Case No: A3/2014/1709

Neutral Citation Number: [2015] EWCA Civ 536

N THE COURT OF APPEAL
ON APPEAL FROM
THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT
Mrs Justice Asplin

IN THE MATTER OF CHARTERHOUSE CAPITAL LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday 20th May 2015

Before :

THE CHANCELLOR OF THE HIGH COURT
LORD JUSTICE LEWISON
and
LORD JUSTICE MCCOMBE

- -

Between :

GEOFFREY ARBUTHNOTT

Appellant/Petitioner

-and-

(1) JAMES GORDON BONNYMAN
(2) DUNCAN ALDRED
(3) JAMES ARNELL
(4) GRAEME COULTHARD
(5) WILLIAM BRUCE DOCKERAY
(6) LIONEL GIACOMOTTO
(7) MALCOLM OFFORD
(8) STUART SIMPSON
(9) STEPHANE ETROY
(10) CHRISTIAN FEHLING
(11) STEPHAN MORGAN
(12) EDWARD BENTHALL
(13) EDWARD COX
(14) SIMON DRURY
(15) JEREMY GREENHALGH
(16) ROGER PILGRIM
(17) THOMAS PLANT
(18) WATLING STREET LIMITED
(a company registered in England and

Wales with number 07842601)
(19) CHARTERHOUSE CAPITAL LIMITED
(a company registered in England and
Wales with number 04220424)

Respondents

(Transcript of the Handed Down Judgment of
WordWave International Limited
Trading as DTI
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

DAVID CHIVERS Q.C., ANDREW THOMPSON Q.C. (instructed by Herbert Smith Freehills LLP) for the Appellants

KENNETH MacLEAN QC., JAMES POTTS QC., SAM O'LEARY (instructed by Slaughter and May) for the Respondents

Hearing dates : 28, 29, 30 April 2015

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Judgment
As Approved by the Court

The Chancellor of the High Court :

1. This is an appeal from the order of Asplin J dated 8 May 2014 dismissing the petition of the appellant, Geoffrey Arbuthnott, pursuant to section 994 of the Companies Act 2006 ("the 2006 Act") claiming that the affairs of the 19th respondent, Charterhouse Capital Limited ("the Company"), have been conducted in a manner unfairly prejudicial to him as a member of the Company.

2. The principal issue on the appeal concerns the propriety of the compulsory acquisition of Mr Arbuthnott's shares in the Company by the 18th Respondent, Watling Street Limited ("WSL"), in which other members of the company holding a majority of the Company's shares were interested, at a price of £1,500 per share. That valued the Company as a whole at £15.15 million, which Mr Arbuthnott claims is a gross under value.

3. Permission to appeal was granted by the Judge herself.

The background

4. The Judge's impressive judgment, which runs to 105 pages and 435 paragraphs, sets out at some length and in close and clear detail the background facts. There is no appeal from some of her findings. As a result and in light of the focus on specific matters, on this appeal, I can summarise much more briefly than she the relevant facts. I gratefully take the following account largely from her judgment.

5. The Company, through various subsidiaries and limited partnerships ("the group"), carries on a well-known and very successful private equity business, trading under the name of "Charterhouse" ("the Business").

6. The early history of the Business may be summarised very briefly. Charterhouse Development Capital Limited ("CDC"), which is now a wholly-owned subsidiary of the Company, was established as a subsidiary of Charterhouse plc in 1965. After various changes in the corporate structure which it is unnecessary to describe, in July 2000 HSBC became the ultimate parent company of CDC. There was a management buy-out of CDC in 2001. The agreed purchase price of approximately £9 million represented £2 million for the assets of CDC and the other companies within the group, £4 million to reflect "goodwill" and £3 million in foregone performance bonuses.

7. Ignoring various changes of company and partnership names, the share purchase agreement was executed between the Company's immediate parent company (a subsidiary of HSBC), Charterhouse Capital Partners Limited ("CCP") and Charterhouse Development Capital Holdings Limited.

8. On 15 June 2001 the 16 investment managers forming the management buy-out team (which included Mr Arbuthnott and the 1st to 8th and 12th to 17th respondents along with Ms Kate Adderley who sold her shares in 2004) ("the Founders"), subscribed for shares for a nominal value in CCP and the Company. Mr Arbuthnott subscribed £9, the par value, for 900 A shares of £0.01 each in the capital of the Company, amounting to 9% of the issued share capital (subsequently reducing to 8.9%). He was the second largest shareholder after the 1st respondent, James Gordon Bonnyman, who

acquired 18% (subsequently reducing to 17.8%). At all relevant times Mr Bonnyman was the chief executive of the Company.

9. CCP was used by the Founders as a vehicle to acquire the various companies related to the private equity business. The Company then acquired the shares of the investment managers in CCP for nil consideration.

10. It was initially contemplated that the Founders would raise two new funds after the management buy-out and then seek an exit.

11. The basis of participation in the Company was set out in a shareholders' agreement dated 15 June 2001 made between CCP, the Company and the Founders ("the Shareholders' Agreement"). Particularly relevant to the present dispute are the following provisions relating to exit and remuneration:

> "7. EXIT
>
> 7.1 Each of the parties confirms its intention to seek an Exit within eight years of the date of this Agreement or such later date as the Founder Majority may specify.
>
> 7.2 Each of the parties (other than the Company) hereby agrees that if a Founder Majority (excluding any Founder who is a proposed purchaser or is connected with a proposed purchaser involved in the Exit and, for this purpose, a Founder will be connected to a proposed purchaser if such a purchaser is a "connected person" within the definition of Section 839 of the Income and Corporation Taxes Act 1988) agrees to pursue an Exit at any time after the date of this Agreement, he will co-operate in the pursuit of the Exit and will agree to sell all the shares in the capital of the Company held by him to the proposed purchaser provided that the terms on which he is required to sell his shares are no less favourable to him than those being offered to any other shareholder holding shares of the same class.
>
> 7.3 The Founders, the Employees and the Company hereby agree to the disclosure by the Founders (acting with Founder Consent) of any information regarding the Group (whether confidential or otherwise) to any third party in contemplation of an Exit provided that no confidential information shall be so disclosed unless such third party shall have undertaken in writing to preserve the confidentiality thereof.
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> . . . . .
>
> 11 REMUNERATION
>
> 11.1 The parties hereto undertake to establish a standing committee of the directors of the Company called the remuneration committee (the "Remuneration Committee"). For

so long as Gordon Bonnyman is Chief Executive of the Company (or, if the office of Chief Executive no longer exists, for so long as Gordon Bonnyman holds an office equivalent to Chief Executive), the Remuneration Committee shall comprise Gordon Bonnyman and, for so long as the Company has a Chairman, one other person who shall be the Chairman of the Company. At all times while composed of such individuals, the Remuneration Committee shall act by the unanimous agreement of its members. In respect of any decision, either member may notify the Founders that the two members are unable to agree on a decision, giving details of the decision which requires to be made. Within 21 days of any such notification, a Founder Majority shall appoint any other person to be a member of the Remuneration Committee in connection only with its consideration of the relevant decision, such appointment to subsist only for so long as is required to make the relevant decision and in relation to which the Remuneration Committee shall act by majority.

11.2 If and when Gordon Bonnyman ceases for any reason to be Chief Executive of the Company (or the holder of an equivalent office), the parties hereto undertake to ensure that the then existing members of the Remuneration Committee resign from membership of that committee and that instead the Remuneration Committee comprises the Founder Representative(s), any person holding the office of the Chief Executive of the Company and any other director appointed to the committee from time to time by the Founder Directors. At all times while the Remuneration Committee is so comprised, the Remuneration Committee shall act by majority, such majority to include a Founder Representative.

11.3 The Remuneration Committee shall make determinations on all matters concerning the emoluments payable or proposed to be paid to any employee or director of the Company or other member of the Group (including, without limitation, initial salary, salary reviews and the setting of bonus levels and performance targets, co-investment opportunities and entitlement to carried interests) and shall be empowered, on behalf of the Company (but not on behalf of the relevant employee or director) to amend any of the terms of the service contracts of any such employee or director from time to time.

11.4 For the avoidance of doubt nothing in Clauses 11.l, 11.2 and 11.3 shall affect or limit the right of the Founder Representative to receive remuneration and repayment of expenses in accordance with Clauses 6.3 and 6.4.

11.5 Each of the parties hereto (with the exception of the Company) hereby waives any right he may have to make a claim (whether in respect of any breach of fiduciary duties or otherwise) in respect of the payment by the Company to the employees and/or directors of the Company or any other member of the Group by way of remuneration (whether as part of a contractual right to be paid or as part of a discretionary element paid) provided the making of such payment has been determined in accordance with Clauses 11.1, 11.2 and 11.3.

11.6 Each of the parties hereto agrees, and each of the parties (other than the Company) undertakes to procure that so far as lawful and subject to:

(a) making prudent provision for the continued operation of the business of the Company (including the payment of remuneration referred to in Clauses 11.1, 11.2 and 11.3 above); and

(b) the Company, having sufficient funds available for such purposes (and does not require to incur any further borrowings),

a dividend in respect of all distributable profits available to the Company in respect of each financial year shall be declared and paid to the shareholders of the Company forthwith upon the production of the audited accounts of the Company for the relevant year."

