



**Price and Prejudice:
*Share Valuation in the
context of s.994/s.111 Petitions***

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UK Legislation: s.994, Companies Act 2006

- Any member or person to whom shares have been transferred by operation of law may petition (s.994(1)-(2))
- Affairs of the company “*are being conducted 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 [the petitioning member])*” or “*that an actual or proposed act or omission...is or would be so prejudicial*” (s.994(1))
- Court can make any order it thinks fit including providing for “*the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company’s capital accordingly*” (ss.996(1) & 996(2)(e))



Bermudian Legislation: s.111, Companies Act 1981

- Any member may petition (s.111(1))
Full Apex (Holdings) Ltd [2012] SC (Bda) 9 Com at [8]-[10]
- Affairs of the company “*are being conducted or have been conducted*” in a manner “***oppressive or prejudicial to the interests of some part of the members, including [the petitioning member]***” (s.111(1))
Bermuda Cablevision Ltd [1998] AC 198 at 211C-F; *Paladin Limited* [2014] SC (Bda) 66 Civ at [33]-[34]; *Fort Knox Bermuda Ltd* [2014] SC (Bda) 15 Com at [58]; *Kingboard Chemical Holdings Limited* [2015] SC (Bda) 76 Com at [16] / [2017] CA (Bda) 3 Civ at [18]
- Additional requirements under s.111(2): the facts would justify the making of a winding up petition on the just and equitable ground but winding up would prejudice the petitioning member(s)
Orient Express Hotels Ltd [2010] Bda LR 32 at [64]; *Kingboard*: Bda SC at [13] and [178]-[179]



Bermudian Legislation: s.111, Companies Act 1981

- Court may make any order it sees fit including *“for the purchase of the shares of any members of the company by other members of the company or by the company and in the case of a purchase by the company, for the reduction accordingly of the company’s capital, or otherwise”* (s.111(2))
- Limited Bermudian jurisprudence consistent with buy out being at *“fair price”* / *“fair value”* (i.e. same as *“fair market value”* under UK Law)
Fort Knox at [105]-[108]; *Kingboard*: Bda SC at [27]
- Cannot seek relief in respect of shares acquired after petition presented (but may be able to in respect of shares acquired after oppressive conduct occurred)
Bermuda Cablevision Ltd at 212E-G; *Full Apex* at [20]; *Kingboard*: Bda SC at [26]-[35] / Bda CA at [91]-[93]



Valuation Issues

- Basis of valuation (going concern/break up; discounted cash flow; capitalized dividend; capitalized maintainable earnings; comparable transaction; adjusted net assets; any fair alternative tailored to particular industry of company...)
Re Edwardian Group Limited [2019] EWHC 873 (Ch) at [15]-[33]
- Adjustments for unfairly prejudicial conduct
- Date of valuation and quasi-interest
- Benefit of hindsight
- Minority discount



Date of Valuation / Quasi-interest

- Starting point is the date of the order on the basis that an asset should be valued at the date of purchase

BUT

- Overriding requirements are fairness and remedying unfair prejudice
- Offers to purchase/sell shares may also be material
- The Court may order “quasi-interest” if, among other things, an earlier date is selected

Re London School of Electronics Ltd [1986] Ch 211 at 224; *Profinance Trust SA v Gladstone* [2002] 1 BCLC 141 at [61]



Date of Valuation / Quasi-interest

- Earlier date may be justified in the petitioner's favour to reflect the misappropriation of assets or a "sea change" in the company's business / market movements

Re Annacott Holdings Ltd [2011] EWHC 3180 at [13] (not appealed - [2013] 2 BCLC 46 (CA) at [2]); *Croly v Good* [2010] 2 BCLC 569 at [105]-[117] cf. *Bennett v Bennett* (unreported judgment of Behrens J 17/1/03 at [105]-[118]); *Re Cumana Ltd* [1986] 2 BCC 99453 at 492

- Earlier date may also be justified out of fairness to the Respondent

Re Edwardian Group Ltd [2018] EWHC 1715 at [632ff.]



Benefit of Hindsight

- If earlier date selected, subsequent events should be ignored
Shah v Shah [2011] EWHC 1902 at [54]-[55]

HOWEVER:

- Subsequent events may inform what forecasts could reasonably have been made at the valuation date
Buckingham v Francis [1986] BCLC 353
- The Court can see whether future intentions were acted upon and/or whether contingencies/uncertainties came to pass
Re Abbington Hotel Ltd [2012] 1 BCLC 410 at [143]; *Annacott (CA)* [2013] 2 BCLC 46 at [19]
- The Court may assume that a purchaser would have included a formula taking into account subsequent performance
Edgar v Munro [2017] EWHC 1814 (Ch) at [14]



Minority Discount: Past Certainties

- No discount in the case of a quasi-partnership which exists at the date of petition save where exclusion justified or non-discounted buyout disproportionate to prejudice suffered
Re Bird Precision Bellows Ltd [1984] Ch 419 at 430-431; *CVC/Opportunity Equity Partners Ltd v Demarco Almeida* [2002] 2 BCLC 108 at [41]-[42]; *Fort Knox* at [60] (Bermudian recognition of quasi-partnership concept)
- Minority discount otherwise the default position
“A minority shareholding...is to be valued for what it is, a minority shareholding, unless there is some good reason to attribute to it a pro rata share of the overall value of the company. Short of a quasi-partnership or some other exceptional circumstances there is no reason to accord to it a quality which it lacks” (per Blackburne J in *Irvine v Irvine No.2* [2007] 1 BCLC 445 at [11]; see also *Strahan v Wilcock* [2006] 2 BCLC 555 at [17] and *Annacott* (HHJ Hodge) at [18]-[21])



Minority Discount: Present Uncertainty

- Default rule should be no discount to avoid rewarding the oppressing majority and improperly treating the petitioner as a willing seller save if shares acquired at a discount or exclusion justified

Re Blue Index Ltd [2014] EWHC 2680 (Ch) at [23]-[37]; *Re Addbins Ltd* at [87]-[91]; *Re Autobody Ringway Limited* [2018] EWHC 2336 (Ch) at [113]-[114]; *Re Westshield Ltd* [2019] EWHC 115 (Ch) at [138]

OR

- No general rule either way, but the Court must have regard to all of the circumstances

Re Edwardian Group Limited [2018] EWHC 1715 at [640]-[652] / [2019] EWHC 873 (Ch) at [7]-[13]; *Re AMT Coffee Limited* [2019] EWHC 46 (Ch) at [194]-[216]



Minority Discount: Some Questions for Coffee

- Should it make a difference that the petitioner can establish that he would have obtained an order for a just and equitable winding up?
- If so, would the default rule in Bermuda be no discount?
- What if the petitioner acquired a minority shareholding at full market value or (more likely) acquired a majority shareholding which has subsequently been diluted?
- What if it could be shown that one or more respondents responsible for the prejudicial conduct had been influenced by a desire to buy out the minority on the cheap?