a section 75 application fairness sometimes requires a valuation to relate back to a date earlier than the date of the petition. This is such a case." Mervyn Davies J used the expression "sea change" which has been repeated in some later cases.

38 When *In re Bird Precision Bellows Ltd* reached this court [1986] Ch 658, Oliver LJ (with whom Purchas LJ agreed) did not comment on what Nourse J had said about the valuation date. But in dismissing the appeal this court emphasised the width of the statutory discretion. After referring to what Pennycuick J said in *In re Jermyn Street Turkish Baths Ltd* [1970] 1 WLR 1194, 1208 and what Lord Denning said in *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324, 369, Oliver LJ observed [1986] Ch 658, 672:

> "Speaking for myself, I have been quite unable to see why these two authorities should be supposed to support the arguments which the majority shareholders have advanced. They seem to me to be entirely against them because, as it seems to me, they indicate as clearly as can be the wide discretion which the court has in directing the basis on which shares should be valued for the purpose of a purchase ordered under this section. It may be true that it can be compensatory, but what the court is required to do, in the exercise of its very wide discretion, is that which is just and equitable between the parties."

39 There was also an appeal to this court from the decision of Vinelott J in *In re A Company (No 002612 of 1984)* (1985) 2 BCC 99, 453. The appeal is reported as *In re Cumana Ltd* [1986] BCLC 430. The choice of valuation date was an issue on the appeal. This court upheld Vinelott J's exercise of his discretion. Lawton LJ said [1986] BCLC 430, 436:

> "the shares had gone down in value between the date of the petition and the date of judgment. They might have gone up. The reason which the judge gave, on the facts of this case, for choosing the date of the petition was a sound one, viz: 'The date of the petition is the date on which the petitioner elects to treat the unfair conduct of the majority as in effect destroying the basis on which he agreed to continue to be a shareholder, and to look to his shares for his proper reward for participation in a joint undertaking.' I would stress, however, that the choice of a date for valuation in cases of this kind is a matter for the exercise of the trial judge's discretion. If, for example, there is before the court evidence that the majority shareholder deliberately took steps to depreciate the value of shares in anticipation of a petition being presented, it would be permissible to value the shares at a date before such action was taken."

40 Nicholls LJ (with whose reasons Glidewell LJ agreed) said, at p 445:

> "Counsel for [the majority shareholder] also attacked the judge's choice of valuation date, which was nearly a year before the date when he made his order. Prior to the hearing, [the minority shareholder] had offered his shares to [the majority shareholder] for £1,700,000, but he did not offer to sell them at their value at the date on which the petition was issued, and the price ought not to have been fixed at a date earlier than the date when it became apparent that the shares had to be sold. As it was, the price fixed by the judge was about £¼m more than the value of the shares at the time of the hearing. In my view, this attack also must fail. The choice of the valuation date was a matter for the judge's discretion. The reasons he gave for choosing the earlier date seem to me sufficient to support his conclusion on this, albeit the result was a severe form of order."

In that case the reason for the fall in value of the shares was not any malpractice by the majority shareholder, but a general fall during 1985 in the market's rating of high technology companies. But the majority shareholder's earlier conduct had been described by Vinelott J as quite unscrupulous.

41 Three more recent first instance decisions were cited to the court. In *In re DR Chemicals Ltd* (1988) 5 BCC 39 the majority (60%) shareholder, Mr Rees, was an inventive chemist and the minority (40%) shareholder, Mr Harries, an engineer, provided premises for the company and helped on the manufacturing side until the company moved to larger premises in 1982. Mr Harries then ceased to take any part in running the company. Mr Rees increased the issued capital by 900%, allotting all the new shares to himself at par, and apparently reducing Mr Harries to a 4% holding. The company prospered but Mr Harries received no dividends, and no director's remuneration after 1983. He presented his petition in 1987.

42 Peter Gibson J was very critical of Mr Rees. Referring to his counsel's submissions he said, at p 51:

> "Bravely though those arguments were put, I feel bound to observe that they are wholly devoid of legal or other merit. Indeed, I cannot conceive of a more blatant case of unfairly prejudicial conduct to a member than the unilateral and secret exercise by a director of the power of allotment so as to increase his own shareholding from 60% to 96% and to reduce the other member's holding thereby from 40% to 4%."