"Founder Majority" for the purposes of a Clause 7 Exit was defined as:

"the Founder or Founders who hold more than 50% of the A Shares held by the Founders (or, where any Founder or Founders are, by the terms of this Agreement, excluded from participating in the Founder Majority, the Founder or Founders who hold more than 50% of the A Shares held by the remaining Founders)".

"Founder Consent" was defined as: "the consent of a Founder Majority".

12. Clause 14.6 of the Shareholders' Agreement provided that in the event of any inconsistency between any of its provisions and the Articles of Association of the Company ("the Articles"), the Shareholders' Agreement shall prevail.

13. The Articles were adopted on 15 June 2001, the same day as the Shareholders' Agreement.

14. Article 38.1 to 38.3 of the Articles contained "drag" provisions permitting a buyer who had acquired 50% or more of the voting rights in the shares in the Company as a result of a General Offer to require any other shareholders who had not accepted the General Offer to sell their shares at the same price as that offered in the General Offer. The expression "General Offer" was defined to mean an offer in accordance with the change of control provisions of Article 36, namely an offer to all the

members to purchase their shares by the person or persons proposing to acquire a controlling interest in the Company (viz shares representing not less than 50% of voting rights), such offer to be approved by a Founder Majority (not including any Founder who is the person or is acting in concert with the person who would be obtaining or increasing a controlling interest). The expression "Founder Majority" was defined to mean the Founder or Founders who hold A Shares representing more than 50% of the aggregate voting rights attached to the A Shares held by the Founders. Article 36 provided that any General Offer must conform to the requirements of the City Code on Takeovers and Mergers ("the Code") as if the Code applied to such General Offer (with the directors of the Company making any determinations which would otherwise fall to be made by the Panel on Takeovers and Mergers).

15. Article 38.4 provided that, if a Founder Majority transferred or agreed to transfer their shares, they could determine that the drag provisions of Article 38 would apply to all the members who had not transferred or agreed to transfer their shares to the buyer and for the same consideration as offered to the Founder Majority.

16. In December 2003 Charterhouse Capital Partners LLP ("the LLP") was incorporated into the group structure. It is the main operating entity in the group and acts as investment adviser for the private equity funds managed by the group. The Company's subsidiary CDC was and remains the managing member of the LLP. From the time it was introduced into the group the members of the investment team and senior administrative staff ceased to be employees of the Company and became self-employed members of the LLP. All new members of the management and investment team become members of the LLP and when a person ceases to have an active role in the management and investment team, they cease to be a member of the LLP but retain any shares they hold in the Company.

17. The LLP deed was executed by all its initial members, including Mr Arbuthnott, on 18 December 2003. It was subsequently amended and restated on 28 July 2003 and 15 October 2007. Clause 11 of the LLP deed provides for the allocation of profits of the LLP as follows:

> "11.1. The Managing Member shall take all decisions relating to the allocation of the profits of the LLP.
>
> 11.2. The Managing Member shall make determinations on all matters concerning the allocation of profits payable or proposed to be paid to any Member and any other matters relating to the benefits which may be enjoyed by Members (including, without limitation, Monthly Drawings Amounts, Special Drawings Amounts, the setting of performance targets, new co-investment opportunities and new entitlement to carried interests) and shall be empowered, on behalf of the LLP (but not on behalf of the relevant Member) to amend any of the terms upon which the relevant Member(s) provide services to the LLP from time to time (provided that, without prejudice to Clauses 17 and 18, any such amendment which is detrimental to the Member shall also require the approval of that Member).

11.3. Each of the parties hereto (with the exception of the LLP) hereby waives any right he may have to make a claim (whether in respect of any breach of fiduciary duties or otherwise) in respect of any allocation of profit share by the LLP to the Members (whether as part of a contractual right to be paid or as part of a discretionary element paid) provided the allocation of such profit share has been determined in accordance with Clauses 9.1 and these Clauses 11.1, 11.2 and 11.3.

11.4. Subject to Clause 12.7, each of the parties hereto agrees, and each of the parties (other than the LLP) undertakes to procure that, so far as lawful and subject to:

(a) making prudent provision for the continued operation of the business of the LLP (including the allocation of profits referred to in Clauses 11.1, 11.2 and 11.3 above); and

(b) the LLP having sufficient funds available for such purpose (and not requiring to incur any further borrowings),

all profits available to the LLP in respect of each financial year shall be allocated amongst and paid to the Members forthwith upon the audited accounts of the LLP being duly signed by the Designated Members for the relevant year."

18. Clauses 12.6 and 12.7 of the LLP deed provided as follows:

> “12.6 Subject to Clause 12.7, each member shall be entitled to be paid by the LLP the balance (if any) of his actual share of any profits shown in the accounts for any financial year at any time after the same has been approved in accordance with Clause 5.5.1.
>
> 12.7 The LLP shall be under no obligation to make a distribution of profits in any circumstances. The Managing Member shall determine in its sole discretion whether a distribution of profits is to be made, how much of the Profits are available for distribution and to what extent a distribution of such amounts shall be made."

19. Clause 11.3 of the Shareholders' Agreement was amended as follows in 2003 (as shown underlined) in order to allow for the incorporation of the LLP into the Charterhouse structure:

> "11.3 The Remuneration Committee shall make determinations on all matters concerning the emoluments payable or proposed to be paid to any employee or director of the Company or other member of the Group (including, without limitation, initial salary, salary reviews and the setting of bonus levels and performance targets, co-investment opportunities and entitlement to carried interests) and shall be empowered, on

behalf of the Company (but not on behalf of the relevant employee or director) to amend any of the terms of the service contracts of any such employee or director from time to time. <u>Any determinations on matters relating to the allocation of profits of the LLP which are to be made by Charterhouse Development Capital Limited pursuant to the terms of the LLP Deed shall be made by Charterhouse Development Capital Limited acting through the Remuneration Committee. The parties hereto shall procure, so far as they are able, that such determinations are implemented by the LLP and any member of the Group which is a Member of the LLP."</u>

20. The investment managers were remunerated not only by way of drawings and annual bonus but also by the award of a percentage of carried interest in a fund which was awarded at the outset and also as a result of the need to "co-invest". Investors in a fund like to see that the investment managers are also committed to the outcome of the investments they make and, therefore, require a level of "co-invest." The investment was covered by way of a bonus payment to the individual managers. If a fund proved successful, both carried interest and co-investment could prove extremely lucrative.

21. As a result of the way in which the complex structure of the Business was set up and the way in which the agreements relating to the funds themselves were organised, 95% of the fees which formed the bulk of the income of the Business was payable (indirectly) to the LLP.

22. Following the introduction of the LLP, the Business has been structured in the following way.

23. The Company is the 100% owner of Charterhouse Intermediate Holdings Limited (“CIHL”). They are both holding companies and have no other activities. CIHL owns 100% of CDC which acts as the Managing Member of the LLP for the purposes of the LLP Deed. CIHL also owns 100% of the shares in each of the companies which act as general partner in the various fund limited partnerships.

24. CDC, as Managing Member of the LLP, is responsible for the allocation of profits and all matters relating to benefits which may be enjoyed by the members of the LLP pursuant to clauses 11.2, 11.3 and 11.4 of the LLP deed. The effect of those provisions is that, subject to prudent provision and having sufficient funds available, all profits of the LLP in each financial year are payable to the members of the LLP.

25. As already mentioned, clause 11.3 of the amended Shareholders’ Agreement provided that the Remuneration Committee would act on behalf of CDC in relation to the determination of the allocation of the profits of the LLP to be made by CDC under the LLP deed. The result is that all profits of the LLP, which amount to at least 95% of the management fee income of the Business, is distributed amongst the members of the LLP. The remainder is used by CDC to cover business expenses.

26. As mentioned above, one of the original Founders, Ms Adderley, retired from the Business and sold her shares to the Company. In addition to the remaining 15 original

Founders, the 9th, 10th and 11th respondents, upon becoming new members of the investment team, acquired shares in the Company.

27. On 18 December 2007 Mr Arbuthnott met with Mr Bonnyman in his office for an end of year appraisal meeting. At that meeting Mr Arbuthnott indicated a wish to resign from membership of the LLP. In the petition and at the trial Mr Arbuthnott claimed that at that meeting he entered an oral agreement with Mr Bonnyman, acting on behalf of the Company, under which it was agreed that there would be an independent valuation of the Company, which would form the basis of a negotiation between Mr Arbuthnott and the Company for the purchase of his shares, and the valuer would be jointly instructed and both Mr Arbuthnott and Mr Bonnyman would have input into the assumptions to be used. Mr Bonnyman has always denied that any such oral agreement was reached or that there was any agreement to an independent valuer or the purchase of Mr Arbuthnott's shares.

28. In January 2008 Mr Arbuthnott gave notice of retirement as a member of the LLP. He also retired as a director of the Company and other subsidiaries in the group but he retained his 900 A shares in the capital of the Company.

29. In 2010 the 16th respondent, Roger Pilgrim, announced that he proposed fully to retire before the next fundraising. The 17th respondent, Thomas Plant, scaled back his working hours prior to taking retirement. By November 2011 Mr Arbuthnott and all of the 12th to 17th respondents had either retired or intimated an intention to do so. Mr Bonnyman also indicated his intention to retire in the near future. The 6th respondent, Lionel Giacomotto, took over from Mr Bonnyman as managing partner in March 2011. Together the retired and retiring members held more than 50% of the shares in the Company.

