IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 54 of 2021 (CRJ)

IN THE MATTER OF THE COMPANIES ACT (2020 REVISION)

AND IN THE MATTER OF MADERA TECHNOLOGY FUND (CI), LTD

Appearances:	**Mr. David Quest KC, Mr. Peter Hayden and Mr. Laurence Aiolfi of Mourant for the Petitioner**
	Mr. Matthew Hardwick KC, Mr. James Eldridge and Mr. Justin Naidu for the Respondent
Before:	**The Hon. Justice Cheryll Richards KC**
Heard:	**5th to 8th December 2022**
Draft Judgment:	**16th August 2023**

HEADNOTE

Company Law-Winding Up-just and equitable ground, whether justifiable loss of confidence in the probity with which the affairs of the company are being conducted.

JUDGMENT

1. By Re-Amended Petition dated 27th October 2022, ("the Petition"), Fideicomiso F/000118, ("the Petitioner" or "the Trust") seeks the winding up of Madera Technology Fund (CI), Ltd ("the Company" or "the Fund") and the appointment of Michael Penner and Grant Hiley of Deloitte and Touche LLP, Cayman Islands as Joint Official Liquidators. Mr. Penner and Mr. Hiley have provided the required Affidavits[1] in accordance with Order 3 Rule 4(1) of the ***Companies Winding Up Rules*** 2018.

2. The Petition is brought pursuant to s.92 (e) of the ***Companies Act*** (2021 Revision) on the basis that it is just and equitable that the Company be wound up. The Petitioner asserts that following a series of acts and omissions by the Company culminating in the removal of its voting rights as shareholders, it has lost confidence in the probity with which the affairs of the Company are being conducted. The Petition is opposed by the Company which contends that its directors have always acted in good faith and bona fide in the best interests of the Company and all its shareholders.

3. By s.92 (e) of the ***Companies Act***: -

   "92. A company may be wound up by the Court if —

   ...

   (e) the Court is of opinion that it is just and equitable that the company should be wound up."

4. By s.94 of the ***Act***, an application for the winding up of a company shall be by petition presented either by the company or by other identified persons or entities including any contributory of the company.

5. The powers of the Court on an application for winding up are set out in s.95 of the ***Act.*** These include powers to dismiss a petition if it is brought in breach of a contractual provision and to make alternative orders where the application is brought by a contributory. Such alternative

[1] Hearing Bundle, Tab 17 dated 4th March 2021 and Tab 21, dated 14th October 2022

orders can only be considered if the Court is first satisfied that it is just and equitable that a company be wound up[2]. Section 95 states: -

> *"95. (1) Upon hearing the winding up petition the Court may —*
> *(a) dismiss the petition;*
> *(b) adjourn the hearing conditionally or unconditionally;*
> *(c) make a provisional order; or*
> *(d) any other order that it thinks fit,*
> *but the Court shall not refuse to make a winding up order on the ground only that the company's assets have been mortgaged or charged to an amount equal to or in excess of those assets or that the company has no assets.*
>
> *(2) The Court shall dismiss a winding up petition or adjourn the hearing of a winding up petition on the ground that the petitioner is contractually bound not to present a petition against the company.*
>
> *(3) If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court shall have jurisdiction to make the following orders, as an alternative to a winding-up order, namely —*
>
> *(a) an order regulating the conduct of the company's affairs in the future;*
> *(b) an order requiring the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do;*
> *(c) an order authorising civil proceedings to be brought in the name and on behalf of the company by the petitioner on such terms as the Court may direct; or*
> *(d) an order providing for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, a reduction of the company's capital accordingly."*

6. The Company is incorporated in the Cayman Islands as an exempt company as at the 6th November 2014. It was established by Mr. Kristopher Drankiewicz and commenced operations on the 1st January 2015. Its registered office is at Maples Corporate Services Limited. It acts as a feeder fund to Madera Technology Master Fund Ltd ("the Master Fund") through which it invests almost all its assets. The Master Fund is incorporated as an exempt company in the Cayman Islands.

[2] Camulos Partners Offshore Limited v Kathrein and Company 2010 (1) CILR 303

7. The Company's investment manager is Madera Technology Advisors LLC., ("the Investment Manager"). This is a limited liability company which is incorporated in Delaware, United States of America. The Company's administrator is NAV Consulting Inc, ("the Administrator") and its auditors are Spicer Jeffries LP, both United States entities.

