OUTER HOUSE, COURT OF SESSION

[2021] CSOH 17

P579/20

OPINION OF LORD ERICHT

In the petition

(FIRST) ALFRED GEORGE CHEYNE; (SECOND) VALERIE CHEYNE

Petitioners

against

ALFRED CHEYNE ENGINEERING LIMITED

First Respondent

and

BALMORAL GROUP HOLDINGS LIMITED

Second Respondent

for

ORDERS UNDER SECTIONS 994 AND 996 OF THE COMPANIES ACT 2006

Petitioners: Lord Davidson of Glen Clova QC, MacGregor QC, Arnott; CMS LLP
Second Respondent: Cormack, QC, sol adv, Young; Pinsent Masons LLP

11 February 2021

Introduction

[1] This unfair prejudice petition called before me on the Second Respondent's motion to dismiss the Petition as an abuse of process because the Petitioners had refused a reasonable

offer to settle. Answers had been lodged by the Second Respondent but not by the First Respondent.

[2] The Petition seeks orders under sections 994 and 996 of the Companies Act 2006 (the "2006 Act") in respect of unfairly prejudicial conduct in the affairs of the First Respondent, Alfred Cheyne Engineering Limited (the "Company").

[3] The orders sought are, in brief:

(i) Interdict from issuing shares or diluting the Petitioner's shareholding;

(ii) Interdict from appointing advisers to assist with, or taking steps to, sell the business or assets of the Company to the Second Respondent, Balmoral Group Holdings Ltd ("Balmoral");

(iii) Reduction of the appointment of a particular individual as a director;

(iv) Interdict from ratifying etc the acts of that individual;

(v) Reduction of a resolution reducing monthly payments to the Petitioner's Loan Account;

(vi) Declarator that the Petitioners were entitled to have these payments increased;

(vii) An order ordaining the increase;

(viii) Declarator that the Petitioners were entitled to information about the Company;

(ix) Order to furnish information;

(x) Interdict the appointment of an insolvency practitioner or winding up the Company;

(xi) Ordain Balmoral to sell Balmoral's whole shareholding to the petitioners on such terms and within such time as to the court seems proper and reasonable.

[4] On 22 July 2020 Lord Tyre granted interim interdict in respect of (i), (ii), (iv) and (vii). On 21 August 2020 I refused the Second Respondents' motion for recall, made a minor amendment to the wording of the interdict on (iv) and granted interim interdict in respect of (x).

[5] Balmoral pled (answer 82) that by letter dated 9 October 2020, Balmoral made a reasonable offer for resolving any possible unfair prejudice being suffered by the Petitioners, and that it would be an abuse of process for the Petitioners to continue with the Petition in the face of such an offer.

Statutory provisions

[6] Part 30 of the Companies Act 2006 is headed "Protection of members against unfair prejudice"

[7] Section 994 provides:

> "Petition by company member
> (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."

Section 996 provides:

> "Powers of the court under this Part
>
> (1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.
>
> (2) Without prejudice to the generality of subsection (1), the court's order may—
> (a) regulate the conduct of the company's affairs in the future;
> (b) require the company—

(i) to refrain from doing or continuing an act complained of, or
(ii) to do an act that the petitioner has complained it has omitted to do;

(c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;

(d) require the company not to make any, or any specified, alterations in its articles without the leave of the court;

(e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly."

The background to the dispute between the Petitioners and Balmoral.

[8] The First Petitioner, Mr Alfred Cheyne, holds 15% of the issued share capital of the Company, represented by 5,500 A shares. The Second Petitioner, his wife Mrs Valerie Cheyne, holds a further 15%, that is 5,500 A shares. The remaining 70% is held by Balmoral, represented by 25,667 B shares. The Company is an engineering company with particular expertise in winching equipment for offshore industries. Mr Milne is a director of Balmoral and the owner of 80% of Balmoral's shares, with the balance of the shares being held in trusts named after him.

[9] The Petitioners founded the Company in 1996 and until 2017 owned the entire issued share capital. In 2017 the Company repaid its bank lending and instead obtained a credit facility for £10million from Balmoral under a Facilities Agreement dated 14 September 2017 (the "Original Facilities Agreement"). Balmoral also acquired 3,865 B shares (the "Original B Shares"), and an option agreement was entered into giving the Petitioners the option to purchase the Original B Shares and regain control of the Company.

[10] The arrangements made in 2017 were amended in 2019. The Original Facilities Agreement was amended by a Facilities Amendment Agreement ("Facilities Amendment Agreement") dated 25 October 2019 (the Original Facilities Agreement as so amended being

referred to as the "Amended Facilities Agreement"). An additional 21,802 B shares were issued to Balmoral at a price of £3million. The new arrangements were given effect to by changes in the Article of Association in a Restated Investment Agreement between the Company, the Petitioners and Balmoral dated 25 October 2019 (the "RIA"), and a call option agreement entered into between the same parties on that day (the "Option Agreement").

[11] Clause 2 of the Option Agreement granted an option to the Petitioners to buy Balmoral's B shares.

[12] The option is exercisable after the third anniversary of the Option Agreement, that is after 25 October 2021 (the "Option Date") (Clause 3).

[13] The consideration for the exercise of the Option was set out in clause 5 and for present purposes as follows:

> 5.2 …The… Consideration shall be the higher of:
> 5.1.1 £10,000,000; or
> 5.1.2. a sum (expressed in pounds sterling) calculated as follows
> (C xA)- (Bx70%),
> where:
>
> **A** is the EBITDA of the Company (consolidated with any other Group Companies) for the trailing 12 month period ending on the last day of the month immediately prior to the month during which the Exercise Notice is served… (the TTM Date); and
>
> **B** is the Net Debt of the Company and all other Group Companies; and
>
> C's value will vary depending on the value of A as follows:
> C= 3.00 where A is less than £6,500,000
> C=2.95 where A is equal to or more than £6,500,000 but less than £7,000,000
> C=2.90 where A is equal to or more than £7,000,000 but less than £7,500,000
> C=2.80 where A is equal to or more than £7,500,000 but less than £8,000,000
> C=2.70 where A is equal to or more than £8,000,000 but less than £8,500,000
> C=2.60 where A is equal to or more than £8,500,000 but less than £9,000,000
> C=2.50 where A is equal to or more than £9,000,000
> plus in either case, the aggregate amount due to the Seller at the Completion Date in respect of any Settled Claims which have not previously been paid or discharged by the Founders [ie Petitioners]."

EBITDA was defined in clause 1.1 as:

> "earnings before interest, taxes, depreciation and amortisation, to be determined with reference to the most recently available management accounts of the [Company and its subsidiaries] which have been approved by the directors of the Company acting with the written consent of [Balmoral]."

[14] The Petitioners were, until January 2020, actively in charge of the day to day management of the Company. They were suspended as directors of the Company on 27 January 2020.