30. Both Mr Bonnyman and Mr Giacomotto were concerned about the prospect of a misalignment between the shareholdings in the Company and the identity of the active executives in the Business since that would cause difficulty with investors when raising funds.

31. In the course of considering a new structure, the proposal emerged of a sale of the company's shares to the continuing executives in the investment team. Around September 2011 the offer price was finalised at £15.15 million. It was set by Mr Bonnyman, Mr Giacomotto and the 5th respondent, William Bruce Dockeray, on the basis of previous transactions and what they considered the purchasers would pay and the vendors would be willing to accept.

32. On 11 November 2011 all of the shareholders of the Company were sent an offer for their shares from WSL, a wholly owned subsidiary of Watling Street Capital Partners LLP. They had only nominal capital having been newly formed. The partners of that limited liability partnership comprised investment executives who intended to continue in the Business after the sale. They included the 1st to 11th respondents. The remaining respondent shareholders, that is to say the 12th to 17th respondents and Mr Arbuthnott ("the non-continuing shareholders") were not intending to continue as members of the investment team. A sale and purchase agreement was appended to the offer letter (the "WSL offer").

33. The principal elements of the WSL offer were as follows:

(1) WSL would purchase the entire issued share capital of the Company at a price of £1,500 per share (£15.15 million for the entire issued share capital). 20% was to be payable in cash on closing and 80% in WSL loan notes redeemable in four annual instalments and bearing interest at 2% pa.

(2) The share purchase agreement would provide for anti-embarrassment payments for a four-year term.

(3) The offer was conditional upon:

(a) acceptance by members holding half the shares in issue and two thirds of all shares held by "Non-Concert Members", that is to say those with no interest in WSL, namely the retiring members;

(b) FSA approval of the change of control;

(c) a Founder Special Majority (under the terms of the Shareholders' Agreement) disapplying the pre-emption provisions of the Articles;

(d) amended Articles being adopted by the Company in the form circulated with the offer;

(e) a Founder Majority (as defined in the amended Articles) approving the sale and purchase as a Relevant Sale (as defined in the amended Articles for the purpose of Article 39 of the amended Articles); and

(f) WSL's desire to acquire the entire issued share capital of the Company in the manner contemplated by the WSL offer being approved by a meeting, to which all Non-Concert Members were to be invited, by Non-Concert Members (i) being a majority in number of the Non-Concert Members in attendance, and (ii) holding in aggregate at least two thirds of the shares held by all Non-Concert Members in attendance at the meeting.

34. By 1 December 2011 all of the non-continuing shareholders had accepted the offer except for Mr Arbuthnott. On 1 December 2011 Herbert Smith LLP wrote on behalf of Mr Arbuthnott to Shepherd & Wedderburn, acting for the Company and the other independent directors, stating that Mr Arbuthnott would not be accepting the WSL offer.

35. On 5 December 2011 an email was sent to all shareholders stating that the sale and purchase agreement had taken effect and setting out the next steps. A Founder Majority consent form was enclosed with the letter. Those forms were signed by all the non-continuing shareholders except Mr Arbuthnott.

36. On 13 December 2011 a written resolution was circulated proposing to amend the Articles. This was signed and accepted by all members of the Company except Mr Arbuthnott. The key amendments were the removal of the reference to a "General Offer" complying with the Code, the introduction of a new majority drag provision, and the alteration of the definition of "Founder Majority", as follows:

" MAJORITY DRAG

39.1 Notwithstanding any other provisions of these Articles and. in particular, the provisions of Articles 33, 36 and 38 (pre-emptive transfers, change of control, and drag-along), the holders of 50% or more of the A Shares in issue at the relevant time (in this Article the "Seller") may agree to sell or transfer (the "Relevant Sale") shares representing not less than 50% of the Voting Rights to any Person whatsoever (in this Article the "Buyer") without restriction. A Relevant Sale shall only be a Relevant Sale for the purposes of this Article if it has been approved as such by a Founder Majority (and the holder(s) of shares included in such Founder Majority does not include any Founder who is the Buyer or is acting in concert with the Buyer). If such Relevant Sale becomes unconditional in all respects, the Buyer may complete the Relevant Sale and shall by written notice to the Company served within 60 days of the Relevant Sale so becoming unconditional, require the Company as agent for the Buyer to serve notices (in this Article each a "Compulsory Acquisition Notice") on all of the members who have not participated in such Relevant Sale (the "Remainder Shareholders") requiring them to sell their shares to the Buyer or a person or entity nominated by the Buyer at a consideration per share (including any contingent or deferred consideration) which is not less than and is in the same form as the consideration payable to the Seller in respect of their shares. The Company shall serve the Compulsory Acquisition Notices forthwith upon being required to do so and the Remainder Shareholders shall not be entitled to transfer their shares to anyone except the Buyer or a person identified by the Buyer. Each Compulsory Acquisition Notice shall specify the same date (being not less than seven nor more than twenty one days after the date of the Compulsory Acquisition Notice) for the completion of the relevant transfer of shares to the Buyer (the "Compulsory Acquisition Completion Date").

39.2 The Buyer shall be ready and able to complete the purchase of all shares in respect of which a Compulsory Acquisition Notice has been given on the Compulsory Acquisition Completion Date. Any transfer pursuant to a Compulsory Acquisition Notice shall not require the relevant Remainder Shareholders to give a Transfer Notice.

39.3 If in any case any Remainder Shareholders shall not on or before the Compulsory Acquisition Completion Date have transferred their shares to the Buyer or a person identified by the Buyer against payment of the price thereof:

(a) the Directors shall authorise some person to execute and deliver on their behalf any necessary transfers in favour of the Buyer or the person identified by the Buyer;

(b) the Company shall receive the consideration in respect of such shares; and

(c) the Company shall (subject to the transfer being duly stamped) cause the name of the Buyer (or the person identified by the Buyer) to be entered into the Register of Members as the holder of the relevant shares.

39.4 The Company shall hold the consideration in trust for the Remainder Shareholders but shall not be bound to earn or pay interest thereon. The issue of a receipt by the Company for the consideration shall be a good receipt for the price for the relevant shares. The Company shall apply the consideration received by it in payment to the Remainder Shareholders against delivery by the Remainder

Shareholders of the certificates in respect of the shares or an indemnity in respect of the same in form and substance acceptable to the Company. After the name of the Buyer or the person identified by the Buyer has been entered in the Register of Members in purported exercise of the aforesaid powers the validity of the proceedings shall not be questioned by any person.

39.5 For the avoidance of doubt, the provisions of Articles 33 and 36 (pre-emptive transfers and change of control) do not apply in respect of either a transfer constituting a Relevant Sale or a transfer pursuant to a Compulsory Acquisition Notice.

SCHEDULE

...

"Founder Majority"
means the Founder or Founders who hold A Shares representing more than 50% of the aggregate Voting Rights attached to the A Shares held by Founders (or, where any Founder or Founders are, by the terms of these Articles excluded from participating in the Founder Majority, the Founder or Founders who hold A Shares representing more than 50% of the aggregate Voting Rights attached to the A Shares held by the remaining Founders);"

37. On 14 December 2011 a Founder Majority Consent form was circulated to approve the sale of shares pursuant to an offer as a Relevant Sale as required under Article 39, which was signed by the requisite majority on 16 December 2011.

38. It was also a term of the WSL offer that the approval of the necessary majority of the non-continuing shareholders be obtained at a meeting. The meeting took place on 30 January 2012. It was attended by all the non-continuing shareholders either in person or by a representative. It was chaired by the 16th respondent, Mr Pilgrim, and was attended by the 12th, 13th, 15th and 17th respondents in person, namely Mr Benthall, Mr Cox, Mr Greenhalgh and Mr Plant. Mr Arbuthnott was represented by Herbert Smith and the 16th respondent, Mr Drury, by Slaughter and May. Herbert Smith argued that the Company was worth substantially more than the offer price. The other non-continuing shareholders disagreed. After further discussion the meeting approved the acquisition by WSL of all the shares in the Company, only Herbert Smith on behalf of Mr Arbuthnott voting against the resolution.

39. In the meantime, on 18 January 2012 Herbert Smith wrote a letter of claim on Mr Arbuthnott's behalf to Slaughter and May. Herbert Smith indicated that Mr Arbuthnott would be willing to make an offer for all of the issued share capital of the Company at a price 25% higher than the WSL offer, in other words £1,875 per share, with the consideration split between cash and loan notes in the proportions 20% to 80% respectively, as under the WSL offer. The offer was repeated in a letter of 7 February 2012 from Herbert Smith to Slaughter & May, in which it was stated that the offer was conditional upon sufficient acceptances to increase Mr Arbuthnott's shareholding in the Company to more than 25%. It was also made clear that Mr Arbuthnott would be willing to enter into negotiation with any shareholder because he considered the value of the Company to be much greater than £18,937,500.

40. In fact, the transfer of all shares in the Company (other than those held by Mr Arbuthnott) took place under the terms of the WSL offer on 6 February 2012.

Mr Arbuthnott's claims

41. Mr Arbuthnott presented his petition for unfair prejudice pursuant to s.994(1) of the 2006 Act on 18 April 2014. He has made four claims of unfair prejudice. They may be summarised as follows.

(1) On 18 December 2008 he made an oral agreement with Mr Bonnyman, acting on behalf of the Company, under which it was agreed that there would be an independent valuation of the Company which would form the basis of a negotiation between Mr Arbuthnott and the Company for the purchase of his shares, and the Company repudiated the oral agreement, causing him unfair prejudice.