Nevertheless Peter Gibson J, at p 54, approached the matter on the basis that Mr Harries had chosen "to sit it out as an ordinary minority shareholder". He was to have his shares purchased as if they were a 40% holding, with a discount appropriate to that important minority holding.

43 That was the context in which Peter Gibson J approached the issue of the date of valuation, and made the observations about interest referred to in paragraph 24 above. It is best to set out the passage in full:

> "A number of possible dates for the valuation have been canvassed. [Counsel for the respondents], not surprisingly, supported the earliest possible date, August 1982, that having been suggested by Mr Rees in 1986 and 1987 as the basis of his offers. But that cannot be fair. The

allotment which caused the unfair prejudice did not occur until October 1983. [Counsel for the petitioner] submitted that the appropriate date was the date of my order or alternatively the date of the petition. Of those two dates the earlier date was contended for by [counsel for the respondents] as being that on which Mr Harries irrevocably elected to be bought out. Mr Harries, acting entirely within his rights and not unreasonably, has remained a minority holder and only now is he obtaining an order requiring the respondents to purchase his shares. Accordingly logic and fairness dictate that the valuation should be at the date of my order. To my mind this conclusion is strongly supported by the fact that a petitioner under section 459 is unable to obtain an order for interest running from a date before the purchase order is made (see *In re Bird Precision Bellows Ltd* [1984] Ch 419, 437, approved on appeal in the Court of Appeal [1986] Ch 658). There will of course be cases where in the particular circumstances a date earlier than the date of the order will be shown to be the fair date, for example, where there has been a sea change in the company's business since the petitioner last associated himself in any way with the company. But that is not this case."

44 *In re Elgindata Ltd* [1991] BCLC 959 is best known for the subsequent appeal on costs. The principal petitioner, Mr Rowland, was the inventor of an electronic calculator and he and his wife were 33% shareholders (but only from 1986) in the company. After a very long hearing Warner J held that he had established prejudicial conduct by the majority shareholder, Mr Purslow, but only to the extent of improper "perks" which had not more than a limited effect on the value of the company. The company's profits had peaked in 1987 and then rapidly declined, not apparently because of any malpractice. The petition was presented at the beginning of 1989 and heard at the end of 1990. That was the context in which Warner J said, at p 1006:

"If I am right in the conclusions that I have reached as to the extent to which the diminution in value of the petitioners' shares was attributable to conduct on the part of Mr Purslow of which the petitioners are entitled to complain under section 459, to fix a date for the value of the shares at or near the time when the company's fortunes were at their peak would be grossly unfair to Mr Purslow."

Warner J found himself faced with the choice between the date of the petition and the date of the order, both of which he regarded as "in a way arbitrary". He chose the date of the order as more appropriate because by then the accounts had been adjusted for certain irregularities.

45 In *In re Regional Airports Ltd* [1999] 2 BCLC 30, 83, Hart J expressed a preference for taking the most up-to-date valuation available, since "To do otherwise risked the possibility that the petitioners might unfairly benefit from my shutting my eyes to a foreseeable 'post balance sheet' event".

The judgment

46 In his judgment the deputy judge discussed the authorities mentioned above and concluded that there was not a prima facie rule that

A the valuation date should be the date of the order. He said [2000] 2 BCLC 516, 522–523:

> "In some of the cases a date earlier than the date of the order has been selected because the value of the shares in question has been diminished as a result of the conduct complained of. It is easy to see the fairness of that. But it does not seem to me that fairness demands that the petitioner is
B entitled to a one way bet, able to take advantage of any rise in the share value, but insulated from any fall. Where the petitioner has continued to fund the company in a real sense, it may well be fair that his actual return on capital should equate to the rise in value of the company, but where, as here, the petitioner has been repaid in full, I do not consider that the same consequence necessarily follows."

C 47 The deputy judge then considered the quasi-interest issue and concluded that an order for payment of the equivalent of interest was within the court's powers under section 461(1) of the Companies Act 1985. For the reasons already mentioned, we consider that the judge was right in that conclusion, but that the power should be cautiously exercised.

48 The deputy judge then identified eight factors which he saw as
D relevant to the exercise of his discretion. The eighth point—that no transfer of shares had taken place, and that Profinance was still investing, however unwillingly, in the company—led towards valuation at the date of the order. It was in line with the observations of Nourse J in *In re London School of Electronics Ltd* [1986] Ch 211 and Jacob J in *Elliott v Planet Organic Ltd* [2000] BCC 610.