The subject matter of the Petition

[15] The Petitioners' case as averred in the Petition can be summarised as follows. Since obtaining a controlling shareholding in 2019, Balmoral has treated the Company as part of the Balmoral Group notwithstanding the existence of the Option. On 10 June 2020 Mr Milne wrote to the Petitioners stating that he wanted to purchase the Petitioner's shares. The Petitioners do not wish to sell their shares but wish to exercise the Option at the Option date in the event that it is not possible for the Petitioners and Balmoral to fulfil the original goal of building up the business and both parties exiting on a sale of the Company. Since the acquisition of the majority shareholding in 2019, Balmoral has abused its position as controlling shareholder and lender to further its own interests rather than the interests of the Company in the following respects. It has sought to marginalise the Petitioners' position in the Company and applied inappropriate pressure on the Petitioners. Mr Milne is personally abusive to the Petitioners. The actions of Balmoral are part of a campaign aimed at engineering a situation whereby the Petitioners are not able to exercise the Option and Balmoral either forces the sale of the Petitioners' shares to it well below market value, or forces the Company (which is solvent) into an insolvency process in order that Balmoral can

purchase the business and assets below market value. The affairs of the Company are being conducted in an unfairly prejudicial manner in respect of (i) creating a reasonable apprehension that it will issue shares in the Company and dilute the Petitioners' shareholding; (ii) failure to comply with the articles; (iii) breaching a term of the Amended Facilities Agreement; (iv) appointment of Mr Mitchell as director in breach of the RIA; (v) breach of duty by Company directors; (vi) withholding financial information from the Petitioners; (vii) exclusion of the Petitioners from management of the Company; (viii) application of economic pressure through the suspension of monthly payments to the Petitioners; and (ix) overall conduct of Balmoral.

[16] Balmoral disputes what is averred by the Petitioners. Its position as averred in the answers may be summarised as follows. The letter of 10 June 2020 was sent as a proposal for the purposes of resolving the breakdown in the parties' relationship. There is no campaign as averred by the Petitioners, and the Petitioners' averments are unduly suspicious and conspiratorial in nature. The Company's interests as a whole were better served by moving the Petitioners to non-executive roles. Balmoral has no intention of issuing shares without the consent of the Petitioners. There was no breach of the articles. There was no breach of the Amended Facilities Agreement, and even if there was there was no realistic prospect of Balmoral attempting to enforce it. The Petitioners have no proper basis not to consent to the appointment of Mr Mitchell and their refusal to consent bears to be driven by personal animosity. The directors were entitled to take into account the views of Balmoral as the largest shareholder and had acted in good faith in the interests of the Company. The Petitioners were given appropriate financial information. The Company was not a quasi-partnership company and had no legitimate expectation to participate in management of the Company beyond that set out in the RIA and Articles of Association,

and in any event had not been excluded as they remained non-executive directors. The Petitioners are not under economic pressure as they have other sources of income and it is not in the interests of the Company to continue to make payments to the Petitioners in view of the financial situation of the Company, which faces imminent insolvency. Balmoral has invested in the Company and taken a lenient approach to events of default: the genesis of the present dispute is the Petitioners' unwillingness to brook any opposition to the manner in which they were operating the Company.

Motion before the court

[17] The issues between the parties can only be resolved after hearing evidence on the facts. An eight day proof diet has been reserved commencing 10 August 2021 to suit Balmoral's convenience. An earlier date in February 2021 which was offered by the court and was suitable for the Petitioners had been turned down by Balmoral due to unavailability of their counsel.

[18] In the meantime, however, the case called before me on Balmoral's motion to dismiss the petition on the basis that the Petitioners having refused a reasonable offer curing the Petitioners' complaint, continued prosecution of the Petition is an abuse of process.

[19] If the motion is granted, then the petition will be dismissed. If the motion is refused, then the petition and answers will proceed to proof on the reserved dates.

Petitioners' offer of 9 October 2020 (the "Petitioner's First Offer")

[20] On 9 October 2020 the Petitioners' agents wrote to Balmoral's agents by email dealing with various matters relating to the litigation and making an offer for the Petitioners to buy Balmoral's majority shareholding as follows:

"**4. RESOLUTION OF THE PETITION**

4.1 As you are aware, the court has encouraged parties to consider a possible resolution to the matters currently affecting the Company, including by exploring mediation.

4.2 The Petitioners' primary position remains that they wish to regain ownership of the Company.

4.3 The Petitioners are in receipt of an in-principle offer of funding, which would enable the exit of your client from its association with the Company.

4.4 On even an expedited basis, it appears likely that the resolution of the Petition, and any appeal which may flow from it, will not be completed prior to the Petitioners' exercise of their rights under the terms of the call option agreement entered into by the Company, the Petitioners and the Second Respondent dated 25 October 2019 (the "**Option Agreement**").

4.5 As such, given the funding available to the Petitioners now, we invite the Second Respondent to confirm whether it is willing to exit its association with the Company now. We respectfully suggest that, given the terms of the Option Agreement, such an outcome is simply recognising the inevitable. Such an outcome avoids, for both our clients, the associated time and cost of litigation, together with its (very considerable) reputational damage likely to be suffered by your client. It is also likely to lead to benefits for the Company, insofar as it would relieve the Company from the ongoing dispute between shareholders.

4.6 We confirm, for the avoidance of doubt, that should the Second Respondent wish to convene a formal mediation to plan for its exit, our clients are willing to do that, however given it falls largely to matters of mechanics, it may, in the first instance, be prudent simply for exit discussions to be documented among solicitors, without the requirement of convening a formal mediation.

4.7 We therefore suggest, in order to move matters forward, that CMS and Pinsent Masons LLP arrange to liaise on terms of agreement, with a view to progressing the exit of the Second Respondent. We suggest that, with focus, such an exit may be achieved prior to the Christmas and New Year break."

Balmoral's offer of 9 October 2020 (the "Balmoral Offer")

[21] Balmoral's agents responded on the same day with a counter-offer. That counter-offer is the offer upon which Balmoral founds in its motion to dismiss the petition. The counter-offer was in the following terms:

"P579/20 PET: ALFRED CHEYNE & ANR FOR ORDERS (THE "PETITION") IN RESPECT OF ALFRED CHEYNE ENGINEERING LIMITED (THE "COMPANY")
OUR CLIENT: BALMORAL GROUP HOLDINGS LIMITED ("BGHL")
YOUR CLIENTS: ALFRED AND VALERIE CHEYNE

We refer to our previous correspondence in relation to the above matter and again write on behalf of and as instructed by BGHL. We note in particular your comments regarding the resolution of the petition in your letter of today's date.
The purpose of this letter is to make a reasonable offer to your clients to resolve the allegations of unfairly prejudicial conduct made in the Petition. We have endeavoured to tailor our offer to the particular circumstances of this case, namely that the central complaint by your clients (which is denied) appears to be that our client has some form of scheme to defeat your clients' option in the Call Option Agreement dated 25 October 2019 (the "**Option**"). We also consider that the whole framework of the jurisdiction under section 994 of the Companies Act 2006 is intended to put right and cure any unfair prejudice which has been suffered for the future and that this generally requires a clean break between the shareholders.

We are concerned that the Petition does not seek to resolve matters for the future nor does it address the various concerns our clients have about unfairly prejudicial conduct on the part of your clients. Instead, it keeps parties locked into a working relationship which has irretrievably broken down. This position is untenable in the longer term, whichever of our clients may ultimately be proven to be correct. In the circumstances, your clients should be aware that, in the event it is not accepted, our clients will found on this offer in the Petition proceedings as curing any possible allegation of unfair prejudice.