(2) The Company failed properly to consider or investigate concerns which he had raised in 2006, 2008 and 2009 about the misuse of confidential information and other irregularities within the Company.

(3) Certain amendments in 2009 to the Shareholders' Agreement, which restricted the information rights of members, were improper and unfair.

(4) The WSL offer, the amendments of the Articles, which were a term of the WSL offer, and the manner in which the WSL offer was dealt with by the Company were carried out improperly in order to expropriate Mr Arbuthnott's shares at a gross undervalue rather than for any genuine corporate purpose.

42. Mr Arbuthnott alleged in the petition that, on the best information then available to him, the value of the Company on a sale between a willing buyer and a willing seller was in the region of at least £465 million.

Relevant legal principles

43. Section 994(1) of the 2006 Act confers jurisdiction on the court to grant relief for unfairly prejudicial conduct in the conduct of a company's affairs in the following terms:

> "(1) A member of a company may apply to the court by petition for an order under this Part on the ground-
>
> (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
>
> (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."

44. There was no dispute on the appeal about the following propositions of law stated by the Judge in her judgment.

45. The expression "the company's affairs" in sub-section 1(a) is of wide ambit and plainly covers all matters decided by the board of directors. Equally plainly, it does not extend to matters which are neither effected by the company nor on its behalf but, for example, concern activities of shareholders solely in that personal capacity and as between themselves. Accordingly, actions or omissions in compliance or contravention of the articles of association of a company may or may not constitute the conduct of the company's affairs within section 994(1) depending on the precise facts: see *Gross v Rackind* [2004] EWCA Civ 815, [2005] 1 WLR 3305 at [29]; *McKillen v Misland (Cyprus) Investments Ltd* [2012] EWHC 2343 (Ch) at [626]; *Oak Investment Partners XII, Limited Partnership v Boughtwood* [2009] EWHC 176 (Ch), [2009] 1 BCLC 453 at [15].

46. A member of a company will not normally be entitled to complain that the conduct of the company's affairs is unfair if it is consistent with the agreement between the shareholders as to the way in which those affairs would be conducted as reflected in the articles of association and any related agreements between the shareholders: *O'Neill v Phillips* [1999] 1 WLR 1092, 1098-1099; contrast *Re a Company (No 005685 of 1988) ex parte Schwarcz (No 2)* [1989] BCLC 427.

47. So far as concerns amendment of the company's articles of association, the legal power of the members to amend the articles is not without limit. I shall examine the limitations later in this judgment.

48. Even if an amendment of articles of association is legally valid, it may still constitute in all the circumstances unfairly prejudicial conduct within section 994 of the 2006 Act.

49. So far as concerns the duties of the directors in relation to takeover offers, like the WSL offer, the role of the directors is a limited one. Section 172 of the 2006 Act sets out certain duties of directors. Section 171 provides that directors must (a) act in accordance with the company's constitution, and (b) only exercise powers for the purposes for which they are conferred. Section 172(1) provides:

> "A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—
>
> (a) the likely consequences of any decision in the long term,
>
> (b) the interests of the company's employees,
>
> (c) the need to foster the company's business relationships with suppliers, customers and others,
>
> (d) the impact of the company's operations on the community and the environment,
>
> (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
>
> (f) the need to act fairly as between members of the company."

50. The duty in section 172 is owed to the company. In the context of a takeover offer, it is not owed to the current individual shareholders with respect to the disposal of their shares: *Dawson International Plc v Coats Patons Plc* [1990] BCLC 560. The primary role of directors is to ensure that the offer and any competing offers are put to the members so that they can decide for themselves whether to accept or reject the best bid available: *Heron International Ltd v Lord Grade* [1983] BCLC 244. As Hoffmann J said in *In Re a Company* [1986] BCLC 382 in the context of two rival bids for the shares of a private company, of which the lower bid was by a company set up for the purpose by directors of the target company:

> "I do not think that fairness can require more of the directors than to give the shareholders sufficient information and advice to enable them to reach a properly informed decision and to refrain from giving misleading advice or exercising their fiduciary powers in a way which would prevent or inhibit shareholders form choosing to take the better price. . . "

51. In their capacity as shareholders, the members, whether or not also directors, are usually entitled to vote their shares in their own self-interest. As was said in *Re Astec (BSR) Plc* [1998] 2 BCLC 556 at 584-585:

> "The starting point is the proposition that in general the right of a shareholder to vote his shares is a right of property which the shareholder is free to exercise in what he regards as his own best interests. He is not obliged to cast his vote in what others may regard as the best interests of the company as an entity in its own right."

The trial and the Judge's judgment

52. The trial lasted 27 days. A sense of the scale of the litigation can be gathered from the Judge's order on dismissing the petition that Mr Arbuthnott pay £3.5 million on account of the costs of the 1st to 18th respondents. There were many witnesses of fact. There were two sets of expert witnesses. There was one expert for each side on private equity and one expert for each side on valuation. All the experts were cross-examined extensively over a number of days.

53. The Judge's judgment is, as I have said earlier, substantial and impressive. It is comprehensive and meticulous in its consideration of the evidence and the many submissions of fact and law advanced before her.

54. On the first of Mr Arbuthnott's claims, the Judge concluded in the light of all the evidence that, on the balance of probabilities, there was no oral agreement between Mr Arbuthnott and Mr Bonnyman for the purchase of Mr Arbuthnott's shares as alleged by Mr Arbuthnott.

55. On the second and third of Mr Arbuthnott's claims, the Judge held that Mr Arbuthnott's allegations in relation to Mr Bonnyman's expenses and concerns about possible misconduct in relation to confidential information were addressed in a thorough way and could not be the basis for a claim by Mr Arbuthnott of unfair prejudice.

56. As to the fourth of Mr Arbuthnott's claims, the Judge concluded that the only relevant matters in relation to the WSL offer which constituted the conduct of the affairs of the Company itself were the manner in which the independent members of the board of directors of the Company responded to the WSL offer and put it into effect ("procedural unfairness") and the alteration of the Articles by the Company.

57. On procedural unfairness the Judge rejected the submission on behalf of Mr Arbuthnott that the directors of the Company were in breach of their duties under section 172 of the 2006 Act in that they failed (1) to seek to involve themselves in negotiations with WSL, to require WSL to explain the basis for the offer price, and to attempt to obtain the best price and terms for members; (2) to obtain and provide independent advice to members of the Company regarding the value of the Company and the WSL offer generally and to give advice on the same matters on the basis of the directors' own views; and (3) to provide information to members, to ensure that all members had equal access to relevant information, and specifically to provide to Mr Arbuthnott information that he requested.

58. The Judge rejected the submission on behalf of Mr Arbuthnott that he was unfairly prejudiced because Article 36 should not have been amended to remove reference to the Code and, had it not been, the Code would have required the board of directors, among other things, (1) to obtain competent independent advice on the offer; (2) to make the substance of that advice known to members; and (3) to circulate its own opinion on the offer to members, all of which the directors failed to do.

59. Having rejected the contention that the WSL offer was generated by the Company itself, she said that the principles in *Dawson International plc v Coats Patons plc* [1990] BCLC 560, *Heron International Ltd v Lord Grade* [1983] BCLC 244 and *Re Astec (BSR) plc* [1998] 2 BCLC 556, 584-584, were relevant to the facts of the present case. She said that that there is no positive duty of the directors to obtain advice on behalf of shareholders or to advise the shareholders or to involve themselves in negotiations as to price, even if the Code applies.

60. The Judge took into account that the shareholders in the Company were sophisticated, well versed in the art of company valuation and best placed to know the Business and, moreover, the independent directors (viz those not intending to continue after the sale to be involved in the Business) received independent advice from Shepherd & Wedderburn.

61. The Judge concluded that on the balance of probabilities none of the shareholders who accepted the WSL offer would have behaved differently if further information had been available. She said that, taking the evidence in the round, the non-continuing shareholders were all sophisticated financial professionals with an intimate knowledge of private equity and the Business in particular, who saw it as the only real opportunity to sell their shares, did not consider that there was any other likely purchaser, did not consider that more would be offered and, in any event, did not wish to create a situation in which the entire business model of the group was broken.

62. The Judge agreed with counsel for the respondents that there was no breach by the independent directors of their duties to the Company in the light of the evidence of both the 13th respondent, Mr Cox, and the 17th respondent, Mr Plant, that they took into account the interests of the Company, its reputation and business relationships,

the evidence of Mr Cox that he considered the effects of run off upon the employees and the future of the Company, and the absence of any indication by the independent directors that they considered the price to be other than satisfactory.

63. The Judge rejected the argument that Mr Arbuthnott suffered unfair prejudice by reason of the alteration of the Articles. She did not accept the argument on behalf of Mr Arbuthnott that the amendment was invalid and unfairly prejudicial under section 994 because its immediate and direct effect was to allow the majority to expropriate Mr Arbuthnott's shares at a grossly undervalued price of £1.35 million. She rejected Mr Arbuthmott's arguments that the independent members were in concert with the buyer, and their votes were really those of the buyer. She rejected the further argument that the alteration was made for the improper collateral purpose of advancing the interests of the continuing executives in that capacity - by facilitating the future pursuit of the Business free of the misalignment obstacle and pursuant to what has been called "the remuneration model" – for their exclusive benefit. She did not accept that the majority decision to alter the Articles was not, in fact, and could not reasonably have been, taken genuinely in the best interests of the Company as a separate entity.