49 The deputy judge viewed all or most of the other seven points as
E leading to an earlier valuation date. Miss Newman criticised most of these points as being either mistaken or based on speculation as to matters not established by evidence properly before the court. We have already observed that the judge was placed in a very difficult position in being asked to exercise his judicial discretion on such limited evidential material. Nevertheless we consider that there is force in Miss Newman's criticisms.

F 50 The seven points identified by the judge can be restated as factors related to the nature of Profinance's (and Mr Serra's) participation in the company; factors related to the performance of the company after March 1997, when Mr Serra ceased to take part in its management; and factors related to the course of the proceedings on the section 459 petition.

51 As to the nature of Profinance's participation, the deputy judge attached importance to what he saw as the essentials of the initial bargain,
G that Profinance was an investor and would provide the start-up capital (which was repaid within a year) and that Mr Gladstone would provide the expertise. He also seems to have regarded Profinance, as an investor with a minority shareholding, as fortunate to have obtained the concession of not being subjected to any discount.

52 The judge did not have the advantage of seeing and hearing the
H witnesses and this court is in as good a position (or in no worse position) to form a view on these matters. We consider that the deputy judge erred in his assessment of them. He seems to have overlooked that Profinance started off as an equal shareholder, and that the alteration of the shareholdings occurred after an incident about which the parties had put in evidence, but which is not referred to in the deputy judge's summary of the facts.

53 The deputy judge also seems to have overlooked that although Mr Gladstone was a talented and energetic salesman, and was to have the day-to-day management of the business, he had not previously been in business on his own, whereas Mr Serra was an experienced businessman who wished to be involved in long-term plans. Mr Serra's company, Profinance, provided the essential start-up capital without which Mr Gladstone would have remained someone else's employee. The repayment of the start-up capital within a year does not alter the fact that Profinance was laying out a significant amount of risk capital with a view to long-term gain from the eventual sale or flotation of the company as a whole—not from the sale of its own shareholding.

54 The deputy judge asked himself why the valuation of the company as a whole had increased almost threefold after the date of presentation of the petition, especially at a time when (because of worldwide oversupply) the expected trend in the industry was downwards. The deputy judge concluded [2000] 2 BCLC 516, 526 that he was entitled to infer that profits rose because of Mr Gladstone's efforts. While sympathising with the deputy judge's understandable wish to establish some sort of firm evidential base on which to exercise his discretion, we do not think that the judge was entitled to attach so much weight to this inference (especially as Mr Gladstone had had the opportunity of adducing further evidence, but had declined it). No doubt Mr Gladstone's efforts were a very important factor in the company's success, but Mr Gladstone had been in charge of the day-to-day management of the business since its inception. There was no reason to suppose that Mr Gladstone's talents had suddenly trebled as a result of his falling-out with Mr Serra. One possible alternative explanation, although we attach no weight to it, is that the accountants seriously underestimated the profits lost to the company as a result of the prejudicial conduct on which the petition was based. Another possible explanation is the importance, in the valuation of a young and growing business, of establishing a core of satisfied customers and a good track record of profits.

55 Mr Saini relied on the fact that Mr Gladstone had no written service agreement with the company and that he was therefore (as the judge put it) free to place his services at the disposal of another employer. That is so, subject to the constraints imposed on Mr Gladstone by his fiduciary obligations as a director of the company. But there is no reason to suppose that that point was not factored in to all the valuations agreed by the experts. It was not by itself a reason for preferring one valuation date rather than another.

56 On an associated point the deputy judge directed himself that a "sea change" in the profitability of a company is not a necessary condition for selecting an early valuation date. This phrase from a song in *The Tempest* is a vivid but imprecise expression. It has been used in the authorities, as we understand them, to denote not simply an alteration (however dramatic) in a company's profits, but a rearrangement of its structure and business (typically by an increase in issued capital and the injection of a new business) which means that the company is (in the eyes of a businessman or an investor) no longer what it was before. It would also no doubt cover the virtual destruction of a company by diversion of its business elsewhere, as in *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324. In our view the deputy judge was too ready to assume that the risk capital which

A Profinance had provided as seed corn in 1994 had no real connection with the healthy profits which the business was making in 2000.