Offer of Early Exercise of the Option
In the Petition, your clients seek, ultimately, to preserve their ability to exercise their rights under the Option, which are currently able to be exercised from 25 October 2021. The terms of the Option do not anticipate the disagreements and breakdown in relations between our respective clients which have transpired over the course of this year. BGHL therefore make this offer with a view to allowing matters between our clients to be brought to a close without the need for extensive further litigation, as presently appears inevitable.

BGHL hereby offer your clients the ability to exercise the Option early (the **"Accelerated Option**") on the terms set out below. If your clients are either not able, or not willing, to exercise the Accelerated Option, BGHL would agree to purchase your clients' 30% shareholding in the Company at market value, as provided for in more detail below.

The terms of this offer are:

1. This offer of the Accelerated Option is open for acceptance, in writing to BGHL or Pinsent Masons, for a period of 14 days from the date of this letter,

unless earlier withdrawn as provided for below. If the offer is not accepted in this period the offer shall be held to be withdrawn by BGHL.

2. The Accelerated Option may only be exercised at the same value and on the same terms as set out in the Option, save as expressly varied by the terms of this offer.

3. If this offer is accepted, BGHL understand that your clients will require a period to arrange finance for (i) the purchase of our client's shareholding in the Company, (ii) the repayment of the outstanding debt under the Facilities Agreement, and (iii) the future working capital and banking arrangements for the Company. Your clients will have a period from the acceptance of this offer until Friday 18 December 2020 to exercise the Option (the "**Accelerated Option Period**"). The Accelerated Option Period will be substituted for the Option Period as defined in the Option.

4. At any time during the Accelerated Option Period, your clients may notify BGHL that they are in a position to proceed with the exercise of the Accelerated Option by service of an Exercise Notice as provided for in Clause 4 of the Option.

5. If (i) no Exercise Notice is served by the end of the Accelerated Option Period, or (ii) your clients notify BGHL that they will not serve an Exercise Notice, your clients shall agree to sell and BGHL shall agree to purchase the total 30% shareholding in the Company held by your clients for 30% of the market value of the Company. The terms of the sale will be detailed in a share purchase agreement together with appropriate ancillary documentation including title and capacity warranties from your clients to be entered into between the parties within 12 weeks of the earlier of (i) the end of the Accelerated Option Period, or (ii) notification from your clients that they will not serve an Exercise Notice.

6. BGHL propose that the market value of the Company is determined by an independent and competent expert to be agreed upon between parties or, failing such agreement, by the president of ICAS. Your clients would be given access to all relevant Company information necessary for the purpose of making any submissions to the appointed expert. The purchase price of the shares would not be subject to any discount on account of your clients' shares constituting a minority interest in the Company.

We note that the cost of any such independent expert would ordinarily be shared but the expert appointed would be given the power to determine that the costs should be borne in a different manner.

7. For the avoidance of doubt, the purchase of your clients' shareholding in the Company by BGHL would include extinguishing your client's whole interest in the Company, including those under the Option, and the Restated

Investment Agreement. Your clients would also be required to resign from their positions as directors and company secretary of the Company and from any other office or employment with the Company. If this offer is accepted, BGHL would require this agreement to be formalised by way of a Minute of Variation to the Option, entered into between BGHL, your clients, and the Company, to be completed within 14 days of this offer being accepted failing which this offer would be deemed to be withdrawn notwithstanding such acceptance.

We note that the Company is also a party to the Option. We have therefore provided a copy of this letter to the Company's solicitors.

Expenses in the Petition

Your clients have an award of expenses in their favour for the interim orders hearing which took place on 21 August 2020. Otherwise, standing the opinion of Lord Hoffman in *O'Neill v. Phillips* [1999] 1 WLR 1092 at 1108, a majority shareholder should be given a reasonable opportunity to make an offer before any offer requires to be made to cover the expenses of the minority shareholder. Accordingly, we make no further offer of expenses at this stage.

If this offer is accepted, we propose that the Petition is dismissed on a no expenses due to or by basis, save for as already provided for by the interlocutor of 21 August 2020.

Time Limitation of Offers, Dismissal of Petition, and Reservation of Rights

BGHL expressly reserves the right to withdraw this offer at any time during the initial 14 day period at their sole discretion.

We consider that this offer would have the effect of curing any unfair prejudice to your clients (which, as you are aware, BGHL deny), and would reflect the terms of any orders which the Court may make in any final disposal of the litigation between our clients. We would therefore encourage your clients to give these offers serious consideration given their potential to bring matters to a close at an early stage in proceedings. Please note that all of BGHL's rights and remedies in the whole matter, and in respect of each and all of the agreements between parties including without limitation our client's rights under the Amended Facility Agreement and the Restated Investment Agreement, and in respect of the Petition and Option, are expressly reserved."

The Petitioners' Offer of 23 October (the "Petitioner's Second Offer")

[22] The Petitioners' agents responded on 23 October 2020 refusing the Balmoral Offer and offering a choice of two options for the purchase by the Petitioners of Balmoral's minority shareholding as follows:

> "**Our clients: Alfred & Valerie Cheyne**
> **Your client: Balmoral Group Holdings Limited ("BGHL")**
> **Alfred Cheyne Engineering Limited ("the Company")**
> **P579/20 Petition of Alfred Cheyne & Anr for orders pursuant ss994 & 996 of the Companies Act 2006 in respect of the Company**
>
> 1.1 We refer to our respective letters of 9 October 2020.
>
> 1.2 It is common ground between the parties that their working relationship has irretrievably broken down and that, ultimately and irrespective of which party's position is vindicated, there will require to be a sale of shares.
>
> 1.3 As stated in our letter of 9 October 2020, our clients' position remains that they wish to regain ownership of the Company and have the financial backing to do so. Our clients are encouraged that BGHL has confirmed that it is willing to facilitate a resolution by the sale of its shares. Whilst it seems we disagree regarding the utility of the Petition should a resolution not be achieved at this stage, and in respect of which we can correspond further should that be required, it also seems that the parties have identified the core foundation of a resolution – the sale of the BGHL shares.
>
> **2. REJECTION OF BGHL OFFER**
>
> 2.1 The terms of Accelerated Option offer (the **"Offer"**) are not acceptable to our clients. The Offer, whilst superficially attractive, is fundamentally flawed.
>
> 2.2 The limitation of the Offer to "*the same value and on the same terms as set out in the Option…*" is not an acceleration of the Option (as defined in the call option agreement entered into among our clients, BGHL and the Company dated 25 October 2019 (the **"Option Agreement"**)). Rather, it is an offer to sell based upon a x3 multiple of an EBITDA of £5,557,198 (being the reported LTM EBITDA in June 2020). A significant aspect of the value of the Option to our clients is that it lasts for a period of five years from October 2021 and may be exercised when our clients choose. ;It is not merely the right to buy but also the right to determine when and, to a degree, at what price. The June 2020 LTM EBITDA is inflated by the sale of assets, which would not be included in a standard EBITDA valuation.