64. The Judge's analysis turned on, among other things, the following findings and reasoning (but not in the same order in which she stated them).

65. There was no evidence of bad faith or improper motive by any of the respondent shareholders and directors.

66. The compulsory transfer provisions existed in the Articles before the alteration and were also envisaged in clause 7.2 of the Shareholders' Agreement. They formed part of the original commercial bargain between the Founders, of whom Mr Arbuthnott was one. She said that, in essence, the amendments to the Articles brought them into line with clause 7.2 of the Shareholders' Agreement and were a tidying up exercise.

67. The lack of alignment was a serious issue which would be an impediment to raising a new fund; Charterhouse was a sequential funds business and by the time of the WSL offer more than 50% of the shareholders had already or were about to cease to be investment executives. The Judge accepted the evidence that there was a concern to resolve the alignment issue in order to secure the Company's future and that Mr Bonnyman and others considered accordingly that they were acting in the best interests of the Company as a whole. The change brought about by the resolution was necessary in order to achieve the long term stability of the Company, as the holding company of the managing member of the LLP which owed fiduciary duties to the other members of the LLP, through which the Business of the group was conducted. There were therefore reasonable grounds upon which the shareholders could have come to the view that they did as to the best interests of the Company.

68. There was no evidence to suggest that there was any realistic prospect either of a third party purchaser or the need or business efficacy of a substantial cash injection from a third party or present investor in return for a minority stake in the Company.

69. For all those reasons it was in the best interests of a hypothetical member of the Company to vote in favour of the resolution to amend the Articles and so facilitate the sale and as a result provide a permanent solution to the alignment issue.

70. Mr Arbuthnott's counsel in their closing submissions at the trial complained about the failure of the Company to pay dividends in the three years between Mr Arbuthnott's departure in 2008 and the valuation date for the shares under the WSL offer in November 2011. Mr Arbuthnott's argument was that the "remuneration model" adopted by the board, through the remuneration committee, under which all profits were paid out to executives on an annual basis, meant that the board never considered the true and appropriate level of remuneration and the payment of dividends pursuant to clause 11.6 of the Shareholders' Agreement. It was contended on behalf of Mr Arbuthnott that the non-payment of dividends was both unfairly prejudicial in itself and also supported a finding of unfair prejudice in relation to the WSL offer and its acceptance insofar as the assumption was made that dividends would not be paid in the future.

71. The Judge considered that, although non-payment of dividends was not expressly stated in the petition as a head of unfair prejudice, the issue of non-payment of dividends was squarely raised in the context of the value of the shares themselves and more generally. She rejected, however, Mr Arbuthnott's complaint about this head of alleged unfair prejudice. She said that Mr Arbuthnott could not complain because prior to his retirement in 2008 he agreed to the policy in relation to the distribution of surplus income in his capacity as a director of the Company and as a shareholder. Further, Mr Arbuthnott was bound by clause 11.5 of the Shareholders' Agreement, under which he waived any right to make a claim whether in respect of breach of fiduciary duties or otherwise concerning remuneration paid under clauses 11.1, 11.2 and 11.3 to employees, directors of the Company and any other member of the group.

72. The Judge also held, having regard to the terms of the Shareholders' Agreement, as amended following the interposing of the LLP in the group structure, and the LLP Deed that the remuneration model was enshrined in the very documentation by which the group structure, of which the Company was an integral part, was governed.

73. So far as concerns the market value and the fair value of the shares in the Company, Mr Arbuthnott's valuation expert, Mr Mitchell, valued 100% of the equity in the Company in the range of £275 million to £321 million. The respondents' valuation expert, Mr Eales, concluded that the shares had no economic value on the present model of the Business and that, in the absence of a third party purchaser, were unlikely to have more than nominal value. He acknowledged, however, that in the actual circumstances of the transaction in this case, the shares had a nuisance value to the purchasers as the continuing investment team. He also accepted that there was always hope of a change of business model and, therefore, for the purposes of the WSL transaction, the market value of the shares was in the region of £10 million to £15 million.

74. The Judge accepted several criticisms made by the respondents' counsel about Mr Mitchell's approach to valuation. She said that she preferred the analysis of Mr Eales.

75. The Judge held that the evidence did not support a valuation on the basis of a third party purchaser. She held, in the light of all the evidence, that Mr Eales and the independent shareholders were right to assume that the only realistic purchasers were the ongoing executives and that the Company was to be valued on the basis that the Business continued as before.

76. The Judge concluded that there was no reason to assume that a reasonable shareholder could not have come to the conclusion which the shareholders (other than Mr Arbuthnott) in this case reached. The price was consistent with previous transactions, a valuation by KPMG in 2009 and Mr Eales' valuation and was considered fair by all the non-continuing shareholders other than Mr Arbuthnott. None of the witnesses, all of whom were sophisticated and with relevant knowledge, suggested that WSL offer price was outside the range which they considered reasonable. The 1st, 3rd, 6th, 13th and 17th respondents were not challenged on their evidence that they regarded the offer price as fairly reflecting the value of the Company.

The appeal

77. The first issue on the appeal is whether, under the original arrangements between the Founders, before the insertion of the new Article 39, the members holding the majority of the shares in the Company could have compulsorily acquired Mr Arbuthnott's shares pursuant to the WSL offer (leaving aside issues of share value). If they could have done, then the Judge was correct to hold that the amendments to Article 39 were no more than a "tidying up exercise".

78. Mr David Chivers QC, for Mr Arbuthnott, submitted that the original bargain between the Founders would not have permitted such a compulsory acquisition or expropriation. He addressed this issue by examining, first, the original Articles and, second, the provisions of the Shareholders' Agreement. I prefer to begin with the provisions of the Shareholders' Agreement since clause 14.6 provided that, in the event of any inconsistency between any of the provisions of the Shareholders' Agreement and the Articles, the Shareholders' Agreement shall prevail.

79. Mr Arbuthnott's case is that, on its proper interpretation, clause 7.2 is not an expropriation provision but a standard "drag provision" by which the majority shareholders can compel the minority to sell their shares to a genuine third party purchaser. WSL was not, he said, such a purchaser for the purposes of clause 7.2, properly interpreted, since the reality was that it was no more than vehicle for the majority shareholders, who were selling to themselves.

80. He submitted that the reality was that the WSL offer and its acceptance did not involve an "Exit" at all within the meaning of clause 7. He referred to various definitions in schedule 6, including the definition of "Exit" as meaning a sale or flotation in respect of the company and the definition of sale as meaning the acquisition by any person of 50 per cent or more of the ordinary shares of the Company. He said that under the WSL offer the majority shareholders were selling to themselves; there was no process of negotiation by the majority shareholders to achieve the best value for the shares; and, if clause 7.2 was expropriatory of the minority shareholders, there was nothing to protect them from having their shares taken away at less than a proper value.

81. Furthermore, he submitted that the established principle of company law that the majority cannot expropriate a minority unless the articles expressly so provide is part of the context for interpreting the provisions of clause 7.2.

82. He submitted that economic reality and commercial common sense and practice supported the interpretation of clause 7.2 as a conventional drag provision to enable

the majority shareholders, as sellers, to procure a sale of 100 per cent of the Company. Only in that way, he submitted, would the minority shareholders have the benefit of a price on the basis of the sale of the company as a whole rather than the sale of minority interests. He illustrated that by reference to the evidence of the respondents' own valuation expert, Mr Eales, who gave a value for Mr Arbuthnott's shares under the WSL offer, as a minority shareholding of 8.9 per cent, of between £0.9 million - £1.3 million and a value, on a sale of the entire issued share capital of the Company, at between £1.8 million - £2.2 million. In effect, Mr Chivers, submitted, under the WSL offer, on the Judge's and the respondents' interpretation of clause 7.2, the majority shareholders were acquiring 100 per cent of the shares but only paying the minority shareholders for their shares on their value as minority interests. Mr Chivers questioned why the parties to the Shareholders' Agreement would ever have agreed to such an arrangement, even if the drag provisions could only operate if there was a majority of the independent (i.e non-purchasing) shareholders in favour of the sale.

83. I reject that interpretation of clause 7.2. I am content to proceed for the rest of this judgment on the assumption (which I am not at all certain is justified) that Mr Arbuthnott is correct to say that WSL is not to be regarded as a genuine third party purchaser for the purposes of the relevant contractual documents and the Articles but rather as a fictional cloak for the majority purchasing shareholders. The meaning and effect of clause 7.2 of the Shareholders' Agreement are nevertheless perfectly clear, and the interpretation urged by Mr Chivers restricts its operation in a way that is simply not consistent with its terms.

84. Clause 7.2 expressly contemplates a sale in which a Founder is a proposed purchaser or is connected with a proposed purchaser. There is nothing on the face of clause 7.2 which gives any indication that its provisions are subject to the major qualification that the clause will only apply if such a Founder, who is a proposed purchaser or connected with the proposed purchaser, holds only a minority of the shares. Insofar as the definition of "Sale" in schedule 6 indicates otherwise, it must yield to the context, as indicated in the opening words of schedule 6. The protection to the non-purchasing minority in such a situation is provided by the definition of "Founder Majority" in schedule 6, the effect of which in the context of clause 7.2 is to require those holding the majority of the remaining shares to agree to the sale. I reject the suggestion of Mr Chivers that the Founders would never have thought that would be sufficient protection. All of the Founders were, as the Judge said, sophisticated professionals well versed in the valuation of companies. Nothing would have been more natural than that they should have confidence that any independent non-purchasing Founder majority would only agree to a sale for the purposes of clause 7.2 if they thought that the price and other terms were fair and proper.