8. Mr. Drankiewicz is the managing member of the Investment Manager. At the time of the incorporation of the Company he was the sole director. His wife Liliana Macias was appointed a director of the Company on 1st January 2020. On the 30th March 2021, a third director, Ronan Guilfoyle of Calderwood in the Cayman Islands was appointed as an independent director of both the Company and the Master Fund.

9. By its Confidential Explanatory Memorandum of December 2018 ("CEM"), the Company summarised its investment objective, strategy and method of operation *as "a fundamental long-short equity investment fund primarily focused on technology. The Funds' investment objective (through its investment in the Master Fund) is to compound capital at high absolute rates of return, in all market conditions while seeking to avoid significant capital loss."* The Company has several share classes with a primary focus on technology investments in both long and short terms. Mr. Drankiewicz and Ms. Macias are shareholders of the Company. As at the 2nd January 2022, they held 6.4% of its net asset value ("NAV").

10. The Petitioner is a trust established under the laws of Mexico. Daniel Alberto Salazar Ferrer is the Chief Financial Officer of the Trust. Members of the Bours family are beneficiaries. The Bours family is said to be a well-known wealthy Mexican family with extensive holdings in two publicly traded companies which were established in 1952 and 1983. The family also owns several private businesses in the agricultural and industrial sectors. Some members of this family have held and hold high political offices in various States in Mexico.

11. On the 1st August 2018 the Petitioner invested US$5,514,253.25 into Class A Accolade E-1 – Sub Class Shares in the Company. This amounted to a purchase of 5,514 shares at US$1,000.00 per share. The agreed management fee was 1.8%. A letter under the hand of Mr. Drankiewicz signing as Director of the Company advised the Petitioner that this represented an ownership interest of approximately *"29.5% in Madera"*[3]. It is agreed that at that time, the Petitioner was the largest investor in the Company.

[3] Hearing Bundle, page 72

12. The Petitioner's shares in the Accolade series were invested in Accolade Inc., through the Master Fund in what is described as a concentrated long-term investment. Accolade Inc., is a technology company in the health sector. As per the CEM and audited statements, the Petitioner's shares were not redeemable. On the 2nd July 2020 Accolade had an initial public offering ("IPO") but the shares were the subject of a "lock-up" agreement between the Company and Accolade's underwriting banks. They became freely tradeable on the 29th December 2020.

13. As at January 2022 the Company had twenty-seven different shareholders and had issued thirty-eight different classes of shares of which Class A Accolade Shares is only one. It is not disputed that the Company is a profitable and successful equity investment fund.

THE BACKGROUND

14. Mr. Drankiewicz holds a bachelor's degree in business administration which he obtained in 2004 from the University of Wisconsin. He worked for several years for technology and investment entities and has extensive experience in investment analysis, management, and information technology. At the time he established the Fund he had sixteen years' experience in the field. This was the first fund which he set up. He states that his aim in doing so was to use his skillsets to provide would-be investors with a channel towards those ventures which were adapting to technological change.

15. Whilst on an airplane journey sometime in September 2016, Mr. Drankiewicz had a chance meeting with a member of the Bours family, Mario Bours Laborin. A friendship developed between the two. They both worked in the field of finance. While Mr. Bours Laborin is not a beneficiary of the Trust, he introduced Mr. Drankiewicz to members of his family who are the principals behind the Trust and have other holdings. One such meeting which Mr. Bours Laborin arranged was a luncheon in Mexico City where Mr. Drankiewicz travelled. As a result of the introductions made by Mr. Bours Laborin, the Petitioner made the investment in the Company.

16. In April 2019 Mr. Bours Laborin resigned his position with Morgan Stanley where he was then employed and at the invitation of Mr. Drankiewicz went to work for Madera Technology

Partners LP[4]. This entity was the investment manager of the Company until 1st March 2020 and is now an affiliate of the Investment Manager (the "IM Affiliate"). Mr. Bours Laborin served as a liaison between the Company and the Petitioner.

17. In June 2019, the uncle of Mr. Bours Laborin, Mr. Javier Bours Castelo invested US$1,000,000.00 in the Company through an entity JI Family Holdings Limited.

18. According to Mr. Bours Laborin the relationship between himself and Mr. Drankiewicz deteriorated over time because despite repeated requests, Mr. Drankiewicz failed to put into writing matters which had been agreed orally between them. Mr. Bours Laborin claims that Mr. Drankiewicz had promised him a 33% stake in the earnings from the Accolade investment[5] and a partnership interest. Mr. Drankiewicz says that he made no such promises to Mr. Bours Laborin. Mr. Bours Laborin says also that by November 2019, he began to have doubts about Mr. Drankiewicz. Because of this, he told Mr. Drankiewicz that he was leaving the IM Affiliate to pursue other interests but that he had not in fact left his post up to January 2020.