2.3 The inherent difficulty with the Offer is further highlighted by (i) the Company's own financial forecasts; and (ii) the debt refinancing report prepared by Johnston Carmichael. The Company projects, as at October 2021, that the LTM EBITDA will be £2,485,935. The Johnston Carmichael report states,

'*The last three years historic performance of the business has been broadly consistent with Revenues of c.£22m and* ***EBITDA between £2.7m and £2.3m*** *generated in each 12 month period*" and, "*The underlying business performance in FY21 is considered strong despite the impact of COVID-19 and the recent downturn in the global oil and gas markets. … ACE is on track to deliver an underlying FY21 EBITDA of £2.6m, after removing the impact of the NS2 asset sales. This is behind budgeted EBITDA of £3.2m but this is due to slippage in timing of two major contracts.*'. (***emphasis added***)

2.4 Our clients have the right to veto the disposal of any tangible asset with a value of more than £100,000 (Restated Investment Agreement, Part 3, item 2). As such, they can prevent the inflation of the EBITDA in the 12 months prior to exercise of the Option.

2.5 The effect of the "acceleration" of the Option is immediately apparent and is in no way commensurate with the rights our clients seek to protect and is therefore rejected.

3. COUNTER PROPOSAL

3.1 Our clients would like to make two alternative counterproposals for the early resolution of this dispute.

3.1.1 **Option 1**: The parties agree that the Option can be exercised by our clients within the Accelerated Option Period and that the Initial Consideration (as defined in the Option Agreement) payable shall be £10,000,000. Arrangements will also be made by our clients such that the Company is in a position to procure that all sums due pursuant to the Facilities Agreement (as defined in the Option Agreement) are repaid at completion; or

3.1.2 **Option 2**: BGHL agrees to sell its entire shareholding in the Company (the **"Shares"**) to our clients (or their nominees, including any new holding company of the Company) for an aggregate cash consideration equal to 70% of the market value of the Company. The terms of sale would be detailed as per the second paragraph of point 5 in your letter of 9 October 2020. The market value would be determined in accordance with point 6 of your letter. The purchase price of the Shares would not be subject to any premium on account of BGHL's shares constituting a majority interest in the Company. Arrangements will also be made by our clients such that the Company is in a position to procure that all sums due pursuant to the Facilities Agreement are

repaid at completion of the acquisition of the Shares. If our clients are unwilling to purchase Shares at the price determined, they would agree to sell their shares in the Company to BGHL for 30% of the determined market value. The election would be made by our clients within the Accelerated Option Period. Note that if such election was made then except for customary warranties regarding unencumbered title and capacity to sell shares, our clients will not be entering into any further warranties and/or indemnities in respect of the sale of their 30% of the shares.

3.2 In either option, the parties would agree that our clients would be provided with access to the information listed at Appendix A [which contained a list of due diligence enquiries] within seven days of agreement in principle and in the case of Option 1 provide our clients' agents and advisers with full access to such records, key employees, advisers and operations of the Company as required to enable our client's funders to complete its due diligence investigations.

3.3 Further, in either option, a full settlement agreement will be required, dealing with waiver of claims, confidentiality, agreed press release, the resignation of directors at completion and other ancillary issues, including sums owed by either party, future regulation of property and the return of any personal effects.

3.4 In order that progress can be made prior to the upcoming hearing before the court, we ask that you take instructions and respond to this offer by **5pm on Monday 2 November 2020**."

Balmoral's rejection of both options in the Petitioners' Second Offer on 30 October 2020

(the "Balmoral Rejection Letter")

[23] On 30 October 2020 Balmoral's agents wrote rejecting the Petitioners' Second Offer in the following terms:

"**P579/20 PET: ALFRED CHEYNE & ANR FOR ORDERS (THE "PETITION") IN RESPECT OF**
ALFRED CHEYNE ENGINEERING LIMITED (THE "COMPANY")
OUR CLIENT: BALMORAL GROUP HOLDINGS LIMITED ("BGHL")
YOUR CLIENTS: ALFRED AND VALERIE CHEYNE

We refer to our previous correspondence in relation to the above matter and again write on behalf of and as instructed by BGHL. We write in particular in response to your letter dated 23 October 2020.

Rejection of Counter-Proposal

BGHL reject the counter proposal contained in your letter of 23 October 2020.

The counter-proposal amounts to an attempt by your clients to avoid the consequences of the commercial agreement which was reached between parties and recorded in the Option.

Amongst other factors, the price at which your clients are able to exercise the Option reflects that BGHL have taken all of the financial risk in the dealings with your clients regarding the Company. Whereas BGHL have provided financing to the Company both by way of capital and lending, your clients have provided no financial support.

We note that the price formula in the 2017 Option Agreement was renegotiated on terms more favourable to your client as part of the 2019 refinancing of the Company. We understand the reason for this was to make it easier for your clients to fund the exercise of the Option. Having already agreed to terms more favourable to your client only 1 year ago, BGHL are not willing to agree to a further reduction.

The Petition seeks, in short, to preserve your clients' ability to exercise the Option standing a claim of a purported scheme on the part of BGHL to deny them that opportunity. The offer made by BGHL provides your clients with an opportunity to exercise that Option early, or to release their capital at market value. BGHL are satisfied that the offer made previously was one which, if accepted, would have cured the alleged unfair prejudice complained of in the Petition (and which is denied).

Restatement of Offer

BGHL therefore wish to restate the offer which was contained in our letter of 9 October 2020 on the same terms as set out therein.

This offer will remain open for acceptance by your clients until 5pm on Wednesday 4 November
2020 subject to the terms as set out in our letter of 9 October 2020 as we say.

Please note that all of BGHL's rights and remedies in the whole matter, and in respect of each and all of the agreements between parties including without limitation our client's rights under the Amended Facility Agreement and the Restated Investment Agreement, and in respect of the Petition and Option, are expressly reserved."

Value of the offers

[24] Valuation of the offers is a matter for an expert. However in order to put the discussions before me in context, parties helpfully set out their calculations as to what the price paid under the various offers would be.

Option price under Balmoral Offer

[25] Clause 5.2 of the Option sets out that the consideration payable on exercise of the Option is the higher of either £10m or the output of the following calculation:

$$(C \times A) - (B \times 70\%)$$

[26] On Balmoral's calculation, the consideration is £22,002,153.60. On the Petitioner's calculation the consideration is £20,850,046. There is not a material difference between these calculations and for the purposes of the present discussion I will take a broad brush approach and work on the assumption that the consideration will be £21million.

Forecast Option price as at start of Option Period on 25 October 2021

[27] Counsel for the Petitioners submitted that on the Company's own projections and forecasts LTM EBITDA will be a typical level for the Company of £2,258,516, in which case the option formula calculation would be

(£2,258,516 x 3) - (£386,861 x 70%) being

£6,775,548 - £270,802.70

= £6,504,745

[28] On an updated calculation based on updated information from the Company in December 2020, the adjusted calculation comes to £6,616,579. As both of these figures are below the floor price, the price of the option would be £10,000,000.

[29] The Petitioners estimate that the loss of a particular project to the Company may further reduce LTM EBITDA by approximately £1 million, to £1,258,516. If that apprehension comes to pass, the Option calculation in October 2021 was calculated by the Petitioners as:

(£1,258,516 x 3) - (£386,861 x 70%) being

£3,775,548 - £270,802.70

= £3,504,745

[30] On an updated calculation based on financial information available in December, the adjusted calculation comes to £3,616,579. As both of these figures are below the floor price, the price of the option would be £10,000,000.