85. Indeed, it seems to me to be perfectly consistent with commercial common sense for the original Founders to have intended clause 7.2 to operate so as to prevent a minority shareholder such as Mr Arbuthnott blocking a sale of the whole Company in precisely such a situation as has arisen in the present case, that is to say where Founders who hold a majority of the shares enter into an agreement with a prospective purchaser to take up the offer of sale conditional on the remainder of the shares also being acquired and the holders of a majority of the other shares also wish to take up the offer.

86. Mr Chivers advanced a similar interpretation of the original Articles 36 and 38. He submitted that the original Article 36.1 only applied where the majority shareholders are sellers and not purchasers and where they need to compel the other shareholder or shareholders to sell in order to procure a sale of 100 per cent of the Company to a true third party purchaser. Once again, he emphasised the economic significance of the minority shareholders' shares being valued on a sale of all the shares in the Company rather than as minority interests and to a lack of protection for the minority shareholders on any other interpretation of Article 36.1.

87. I do not agree. Again, the meaning and effect of the original Article 36.1 seem to me to be perfectly clear in permitting the majority shareholders, as purchasers, to acquire all the shares of the minority provided that a majority of the non-purchasing shareholders agree to the sale. Article 36.1 expressly refers to a "sale or transfer of, or transfer of any interest in, any shares … to any person whomsoever which would result … in a person … <u>whether or not then a member of the Company</u> obtaining <u>or increasing a Controlling Interest in the Company</u>…" (emphasis added). The expression "Controlling Interest" is defined in the schedule to the Articles to mean "shares representing not less than 50% of the Voting Rights". Article 36(b) provides protection for the minority shareholders in requiring the offer to be approved by a majority of the non-purchasing shareholders. That is the effect of the definition of "Founder Majority" being expressly qualified by the words in parenthesis in Article 36(b).

88. Mr Chivers reinforced his submissions on this point by observing that the drag-along provisions in Article 38.1 to 38.3 (which have not been amended) only apply where, as specified in Article 38.1, a person acquires or persons acquire a "Compulsory Purchase Interest" – an expression which is defined to mean "an interest in shares carrying more than 50% of Voting Rights". Once it is accepted, however, that the original Article 36 extended to the acquisition by majority shareholders of the shares of the minority then it is obvious that Article 38.1 must also have been intended to cover that situation and the definition of "Compulsory Purchase Interest" in the schedule to the Articles must give way to the context. There is simply no rational explanation why the framers would have intended there should be a mismatch between the two Articles.

89. Mr Arbuthnott contends that the amendments to the Articles were invalid even if he is wrong on the proper interpretation of clause 7.2 of the Shareholders' Agreement and the original Articles. He submitted that they are invalid because they enlarge and facilitate the expropriation of the shares of a minority shareholder and were specifically directed at expropriating his shares.

90. It is common ground that an alteration to a company's articles, even if passed by the requisite majority of shareholders, may be challenged as invalid in certain circumstances. We were taken to a number of cases which consider the conditions for an effective challenge. They included *Allen v Gold Reefs of West Africa Limited* [1900] Ch 656, *Sidebottom v Kershaw Leese and Co Ltd* [1920] 1 Ch 154, *Shuttleworth v Cox* [1927] 2 KB 9, *Peters' American Delicacy Co v Heath* (1939) 61 CLR 457, *Greenhalgh v Aderne Cinemas Ltd* [1952] Ch 286, *Citco Banking Corp NV v Pusser's Ltd* [2007] UKPC 13, and *Assenagon Asset Management SA v Irish Bank Resolution Corpn Ltd* [2012] EWHC 2090 (Ch), [2013] Bus LR 266. It is not

necessary to set out the facts of those cases. I would extract from them the following principles:

(1) The limitations on the exercise of the power to amend a company's articles arise because, as in the case of all powers, the manner of their exercise is constrained by the purpose of the power and because the framers of the power of a majority to bind a minority will not, in the absence of clear words, have intended the power to be completely without limitation. These principles may be characterised as principles of law and equity or as implied terms: *Allen* at 671; *Assenagon* at 278-280.

(2) A power to amend will be validly exercised if it is exercised in good faith in the interests of the company: *Sidebottom* at 163

(3) It is for the shareholders, and not the court, to say whether an alteration of the articles is for the benefit of the company but it will not be for the benefit of the company if no reasonable person would consider it to be such: *Shuttleworth* at 18-19, 23-24, 26-27; *Peters' American Delicacy Co* at 488.

(4) The view of shareholders acting in good faith that a proposed alteration of the articles is for the benefit of the company, and which cannot be said to be a view which no reasonable person could hold, is not impugned by the fact that one or more of the shareholders was actually acting under some mistake of fact or lack of knowledge or understanding: *Peters' American Delicacy Co* at 491. In other words, the court will not investigate the quality of the subjective views of such shareholders.

(5) The mere fact that the amendment adversely affects, and even if it is intended adversely to affect, one or more minority shareholders and benefit others does not, of itself, invalidate the amendment if the amendment is made in good faith in the interests of the company: *Sidebottom* at 161, 163-167, 170-173; *Shuttleworth*; *Citco* at 490, 493; *Peters' American Delicacy Co* at 480, 486.

(6) A power to amend will also be validly exercised, even though the amendment is not for the benefit of the company because it relates to a matter in which the company as an entity has no interest but rather is only for the benefit of shareholders as such or some of them, provided that the amendment does not amount to oppression of the minority or is otherwise unjust or is outside the scope of the power: *Peters' American Delicacy Co* at 481, 504, 513, 515; *Assenagon*.

(7) The burden is on the person impugning the validity of the amendment of the articles to satisfy the court that there are grounds for doing so: *Citco* at 491; *Peters' American Delicacy Co* at 482

91. The Judge referred, and we were referred, to *Albert Phillips v Manufacturers' Securities Ltd* (1917) 116 Law Times 290 and *Re Bugle Press Ltd* [1961] Ch 286 but they turn on their own particular facts and I do not consider that it is possible to extract from them any principle in addition to or in contradiction to those I have mentioned.

92. Principle (6) above requires some further explanation. In *Greenhalgh*, the articles of the company contained a pre-emption provision in favour of shareholders. The second defendant, who held a majority of the shares, wished to sell them to the first defendant. At an extraordinary meeting of the company a special resolution was passed amending the articles so as to provide that any member authorised by ordinary resolution could transfer shares to any person named in the resolution and the directors would be bound to register the transfer. That resolution was followed by an ordinary resolution sanctioning the transfer by the second defendant to the purchaser. The plaintiff, a minority shareholder, commenced proceedings claiming a declaration that the resolutions were void and of no effect, and a declaration that the transfer under the resolutions should be set aside. The claim was dismissed as was the appeal from the trial judge. Evershed MR said (at 291) that the expression "bona fide for the benefit of the company as a whole" did not mean, in such a case as the one in issue, "the company as a commercial entity, distinct from the corporators". He said it means the corporators as a general body. He continued:

> "That is to say, the case may be taken of an individual hypothetical member and it may be asked whether what is proposed is, in the honest opinion of those who voted in its favour, for that person's benefit. I think that the matter can, in practice, be more accurately and precisely stated by looking at the converse and by saying that a special resolution of this kind would be liable to be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders, so as to the give the former an advantage of which the latter were deprived …It is not … necessary to require that persons voting for special resolution should … dissociate themselves altogether from their own prospects and consider whether what is thought to be for the benefit of the company as a going concern. If, as commonly happens, an outside person makes an offer to buy all the shares, prima facie, if the corporators think it a fair offer and vote in favour of the resolution, it is no round for impeaching the resolution that they are considering their own position as individuals "

93. Evershed MR said (at 293) that the amendment in question discriminated between no types of shareholder since "any who wanted to get out at that price could get out, and any who preferred to stay in could stay in."

94. As Lord Hoffmann, giving the judgment of the Privy Council in *Citco* observed (at 491), commentators have had difficulty with Evershed MR's concept of an honest belief that a proposal is for the benefit of an individual hypothetical member of the company.

95. In the Australian case of *Peters' American Delicacy Co* the amendment provided that shareholders should from then on receive dividends rateably according to the amounts paid up on their shares rather than, as previously, according to the number of shares (fully or partly) paid which they held. The High Court of Australia held that the resolutions were not invalid. As Latham CJ (at 482) and Dixon J (at 504) observed shareholders are not trustees for the company or for one another. Latham CJ said that

shareholders may vote in his or her own interests but nevertheless the power of shareholders to alter articles is limited by the rule that the power must not be exercised fraudulently or for the purpose of oppressing a minority. Dixon J said that the power is limited in that the alteration must not be such as to sacrifice the interests of the minority to those of the majority without any reasonable prospect of advantage to the company as a whole. Dixon J said (at p.513) that the resolution in question "involved no oppression, no appropriation of an unjust or reprehensible nature and did not imply any purpose outside the scope of the power" and (at p. 515) that ultimately his reason for upholding the resolution was that he found "no vitiating element present".