57 In relation to the petition the deputy judge accepted that Mr Gladstone's offer of £20,000 in April 1997 was inadequate. But he also expressed views as to the attitude which Profinance might have taken to a larger offer, and speculated as to whether Profinance might have refused a
B reasonable offer in the hope that the shares would increase in value. We think Miss Newman is right to point out that Profinance could not be criticised for failing to accept any offer so long as Mr Serra and his advisers were deprived of access to the company's accounting records: see Lord Hoffmann's observations about "equality of arms" in *In re A Company (No 00709 of 1992)* [1999] 1 WLR 1092, 1107. The deputy judge also criticised Profinance for delay in bringing the petition to trial, but said that it
C was not solely to blame, and that point had no influence on the exercise of his discretion.

58 Finally the deputy judge directed himself that he could build into the price for the shares a generous allowance for delay in payment. We think he was right about this as a matter of jurisdiction, but it may have been unwise to take that unusual course where initially neither side was asking him to do
D so, and he had little or no evidence to assist him. We do not think Miss Newman is right in saying that the terms of the partial compromise absolutely excluded this possibility (see the observations of Oliver LJ in *In re Bird Precision Bellows Ltd* [1986] Ch 658, 670) but they did make it problematical.

Conclusions

E

59 We have with some reluctance come to the conclusion that the deputy judge did err in the exercise of his discretion, wide though it was. He did not take the right view of the undisputed facts as to the inception of the joint venture between Profinance and Mr Gladstone, and he went too far in his inferences as to the reasons for the increase in the value of the company between 1997 and 2000.

F 60 The court is therefore required to consider whether it would be right to exercise its own discretion. Mr Saini submitted that we should if necessary remit the case to the Companies Court for further consideration. But that course would involve even more delay and expense. It would also give Mr Gladstone a further opportunity to put in late evidence, after he had declined the deputy judge's offer of an adjournment for that purpose. In our
G view this court should resolve the matter on the basis of what we have called the core of undisputed fact. The starting point should in our view be the general proposition stated by Nourse J in *In re London School of Electronics Ltd* [1986] Ch 211, 224: "Prima facie an interest in a going concern ought to be valued at the date on which it is ordered to be purchased." That is, as Nourse J said, subject to the overriding requirement that the valuation should be fair on the facts of the particular case.

H 61 The general trend of authority over the last 15 years appears to us to support that as the starting point, while recognising that there are many cases in which fairness (to one side or the other) requires the court to take another date. It would be wrong to try to enumerate all those cases but some of them can be illustrated by the authorities already referred to.

(i) Where a company has been deprived of its business, an early valuation date (and compensating adjustments) may be required in fairness to the claimant: see *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959] AC 324.

(ii) Where a company has been reconstructed or its business has changed significantly, so that it has a new economic identity, an early valuation date may be required in fairness to one or both parties: see *In re OC (Transport) Services Ltd* [1984] BCLC 251, and to a lesser degree *In re London School of Electronics Ltd* [1986] Ch 211. But an improper alteration in the issued share capital, unaccompanied by any change in the business, will not necessarily have that outcome: see *In re DR Chemicals Ltd* (1988) 5 BCC 39.

(iii) Where a minority shareholder has a petition on foot and there is a general fall in the market, the court may in fairness to the claimant have the shares valued at an early date, especially if it strongly disapproves of the majority shareholder's prejudicial conduct: see *In re Cumana Ltd* [1986] BCLC 430.

(iv) But a claimant is not entitled to what the deputy judge called a one-way bet, and the court will not direct an early valuation date simply to give the claimant the most advantageous exit from the company, especially where severe prejudice has not been made out: see *In re Elgindata Ltd* [1991] BCLC 959.

(v) All these points may be heavily influenced by the parties' conduct in making and accepting or rejecting offers either before or during the course of the proceedings: see *In re A Company (No 00709 of 1992)* [1999] 1 WLR 1092.

62 In our judgment the fairest course in this case would be to take the agreed value as at the time of the first instance hearing, that is £215,000. We allow this appeal and substitute an order that Mr Gladstone should purchase Profinance's 40% holding in the company for £86,000.

Appeal allowed.
Permission to appeal refused.

Solicitors: Russell-Cooke Potter & Chapman; Robbins Olivey, Woking.

Reported by EDWINA EPSTEIN, Barrister