Price for shares at market value

[31] The Solicitor advocate for Balmoral submitted that page 24 of the Balance Sheet of the Company in the 15 December 2020 Board Pack attributes shareholders' funds in the sum of £29,122,000. 70% of the shareholders' funds, representing Balmoral's 70% shareholding would be £20,385,000.

The Petitioners do not calculate the offer price, but take issue with Balmoral's calculation given Balmoral's averments as to the insolvency of the Company.

[32] Balmoral avers that "As at the date of the Petition being lodged, the Petitioners, fundamentally, were seeking to ignore the reality that the Company had suffered, and was predicted to continue to suffer, an Event of Default under the Amended Facilities Agreement that **rendered it open to** enforcement action and **insolvency at any time**." (Answer 44 emphasis added). Balmoral also avers that "at the [July 2020] board meeting, Mr. Main [Deputy Managing Director of Balmoral] simply explained, in good faith and in what he perceives to be the best interests of the Company as a whole, that **he considered an insolvency practitioner would be best qualified to provide** both **suitable** debt advice and **insolvency advice** for dealing with the current situation under the Amended Facilities Agreement" (Answer 46 emphasis added) I find it difficult on the face of the information currently before me to reconcile Balmoral's concerns about the potentially imminent insolvency of the Company with Balmoral's valuation of the Company as a whole at a substantial figure of over £29million. The valuation of the Company, and of the Petitioners' offer, would require detailed input and consideration from an expert. The offers very sensibly provide for a mechanism for market value to be fixed by an expert. I am not in a position to come to a decision on the market value of the parties' respective shareholdings. However for the purposes of discussion (and while reserving my opinion as to whether Balmoral's valuations are correct) I note that Balmoral values its 70% shareholding at approximately £20 million and the Petitioner's 30% shareholding at approximately £9 million.

Summary of offers

[33] The above offers may be summarised as follows.

(a) Balmoral made an offer to allow the Option to be exercised at an early date, so that the Petitioners would purchase Balmoral's shares at the option price struck now (£21million) rather than the price struck at the date set out in the Option (forecast to be £10million), which failing Balmoral would buy the Petitioners' shares at market value (which Balmoral calculates at £9million but as this figure is disputed by the Petitioners it would be determined by an expert).

(b) The Petitioners made an offer to purchase Balmoral's shares at a price of £10 million (Option 1). The Petitioners made an alternative offer to purchase Balmoral's shares at market value (which Balmoral calculates at £20million but would be determined by an expert), which failing for Balmoral to purchase the Petitioners' shares at market value (which Balmoral calculates at £9million but would be determined by an expert) (Option 2).

[34] A significant difference between the offers is that under the Petitioners' offer, the price would be current market value, regardless of which of the parties was the buyer. Under Balmoral's offer on the other hand, if Balmoral bought the Petitioners shares it would pay current market price and if the Petitioners bought Balmoral's shares they would pay the accelerated option price. Balmoral made no offer to sell its shares to the Petitioner at current market value.

Submissions for Balmoral

[35] The Senior Solicitor Advocate submitted that the Balmoral Offer was a reasonable one curing the Petitioners' complaint and making continued prosecution of the petition an abuse of process because (a) it gave the Petitioners all they could reasonably hope to achieve by remedy and (b) the fact that the Petitioners might be able to pay less later did not make the offer unreasonable.

[36] He submitted that other than in exceptional cases, nothing less than a clean break would satisfy the objective of the court's powers under sec 994 and 996 of the 2006 Act (*Grace* v *Biagoli* [2006] BCC 85). The default remedy was for the majority to purchase the minority's shares (*Re a Company No. 00836 of 1995* [1996] BCC 432; *Re a Company No 006834 of 1998 (ex parte Kramer)* (1989) 5 BCC 218). The policy of the courts was to encourage reasonable offers to avoid expense in money, time and spirit in unfair prejudice petitions (*O'Neill* v *Phillips* [1999] 1 WLR 1092; *Re Sprintroom Ltd* [2019] BCC 1031). In judging reasonableness the judge must have regard to all the circumstances (*Re Sprintroom* at p 129-36; O'Neill at p 1107-1108). If a reasonable offer is made it is an abuse of process to continue with the Petition (*Re Sprintroom Ltd* at para 127-129). The Scottish courts have an inherent power to dismiss proceedings as an abuse of process (*Moore* v *Scottish Daily Record and Scottish Sunday Mail Ltd* 2009 SC 178 at paras 13-14) and there was no compelling reason to take a different approach from the English courts.

[37] He further submitted that the complaint in the Petition was that Balmoral had a scheme to deprive the Petitioners of their ability to exercise the Option and acquire the business and assets of the Company at an undervalue. This was not a case where determination of any of the allegations in the Petition was a necessary precondition to fair valuation of the shares. The Balmoral Offer was a reasonable one designed to cure the

unfair prejudice complained of by giving the Petitioners the ability to exercise the Option on the same terms and conditions as agreed between the parties. It offers a chance by the Petitioners to exercise the Option and the same terms and value as set out in the Option. It provides certainty that if the Option is not exercised there will be a clean break as Balmoral will purchase the Petitioners' shares.

[38] He further submitted that the Balmoral Offer was the only realistic remedy the Petitioners could hope to attain as it was not reasonable or practicable for the Court to regulate the affairs of the Company for the 5 years of the Option Period. The parties' main expectation in October 2019 was that there would be a mutually agreed exit involving sale of the Company, and so the Petitioners can only have expected to receive market value for the shares, which is what was being offered in the Balmoral Offer.

[39] He further submitted that the Petitioners have no good reason for rejecting the offer. The only reason given was that the price was too high. The Petitioners' stance was predicated on a forecast of what EBITDA might be as at the Option Date but that forecast was entirely hypothetical and speculative. It was also predicated on the Petitioners being allowed to commit persistent breaches of their and the Company's obligations in order to reach the Option Date. The Petitioners were not entitled to pick the most advantageous date for valuation (*Profinance Trust SA* v *Gladstone* [2002] 1 WLR 1024 at para 33 and 61). The Petitioners' stance makes no allowance for the fact that if the Option Price is too high at the moment, Balmoral has offered to purchase the Petitioners' shares at market value.

Submissions for the Petitioners

[40] Counsel for the Petitioners submitted that the existence of the Option differentiated this case from other unfair prejudice cases. The intention of the parties was that the

Petitioners would be able to regain control of the Company at the Option date and the Petitioners seek at proof to establish their averments of unfair prejudice and purchase Balmoral's shares. Balmoral had unreasonably refused the Petitioners' offers. The Balmoral Offer did not offer all that the Petitioners could achieve if successful in the action and it was not an abuse of process to ask the court to adjudicate on the dispute.

[41] He further submitted that the early exercise of the Option in December 2020 was not the same as exercise at the Option Date in October 2021. Balmoral seeks to force the Petitioners to pay an artificially inflated price as the EBITDA figure in December 2020 has been artificially inflated by one-off asset sales made while Balmoral was in control of the Company. The court could not adjudicate on whether the Balmoral offer was fair without resolving the factual disputes between the parties.