96. In the case of an amendment in which the company as an entity has no interest (which, as it happens, is not the present case) I would prefer to express the test as one which depends on the type of vitiating factors described by Latham CJ and Dixon J in *Peters' American Delicacy Co* rather than in terms of the benefit to the "corporators as a general body" or a "hypothetical member" as in Evershed MR's judgment in *Greenhalgh*. That is the reason why I have expressed paragraph 90(6) as I have.

97. In the light of those principles, I can see no basis for Mr Arbuthnott's challenge to the validity of the amendments to the Articles. The Judge found that there was no evidence of bad faith or improper motive. There can be no possible challenge to that finding.

98. The amendments to the Articles were in substance, as the Judge said, a "tidying up exercise": removing from Article 36 a reference to "the Code" which had no corresponding place in clause 7.2 of the Shareholders' Agreement or Article 38.4, and extending to Article 38.4 the protective condition in Article 36 and clause 7.2 that the non-purchaser shareholders holding a majority of the remaining shares must agree to the proposed sale.

99. The amended Article 39 also provided a mechanism by which, if any shareholder fails to transfer their shares to the buyer pursuant to a "Relevant Sale", the buyer can request the directors to authorise some person to execute and deliver on behalf of the shareholder any necessary transfer in favour of the buyer.

100. On the face of it those changes – making the Articles clearer and more consistent and facilitating the transfer and registration of shares compulsorily acquired – were for the benefit of the Company even if they also benefited the shareholders as such.

101. The Judge also found that the respondent shareholders considered that they were acting in the best interests of the Company as a whole because they were concerned to resolve the alignment issue in order to secure the Company's future.

102. Mr Chivers raised a large number of subtle and sophisticated arguments attacking the findings of the Judge that the views of the respondent shareholders on those matters were ones which reasonable people could have reached. His starting point was that the facts of the present case only engage the first category in *Greenhalgh* (which the Judge called the 1st category in *Citco*), namely where a reasonable person could consider that the decision of the majority was in the best interests of the company. He said that the second category (which the Judge called the 2nd category in *Citco*), where only the interests of the shareholders between themselves are engaged, cannot validate

an expropriation of the shares of a minority shareholder which was, he submitted, the purpose of the amendment in the present case. Mr Chivers said that the Business operating at the LLP level was not the Company, in which the respondents were shareholders, and so they did not in fact have regard to the interests of the Company at all. He said that, in the light of the remuneration model and its intended continuation after the sale, the success of the Business carried no benefit for the Company because no profit would be passed up to the Company and the only benefit would be for the executives at the LLP level. He contended, moreover, that the evidence did not support the conclusion that there had to 100 per cent alignment since Mr Arbuthnott and other shareholders had, by the time of the WSL offer, ceased to be actively involved as executives but had kept their shareholdings. He said that the respondent shareholders, in resolving to amend the Articles, did not in fact have any concern for the interests of the Company but were motivated solely by their desire to implement the pre-conditions for the implementation of the WSL offer.

103. Mr Chivers referred us to the oral evidence of several witnesses in order to demonstrate the true subjective motives of the respondent shareholders and the absence of any concern, at least on the part of some of them, for the best interests of the Company or the shareholders generally. He said that such evidence also showed that no real independent thought was given to the amendment to the Articles and the only motivation was to accept the WSL offer and to satisfy its conditions.

104. It is not necessary to examine each of those arguments. The outcome of unfair prejudice petitions invariably turns on disputes of fact, and these proceedings, which resulted in a 27 day trial, are no different. Mr Chivers' submissions which I have briefly summarised amount in reality to an attempt on appeal to re-run the trial. The burden is on Mr Arbuthnott to establish the invalidity of the decision of the majority shareholders to amend the Articles. The Judge, in the light of all the evidence, found no evidence of lack of good faith or improper motive, rejected Mr Arbuthnott's case that the amendment of the Articles was targeted purely at Mr Arbuthnott and intended as an expropriation, and accepted the evidence of Mr Bonnyman and others that they were concerned to resolve the alignment issue in order to secure the Company's future and considered accordingly that they were acting in the best interests of the Company as a whole. There can be no doubt, in the light of those findings of the Judge based on the evidence she had seen and heard, that those voting in favour of the amendment of the Articles honestly believed that they were acting in the best interests of the Company.

105. On the issue of whether or not a reasonable person could have reached the same conclusion, the Judge concluded, in the light of the evidence, that the lack of alignment would be an impediment to raising a new fund and was a serious issue affecting the Business bearing in mind the number of shareholders who had retired or were about to retire from active management and the fact that Charterhouse was a sequential funds business. The Judge concluded that it is artificial to view the purposes and interests of the Company separately from the Business as a whole. That was plainly a view she was entitled to reach since it reflected the reality of the way the Company and the Business had been operated for many years, with the consent of Mr Arbuthnott himself. I also agree with her observation that an analysis which assumes that the destruction of the Company, by running off the Business rather than enabling its highly successful Business to continue, might be more in the interests of

the Company is unreal. I would add that it would be wrong to discount any possibility that in the future there might be changes which would enable the Business to continue to be a success while permitting some of the profit to be passed up to the Company.

106. The Judge was also plainly entitled to take into account, in postulating the view that a reasonable person might hold, the evidence that the investment management team would have resisted a complete change of the model of the Business and the absence of any evidence to suggest that there was a realistic prospect of either a third party purchaser or the need or business efficacy of a substantial cash injection from a third party or present investor in return for a minority stake in the Company.

107. In addition, as I have already said, the Judge accepted the respondents' case that the amendment of the Articles was in substance a tidying up exercise, making the Articles more consistent and clearer in their application to the type of factual situation which had occurred rather than bringing about a major change. Mr Chivers sought to undermine that point by submitting that the amended Article 39 would never be used again. That was not a finding of the Judge and I see no reason to make any such assumption. There was nothing in the amended Article 39 which tied its operation to the WSL offer alone.

108. The test is not whether all reasonable people would have agreed that the amendment was in the best interests of the company. It is sufficient that a reasonable person could have thought it was in the company's best interests. It is for Mr Arbuthnott to satisfy the court that no reasonable person would have thought that. In the light of the Judge's findings of fact and her correct decision that the amendment did not introduce any major change from clause 7.2 of the Shareholders' Agreement and the unamended Articles, I cannot see any basis for saying that he has satisfied that requirement.

109. Mr Chivers submitted that, even accepting everything I have found so far, the amendment of the Articles was nevertheless unfairly prejudicial conduct of the Company because it was intended to facilitate the enforced sale of Mr Arbuthnott's shares for a price that was not a proper price, that is to say a price which was significantly below the real value of the shares. Once again, he made a number of sophisticated points in support of his argument.

110. Mr Chivers submitted that the offer price reflected a valuation of the shares of non-continuing shareholders on a minority basis rather than on the basis, which was both the assumption in clause 7.2 of the Shareholders' Agreement and in any event the respondents' own submission as to the reality, that the purchaser (here WSL) was acquiring a controlling interest in the Company. He pointed to Mr Eales' own valuation evidence to illustrate the difference in valuation terms.

111. Further, Mr Chivers said, the offer price reflected the assumption that the remuneration model was proper and would continue whereas it was not proper and should not have continued or be assumed to continue: rather, the remuneration of executives should have been limited to market levels and, in accordance with the terms of clause 11.6 of the Shareholders Agreement, the balance of profit be passed up to the Company to be distributed to shareholders as it ought to have been at all times after Mr Arbuthnott's retirement. Mr Chivers said that the remuneration model

was never a formally agreed policy, let alone entrenched in any contractual document; and he said that the Judge was moreover wrong to treat Mr Arbuthnott as being precluded from challenging it because of his conduct when he was a director of the Company. He further submitted that a policy which distributed all the profits to the executives rather than enabling them to be distributed to the Company's shareholders was in excess of the scope of the powers of the remuneration committee under clauses 11.1 to 11.3 of the Shareholders' Agreement and for that reason also Mr Arbuthnott was not precluded from challenging the policy by virtue of the exoneration or waiver provisions of clause 11.5.

112. Despite that line of argument, Mr Chivers criticised the Judge for examining the valuation of the Company on the basis, which she found as a fact, that, if the remuneration model was changed, the investment executives would leave. He referred to the approach of the court in *Parkinson v Eurofinance Group Ltd* [2001] 1 BCLC 720 and to the restrictive covenants in the LLP. He submitted that the Judge ought to have valued the Company as a going concern, with the continuing executives maintaining an involvement in the Business, and on the basis that they would be special purchasers because they would have complete control over what to do with the income from the Business.

113. Further, Mr Arbuthnott's case is that if the WSL offer had been rejected, and, as the Judge thought probable in those circumstances, the investment executives would leave the Business and the Business would have to be run off, the Company would actually have been worth more to the shareholders than with the Business continuing as a going concern on the basis of the remuneration model. Mr Chivers said that the evidence supported that conclusion. He described that value as the objective minimum value to the existing shareholders and, indeed, to the continuing executives on buying the Company since they could immediately have put the Business into run off. In that connection, Mr Chivers said that Mr Eales had wrongly failed to take into account that on the valuation date the Company had cash in hand of £50 million. Mr Chivers described this as effectively a net assets valuation. He submitted that the Judge was wrong to have no regard to such a valuation.