[42] He further submitted that the court would require to adjudicate on which party should buy the other out and at what price. There was no default rule that the majority should buy out the minority (*Apcar* v *Aftab* 2003 BCC 510). The court should hear evidence before deciding whether the Balmoral offer is fair (*JD* v *Lothian Health Board* 2018 SCLR 1). Rejection of an offer will not always result in a petition being dismissed (*Harborne Road Nomineess Ltd* v *Karvaski* 2011 EWHC 2214 at para 26). Balmoral had not shown that the Petitioners' case was bound to fail or that the offer so clearly cured the unfair prejudice that continuing the petition amounted to an abuse of process.

[43] He further submitted that there was no default remedy of the majority purchasing the minority shares (*Re Bird Precision Bellows Ltd* 1986 CH 658 at p 669D; *Apex Global Management Ltd* v *FI Call Ltd* [2013] EWHC 1652 at para 125, *Goodchild* v *Taylor* [2018] EWHC 2946 (Ch) paras 91 and 92). There were many examples of the court ordering the majority shareholder to sell to the minority (eg *Re Brenfield Squash Racquets Club Ltd* [1996] 2 BCLC

184; *Oak Investment Partners XII Ltd Partnership* v *Boughtwood* 2009 EWHC 176 (affirmed on appeal [2010] EWCA Civ 23); *Re A Company (No000789 of 1987) Ex parte Shooter [*1990] BCLC 384 and *Gray v Braid Group Holdings Ltd* 2017 SC 409).

[44] He further submitted that the Balmoral offer was not a fair or reasonable one (*In re Sprintroom* at para 130). If the Court ordered sale of the Petitioners' shares to Balmoral, this would not be a clean break as the Option would still exist. Balmoral cannot re-write the contractual relationship by demanding that the exercise date is brought forward or the Petitioners give up their contractual right. Balmoral contend that it would be unfair for them to sell their shares at current market value, but it would be fair for the Petitioners to do so. The Petitioners had a five year period in which to select a date to exercise the Option.

[45] He further submitted that the fairness of a valuation exercise includes the date of the valuation (*Re London School of Electronics Ltd* [1986] Ch 211 at p 224, *Re Annacott Holdings Ltd* [2013] EWCA Civ 119 at 11-14, *CVC/Opportunity Equity Partners Ltd* v *Demarco Almedia* [2002] 2 BCLC 108 at para 38). The date chosen for the Balmoral offer was manifestly unfair. The option price based on the September 2020 EBITDA would be over £20,000,000. The Option Price based on the October 2021 forecast EBITDA would be the floor price of £10,000,000.

[46] He further submitted that the offer was unreasonable in that Balmoral had not provided the Petitioners with sufficient information to assess it (*Re Sprintroom* at para [132]). The information was conditional on the offer being accepted.

[47] He further submitted that the court needed to hear evidence before deciding on the reasonableness of the Balmoral Offer (Charman & Du Toit *Shareholder Actions* (Second Edition) p 326, *Heather Capital (In Liquidation)* v *Levy and McCrae* 2017 SLT 376).

[48] He further submitted that the court had an inherent power to prevent abuse ((*Hepburn* v *Royal Alexandra Hospital NHS Trust* 2001 S.C. 20; *Moore* v *Scottish Daily Record and*

Sunday Mail Ltd 2009 SC 178 at 13-14), but this did not arise in the current case where the Petitioners merely sought an adjudication on the merits of their petition. The Balmoral Offer did not offer the Petitioners everything they could achieve if successful. The court could order Balmoral to purchase at market value, or protect the Option. (*Balk* v *Otkritie International Investment* [2017] EWCA Civ 134 at paragraph 23).

[49] He further submitted that it might be appropriate to refuse the motion *in hoc statu* as the motion might have a bearing on expenses (*Re Sprintroom*).

Discussion and decision

Introduction

[50] Balmoral's motion is to dismiss the petition on the basis that as the Petitioners have refused a reasonable offer curing the Petitioners' complaint, continued prosecution of the Petition is an abuse of process.

[51] A court has a wide range of remedies available to it when a shareholder complains of unfairly prejudicial conduct under Part 30 of the Companies Act 2006. These remedies include power to regulate the conduct of the company's affairs and power to provide for either party to purchase the shares of the other party (sec 996). In the current petition, the Petitioner's seek various orders regulating the Company's affairs and an order for Balmoral to sell its shares to the Petitioners.

Striking out of a petition under English law for abuse of process

[52] It is now well recognised in English law that where a reasonable offer from a respondent to purchase the Petitioners is rejected it may be appropriate for the petition to be struck out. The Court of Appeal reviewed this area of law in depth in *Re Sprintroom*, stating:

"127. The leading authority on the effect on an unfair prejudice petition of an earlier offer by the majority to purchase the minority shareholding is *O'Neill v Phillips*, …. Lord Hoffmann held that there had in fact been no unfairly prejudicial conduct in that case. He went on to consider, *obiter*, the effect of the offer by Mr Phillips to buy the shares at a fair price since the effect of such an offer as an answer to a petition was a matter of great practical importance. In that case the offer had been made to Mr O'Neill when the petition proceedings had already been underway for almost three years. The offer was to buy the shares at a price to be agreed or in default of agreement to be fixed by a chartered accountant as valuer, on a non-discounted basis. Lord Hoffmann agreed with the Court of Appeal that Mr O'Neill had been entitled to reject the offer because it did not include his legal costs. He went on to encourage parties, where at all possible, "to avoid the expense of money and spirit inevitably involved in such litigation by making an offer to purchase at an early stage": at 1106H. The way he proposed was for the majority to make an offer to buy which was plainly reasonable so that if the minority rejected it, the majority could apply to strike out any petition he subsequently lodged. Unfairness, Lord Hoffmann said, did not lie in the exclusion from management alone but "in exclusion without a reasonable offer": "If the respondent to a petition has plainly made a reasonable offer, then the exclusion as such will not be unfairly prejudicial and he will be entitled to have the petition struck out. It is therefore very important that participants in such companies should be able to know what counts as a reasonable offer".

128. Lord Hoffmann then set out the features of a reasonable offer. The first is that it must be to purchase the shares at a fair value. That will normally be a valuation without a minority discount. Although there may be special circumstances in which it is fair to take a discounted value, it will seldom be possible for the court to strike out a petition based on such an offer. The value, if not agreed, should be determined by a competent expert acting as an expert consistent with the objective of economy and expedition "even if this carries the possibility of a rough edge for one side or the other". The offer should also provide for equality of arms between the parties in the sense that both parties should have access to information about the company which bears upon the value of the shares and both should have the right to make submissions to the expert. Where the offer is made after a long period of litigation it should include an offer of costs, although the majority shareholder should be given a reasonable opportunity to make the offer, including time to explore the question of how to raise finance, before he becomes obliged to pay the petitioner's legal costs as part of the offer.

129. In later cases where the parties have cited the guidance in *O'Neill v Phillips*, judges have counselled against treating the reasonableness of an offer as being a trump card in the hands of the respondent majority shareholder. In *Harborne Road Nominees Ltd v Karvaski* [2011] EWHC 2214 (Ch), the respondent applied to have an unfair prejudice petition struck out on the grounds that he had made a series of offers to purchase the shares of the complainant and those offers had been unreasonably refused. HH Judge David Cooke noted at [26] that the parties had approached the matter as if what had to be considered was the extent to which the

offer made complied with the guidance of Lord Hoffmann in *O'Neill v Phillips* and that if a sufficient degree of compliance was achieved, the respondent was inevitably protected from any petition that the complainant might issue. That approach, he held, would be a cardinal error. The guidance given by Lord Hoffmann was widely accepted as providing a basis on which many shareholders' disputes could be resolved without the notoriously high cost of litigation by way of unfair prejudice petition. He went on, however, to stress that the guidance though detailed, did not have the status of legislation:

> "… The question for the court is always whether in all the circumstances of the case the applicant has satisfied the conditions required to have the petition struck out, or summary judgment in his favour given on it. These [counsel] accurately summarised as being that it must be shown that the continued prosecution of the petition after the making of the offer amounts to an abuse of process, or was bound to fail. The issue is highly sensitive to the facts and circumstances of each case, the consideration of the nature and terms of any offer made can only ever be an intermediate step in the process"….

139. When considering the proper case management of a petition, the court should also take into account that the effect of a reasonable offer is not binary in the sense that either it leads to the petition being dismissed or it is to be disregarded altogether. Once the court has considered the reasonableness of an offer, it may take one of four courses. If the offer made was entirely reasonable and the petitioner acted unreasonably in rejecting it, it is open to the court to conclude that the unfair prejudice petition fails. The court should bear in mind the potentially draconian effect of that conclusion if the petitioner is then forced indefinitely to remain a minority shareholder in a business in the management of which he is no longer involved. Secondly, it is open to a court to conclude that the unfair prejudice petition succeeds but that the appropriate remedy is an order directing the buy out of the shares at the price that was offered, perhaps subject to adjustments to take account of the passage of time and changes in the market or to redress the impact of the unfairly prejudicial conduct on the value of the company. This course would have the advantage of avoiding the delay and expense of a subsequent hearing and the instruction of experts to value the shares. Thirdly, a court may conclude that the fair response is to treat the offer as a factor relevant to the award of costs following the conclusion of the proceedings. It may be appropriate in some cases to modify an order that costs follow the event so as to recognise the making and rejection of the offer. This is an approach recognised by Lord Hoffmann in *O'Neill v Phillips*: see 1106E–H; 613G–H. Fourthly, of course, the court could conclude that the making of the offer has no effect on the success of the petition, the appropriate method for valuing the shares for the buy out order or the petitioner's entitlement to his costs of the proceedings."

Dismissal of a petition under Scots Law for an abuse of process

[53] The concept of striking out a claim is a concept of English procedural law. The English Rules of Court permit a claim to be struck out on various grounds, including:

> "that the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings" (CPR 3.4(2)(a))

It would appear from the commentary on Rule 3.4(2)(a) in the *White Book* that English concept of "abuse of process" is a wide one. It covers, for example:

(i) vexatious proceedings (*White Book* para 3.4.2.1),

(ii) *res judicata* (para 3.4.2.2),

(iii) cases where the gain attainable by the claimant in the action is of such limited value that "the game is not worth the candle" and the costs of the litigation will be out of all proportion to the benefit to be achieved (para 3.4.3.4),

(iv) pursuit of a claim for an improper collateral purpose (para 3.4.3.5),

(v) delays caused by a claimant acting in wholesale disregard of the norms of conducting serious litigation (para 3.4.3.6),

(vi) claims that are so badly drafted that they fail to reveal the case the defendant can expect to meet at trial (para 3.4.3.7).

The striking out of a claim should be the last option: if the abuse can be addressed by a less draconian course, it should be (para 3.4.3). It would appear that in considering whether to strike out a petition prior to a full hearing, the English court proceeds on the basis that what is said in the petition is true (*Apcar* para [3], *Harborne* para [3]).

[54] By contrast, striking out does not exist in Scottish law or procedure. For example, in Scotland, vexatious litigation is controlled by orders under Chapter 6 of the *Courts Reform (Scotland) Act 2014*. *Res judicata* is not dealt with as an "abuse of process" which is to be

struck out, but instead as a preliminary plea which leads to dismissal. Pleadings which do not reveal a case are dealt with not as an "abuse of process" which is to be struck out, but as a plea to relevancy or specification which leads to dismissal. Inordinate delay is dealt with not as an "abuse of process" which can be struck out, but by dismissal under Rule 21A of the Rules of the Court of Session. Given the different ways in which Scots law deals with matters which would be covered by the phrase "abuse of process" in England, it is not surprising that there has been little reference to that phrase in Scottish cases, nor that what references there are are comparatively modern. However it is now well-established that the Scottish Courts have an inherent power to dismiss a case for abuse of process. As the Lord Justice Clerk (Gill) put it in the 5 bench case of *Moore v Daily Record*:

> "[13] The court has an undoubted inherent jurisdiction to take action where there has been a contempt of court or an abuse of process; or where for some other reason a fair trial of a case has become impossible.
>
> [14] It is well established in Scots law that the court can exercise its inherent jurisdiction in the case of an abuse of process by way of a procedural sanction such as dismissal (*Tonner v Reiach and Hall*)."

[55] Further consideration was given to dismissal for abuse of process in *Hepburn v Royal Alexandria* where Lord Reed said:

> "[47] As has been explained in such cases as *Cordiner, Petr, Hall v Associated Newspapers Ltd* and *Moore v Scottish Daily Record and Sunday Mail Ltd,* the court possesses an inherent power to do whatever is necessary in order for it to maintain its character as a court of justice. This power is described as 'inherent' because it is essential to the court's performance of its constitutional function. It is distinct from the court's power to make rules of court having the force of law. Its juridical basis is the authority of the court to uphold, protect and fulfil the judicial function of administering justice according to law. This power is exemplified by punishment for contempt of court, and by the prevention of abuses of process, but is not restricted to those examples.
>
> [48] An understanding of the nature of the court's inherent power is the key to understanding the circumstances in which it can be exercised. Those circumstances cannot be reduced to a single formulation or test, unless the test is expressed at a level of generality which is unlikely to provide useful guidance in individual cases.

…

> [49] …If the court is satisfied that its process is being abused, then it is entitled to bring that abuse to an end."

[56] The basis on which the courts have treated refusal of a reasonable offer as an abuse of process in an unfair prejudice petition in England is set out in *Harborn*e as being:

> "that an offer has been made which gives the petitioner all the relief that he could realistically expect to obtain on his petition, and that it would therefore be an abuse of the process to continue to litigate matters just for the sake of having a day in court."

[57] The unfair prejudice provisions in the Companies Act 2006 apply in both Scotland and England. The remedies given are equitable, and the court has a wide discretion. In these circumstances it seems to me that it is inherently desirable that there is consistency between the approach of the Scottish and English courts. Accordingly, in my opinion, where the respondent to an unfair prejudice petition makes a reasonable offer which gives the petitioner all the remedy which the petitioner could realistically expect to obtain, and the petitioner refuses the offer and continues with the litigation, it is competent in Scotland for the court to dismiss the petition as an abuse of process. I reserve my opinion as to whether dismissal for abuse of process for refusal of an offer would be competent in Scotland in any petition or action other than an unfair prejudice petition.