114. He also criticised the Judge for failing to take into account or sufficient account the nuisance value arising from the ability of the non-continuing shareholders to refuse to approve the sale and so effectively forcing the continuing executives to leave and set up a new business or join some other existing business but in either case with the constraints arising from the restrictive covenants into which they had entered. It was contended before the Judge, on behalf of Mr Arbuthnott, that such nuisance value was in excess of £88 million.

115. This line of argument on unfair value faces a range of range of difficulties and, overall, an insuperable obstacle. Mr Chivers made numerous references to the evidence and asked us to conclude that the Judge had been wrong in some of her conclusion of facts, in some of her assumptions, and in rejecting or ignoring parts of the evidence. Once again, Mr Chivers was effectively attempting to re-try the case on appeal on the evidence.

116. Further, I am far from confident that all the arguments deployed before us were also deployed, at least in the same way, before the Judge. An example is Mr Chivers' analysis before us of valuing the shares on the basis that the continuing executives

were special purchasers. It is clear that reference was made at the trial to *Parkinson v Eurofinance* but the meticulous summary by the Judge of the arguments of each side does not repeat or reflect this aspect of Mr Chivers' submissions on appeal.

117. So far as concerns the remuneration model, I reject the suggestion that there was anything unreasonable, unfair or improper in its continuation after Mr Arbuthnott's retirement and its assumed continuance for the purposes of ascertaining the value of the shares. For all the reasons I have given in rejecting Mr Chivers' arguments as to the best interests of the Company, on the findings of the Judge, it was not unreasonable for the best interests of the Company to be regarded as tied to those of the group's underlying Business, and the remuneration model was reasonably regarded as critical to the success of the Business.

118. The Judge found as a fact that Mr Arbuthnott had agreed, while he was a director, with the remuneration model. Once again, Mr Chivers sought to undermine that finding by taking us to some of the evidence before the Judge at the lengthy trial and also the Defence, and so attempting the inappropriate task of a re-conducting on appeal the trial on the facts. What is certainly clear is that Mr Arbuthnott agreed to the appointment of the remuneration committee, and that its decisions should be binding on him and the other Founders, and he was fully aware as a shareholder and director that the remuneration committee's practice was, as the Judge found, to deal with remuneration consistently with the remuneration model.

119. I agree with Mr Chivers that Mr Arbuthnott's conduct while a director does not legally prevent him arguing about the propriety of the remuneration model after his retirement as a director. It does, however, support the respondents' case that it was reasonable and proper for those running the Company and the respondent shareholders to view the continuation of the policy as being in the best interests of the Business and of the Company and the only basis on which the Business could survive or, at any event, prosper.

120. I reject the argument that the remuneration model was outside the powers of the remuneration committee – an unattractive argument on any footing in view of Mr Arbuthnott's failure to take that legal point, whether as director or shareholder, before these proceedings. The terms of clause 3.1 of the Shareholders' Agreement (as amended after the introduction of the LLP) and clauses 11 and 12 of the LLP deed, against the background of the consistent implementation of the remuneration model, lead to the inevitable conclusion that those provisions contemplated and were intended to encompass the remuneration model. Objection to the remuneration model is therefore precluded by the wide terms of clause 11.5 of the Shareholders Agreement, by which the Founders agreed to waive any objection to that model on the grounds of breach of fiduciary duty "<u>or otherwise</u>" (emphasis added).

121. Aside from the issue of the remuneration model, I do not propose to address each of Mr Chivers' submissions on the valuation issue because the general answer to all of them is that each of the Founders agreed in clause 7.2 of the Shareholders' Agreement that, if the Founder Majority agreed to pursue an Exit, he would be bound to sell his shares "provided that the terms on which he is required to sell his shares are no less favourable to him than those being offered to any other shareholder". In other words, Mr Arbuthnott, as one of the Founders, agreed that he would be bound by the price with which the Founder Majority was content.

122. Mr Chivers advanced a raft of arguments to meet this point. He said that clause 7.2 was concerned with an Exit, which pre-supposed some form of negotiation to achieve the best price for the shares and discussion and co-operation between the shareholders to that end. He said that actually the express terms of clause 7.2 required co-operation between the shareholders. He submitted that, by contrast, in the present case there had been no negotiation, no discussion and no co-operation. He described the WSL offer as having come "out of the blue".

123. Mr Chivers further submitted that, in any event, the power of the Founder Majority under clause 7.2 to bind the non-purchasing shareholders was a power to be exercised in the best interests of those shareholders. He said in some of his oral submissions that obligation meant that the Founder Majority had to secure the best possible price for all the shares in the same class, taking into account all relevant matters and ignoring irrelevant matters, and if they could not do so they had to refuse to agree to the sale. He also said in some of his oral submissions that it was an obligation to ensure the non-purchasing shareholders obtained a proper price, namely a proportionate share of the value of the entire controlling interest being sold. He said that obligation (however expressed) was either a principle of law or an implied term.

124. During oral submissions reference was made to *Braganza v BP* [2015] UKSC 17, on which Mr Chivers relied in support of an implied term (although we were not taken to the actual judgments in that case). Mr Chivers submitted, on the basis of much of his argument I have already mentioned earlier, that the Founder Majority had not taken into account all relevant matters and had taken into account irrelevant matters in agreeing to sell at a price which was objectively well below the true value of the shares.

125. I accept Mr Chivers' submission that the power of the Founder Majority under clause 7.2 to compel the sale of shares by non-purchasing shareholders carried with it an obligation beyond an unconditional self-interest. I reject without hesitation, however, that such an implied term was either of those advanced by Mr Chivers, namely to secure the objective best possible price for the shares, taking into account all relevant matters and ignoring irrelevant matters, or to ensure that the non-purchasing shareholders received a proportionate part of the true value of the controlling interest being sold. It seems to me inconceivable that such an exacting and indeed onerous term would have been agreed or intended by the parties to the Shareholders' Agreement, with all its possibilities for dispute and litigation in the context of a sale of the Company with which one or more minority shareholders (but fewer that the majority of the non-purchasing shareholders) do not agree.

126. The factual setting for the Shareholders Agreement was that the Founders were, as the Judge found, a group of sophisticated financial professionals with an intimate knowledge of the private equity business. They had sufficient trust in each other to go into business together. It is perfectly natural that, in such circumstances, they would be willing to rely on the honest judgment of the Founder Majority as to what were fair and reasonable terms for a sale in the context of clause 7.2. In the light of the factual background to the Shareholders' Agreement, I consider that clause 7.2 contained an implied term that the Founder Majority would not agree to pursue an Exit except on terms which they honestly considered to be fair and reasonable. I do not consider that *Braganza*, an employment case, requires a more rigorous standard on the particular facts of the business arrangements in this case. For the reasons which I have given

earlier, and on the factual findings of the Judge, including her finding that the ongoing executives were the only likely purchasers of the shares, that implied term was satisfied in the present case.

127. Mr Chivers submitted, as he had at the trial, that in any event the amended Article 39 had no application on the facts because a "Relevant Sale" for the purposes of Article 39 was one approved by a Founder Majority, excluding "any Founder who is the Buyer or is acting in concert with the Buyer". Mr Arbuthnott's case is that all the respondent shareholders were acting in concert with WSL as soon as they had accepted the WSL offer, which imposed an obligation on each vendor to take all reasonable steps to fulfil or procure the fulfilment of the condition as to the amendment of the Articles and other conditions. Accordingly, Mr Arbuthnott claims, none of the respondent shareholders could give the Founder Majority approval required by the express terms of Article 39.

128. The short answer to that point is that Article 39, on its plain and proper interpretation, which accords with reality, contemplates two groups of shareholders: namely, on the one hand, those who wish to sell and, and on the other hand, those who wish to purchase and others relevantly associated with the prospective purchasers. The effect of Mr Arbuthnott's interpretation is that the desire of the non-purchasing sellers to achieve a sale - by committing the buyer to purchase pursuant to an agreement to purchase - has the perverse result of disabling the non-purchasing sellers from using Article 39 to achieve that end. It is an uncommercial and unrealistic interpretation: cf. the Takeover Panel Practice Statement on the definition of the expression "acting in concert" in the Takeover Code 10^{th} ed. Part C. In the present case, the non-continuing shareholders were in substance and reality sellers and not purchasers and so the amended Article 39 was properly engaged on the facts.

129. Finally, there is Mr Arbuthnott's claim that the failure to pay out profits of the Business to the shareholders in the years following Mr Arbuthnott's retirement was conduct of the Company unfairly prejudicial to him. This rested in part on Mr Arbuthnott's attack on the legitimacy of the remuneration model, on his criticism that the Judge had wrongly concluded that the remuneration model was a policy enshrined in the contractual documents made by the Founders, including Mr Arbuthnott, on his criticism that the Judge wrongly treated Mr Arbuthnott as having lost any right to attack the legitimacy of the remuneration model because he had acquiesced in the remuneration model while he had been a director, and, as regards 2009 and 2010, on the exceptional additional profits in those years which was paid to the executives as bonuses.

130. I have already dealt with those criticisms in earlier parts of this judgment. For the reasons I gave there, I reject any suggestion that the remuneration model or the failure to distribute profit to Mr Arbuthnott as a shareholder was at any relevant time illegitimate or invalid or can properly be attacked by Mr Arbuthnott as being unfairly prejudicial to him.

Conclusion

131. For all those reasons, I would dismiss this appeal.

Lord Justice Lewison

132. I agree.

Lord Justice McCombe

133. I also agree.