[58] In my opinion, in considering whether to dismiss an unfair prejudice petition for abuse of process for rejection of a reasonable offer, the court should treat the petitioner's averments *pro veritate.* The advantage to the efficient administration of justice of early dismissal before proof would be lost if the court required to hear evidence and adjudicate on the facts at that early stage. Consistently with the approach taken by the court to early dismissal before proof on relevancy grounds (*Jamieson v Jamieson* 1952 SC (HL) 44), the

petitioner's case should be taken at its highest. For an unfair prejudice petition to be dismissed at this early stage before proof, the court would have to be satisfied that if the petitioner succeeds in proving all he avers the court will grant the remedy in the offer.

Whether this petition should be dismissed as an abuse of process

[59] In order for the petition to be dismissed at this stage prior to proof, Balmoral require to satisfy me that the Balmoral offer is a reasonable offer which gives the Petitioners all the remedy which the Petitioners could realistically expect to obtain if the case proceeds to proof. Balmoral have failed to do so, for the following reasons.

[60] Firstly, I am not satisfied that if the Petitioners prove their case, the only possible remedy will be that the court will order a clean break solution with one of the parties being ordered to sell its shares to the other. The court has a wide power to grant remedies and the remedies given in any particular case are very dependent on the circumstances of the case.

[61] In particular, I do not agree with the submission made on behalf of Balmoral that the default remedy is for the majority to purchase the minority's shares. In my opinion, a buy out of the minority by the majority is an appropriate remedy in many but not all circumstances (*O'Neill v Phillips*, *Re Brenfield Squash Racquets Club Ltd*; *Re a Company No. 00836 of 1995*). In a situation where persons expect to remain as both a shareholder and a director, but the relationship between them has broken down and one is being excluded from being a director, the court will often order a clean break whereby the majority shareholder buys out the minority. The advantage of such a solution is that the excluded person is not trapped in a situation where he has no access to the money which he has invested in shares and cannot control the use of it.

[62] Taking the Petitioners' averments *pro veritate*, the current case differs from these clean break situations. This not a case where there was an expectation that both the Petitioners and Balmoral would remain as long-term shareholders. The contractual documentation shows that the parties envisaged two situations. The first, as senior solicitor advocate for Balmoral put it in his submissions, was that the parties' main expectation in October 2019 was that there would be a mutually agreed exit involving sale of the Company. The Company's articles of association were drafted with this specifically in mind, with "drag along" rights to ensure that if one party sold their shares the other party also did so. The second situation was that the Petitioners would exercise the Option during the five year option period and Balmoral would exit as shareholders, leaving behind as the sole shareholders the Petitioners, who would thereby resume full ownership of the company which they had founded. So the possible permutations of ownership were that (a) neither party was a shareholder as they had both sold their shares to a third party, (b) the Petitioners were the sole shareholders as they had exercised the Option, or (c) both parties were shareholders as the Option had not yet been exercised or had expired. What is striking about all of this is that it was not envisaged that Balmoral would become the sole shareholder. That is something which will have to be borne in mind after proof when considering what remedies to grant if the Petitioners are successful in proving their case. In the circumstances of this petition, it will not necessarily be the case that after proof the court will order the Petitioners to sell their shares to Balmoral and exit the company. The Petitioners seek orders for the regulation of the Company to protect their position in respect of their rights to exercise the option. Sometimes the court prefers to deal with a breakdown in the shareholder relationship by ordering a buy-out rather than long term regulation of the company, but the court is not precluded from regulating. Where the regulation is short-term

(for example the time between a proof in August and an option becoming exercisable in October), then there might be an argument that regulation is a preferable and more proportionate remedy than a forced sale of shares. If, on the other hand, the court takes the view after proof that a clean break is preferable to regulation, then one possibility might be, as Balmoral suggests, that the court will order the sale of the minority shares to the majority shareholder. However, another way to give effect to a clean break would be to order the sale of Balmoral's shares to the Petitioners as is sought in the petition. As the parties never envisaged that Balmoral would remain as sole shareholder, but did envisage that the Petitioners might, then the appropriate clean break remedy might be for Balmoral to exit the Company. A decision as to the appropriate remedy cannot be made until after proof, and nothing in this opinion should be taken as an indication of what that decision will be. For present purposes it is sufficient to note that in the circumstances set out in this petition, a buy out of the minority by the majority is a possible remedy, but there are also other possible remedies.

[63] Secondly, I am not satisfied that Balmoral's offer to sell its majority shareholding to the Petitioners is a reasonable one in terms of price. When considering the date at which to value shares which are being transferred in the context of an unfair prejudice petition, the overriding requirement is that the valuation must be fair on the facts of the particular case (*Profinance Trust SA v Gladstone* at para 60-1). Balmoral does not offer to sell its shares to the Petitioners at market value. It does not offer to sell under the Option formula price at a valuation date on which the Option is legally exercisable, calculated on the Company's own forecasts of the Company's financial position at that legal valuation date. Instead it seeks to advance the valuation date to a date when the Option is not legally exercisable, and offers to sell under the Option formula price calculated at that accelerated valuation date.

[64] Taking the Petitioners' averments *pro veritate*, at the accelerated valuation date the Company's financial position is temporarily inflated by a number of exceptional asset sales and by a one off contract for the Nord Stream 2 Project. The effect of this is that the price the Petitioners would have to pay under the Balmoral Offer, based on the accelerated valuation date, is £21million. This is around double the £10million which, on the Company's forecasts, the Petitioners are likely to have to pay if they legally exercise the Option around 11 months later in October 2021. One purpose of the petition is to protect the Petitioners' legal right to exercise the Option during the Option Period at a valuation price struck at the time of exercise. In my view it is reasonable for the Petitioners to refuse an offer which would require them to pay double the price which they might pay if they were successful at proof in August and exercised the Option in October. The accelerated valuation date of December 2020 is not a fair one.

[65] In summary then, Balmoral has offered to sell its shares at a price struck under the Option formula at an accelerated valuation date, or to buy the Petitioners' shares at market value. While these are possible remedies which the court may grant if the Petitioners are successful at proof, they are not the only possible remedies. Another possible remedy would be for the court to regulate the Company in order to allow the Petitioners to exercise the Option during the Option Period, which might result in the Option being exercised at a fairer valuation date and at a lower price than under the Balmoral Offer. Another possibility would be for the court to order sale of Balmoral's shares to the Petitioners at a price which is not distorted by a temporary inflation of the Company's financial position. Accordingly, in my opinion Balmoral has failed to establish that its offer gives the Petitioners all the remedy which the Petitioners could realistically expect to obtain. It follows that the motion be refused and the petition proceed to proof. It will of course remain open to the Second

Respondent to make reference to the Balmoral Offer in respect of any submissions on expenses it may wish to make after the proof.

Order

[66] I refuse the Second Respondent's motion. The case will now proceed to proof on the previously reserved dates. I shall put the case out by order for discussion of a pre-proof timetable and any other matters which will require to be dealt with before the proof.