19. The 17th January 2020 was a fateful day. Mr. Bours Laborin and Mr. Drankiewicz had two meetings in Chicago at intervals in the course of the day. Each has a different account of what occurred. Mr. Bours Laborin says that at an initial meeting in the late morning of that day, together they prepared a draft agreement to which Mr. Drankiewicz agreed but said that he wanted to fine tune it with his lawyer. Mr. Drankiewicz says that he did not agree to this and that Mr. Bours Laborin brought a prepared document to the meeting. There was a second meeting at about 7:00pm that day. Mr. Bours Laborin says that Mr. Drankiewicz reneged on their agreement and his dishonesty was then confirmed. Mr. Bours Laborin says that he threatened to sue him. Mr. Drankiewicz says Mr. Bours Laborin threatened him with physical violence and to do everything in his power to make sure that "he got what was coming to him" and "to end him". Mr. Drankiewicz filed a police complaint and exhibits an email note to a partner of the Company which he made some thirty-five minutes after the last meeting. This note details what he says occurred at the meeting. Mr. Drankiewicz says that he did so to ensure that his partner *"was aware of the meeting and the serious problems that Mr. Bours Laborin could potentially create for Madera*"[6]. Mr. Bours Laborin says that this was a packed

[4] A limited partnership organised under the laws of Delaware, United States of America.
[5] Management fees and carried interest.
[6] Hearing Bundle- Tab 26 - Paragraph 14.6 of Affidavit dated 11th August 2022

restaurant, that the account of Mr. Drankiewicz is false, and he denies any threats of physical violence. On the 29th May 2020, Mr. Bours Laborin filed a lawsuit in New York against the IM Affiliate.

20. This then is the human background to the series of interactions between the Petitioner and the Company which next followed, beginning in February 2020, and about which complaints are made. The inescapable inference from the evidence before this Court is that it was the catalyst for at least the initial events. On any view, Mr. Bours Laborin is a central figure. It is not for me to determine the truth of the details of what occurred between the two men and whether Mr. Drankiewicz had made any such promises. Suffice it to say that for both parties the fact of the falling out is at the center of the disputes and the arguments raised on this application.

21. The Petitioner puts it forward as the initial reason to seek reassurance as to its stake in the Company and to raise an inquiry. Mr. Bours Laborin's evidence in cross-examination at this hearing is that after the 17th January 2020 he communicated to his family his views about the dishonesty and dishonorable conduct of Mr. Drankiewicz in going back on his promises. Mr. Bours Laborin says that he was concerned about getting out those investors that he had brought into the Company. He says that his departure gave rise to concerns about the integrity of Mr. Drankiewicz given his refusal to honour his obligations and meant that there was no longer any person at the investment manager in which the Petitioner had any real trust and or confidence. At the time the Company had no independent directors.

22. Mr. Ferrer's evidence both in Affidavit[7] and in cross-examination is that with Mr. Bours Laborin having left his position with the investment manager, the Petitioner was seeking to be comfortable about its investment. In summary he said that while the dispute between the men is not directly related to the investment, the Petitioner no longer had the same level of information relating to the investment and comfort in knowing that someone it knew and trusted very well worked with the Company. While Mr. Bours Laborin was working there the Petitioner felt comfortable that he would look after its interests. He was a trusted individual who would have had access to all the necessary information available on the performance of the Company.

[7] Hearing bundle, page 30 - First Affidavit of DASF dated 8th July 2021 in Cause 155 of 2020 paragraph 14.

23. On the 12th February 2020, less than a month after the 17th January 2020 meetings between the two men, the Petitioner began making requests for information from the Company. It says that these were not answered. There then followed a chain of events which I will outline in more detail below. The Petitioner's submission is that each of these events and or all taken together evidence the lack of probity of Mr. Drankiewicz and Ms. Macias, such that there is justifiable loss of confidence and grounds upon which the Company should be wound up.

24. In reply, the Company relies heavily on what it says is no more than a personal vendetta by Mr. Bours Laborin which is behind the bringing of this Petition. Its position is that this Petition is orchestrated by him and that even if the actions of Mr. Drankiewicz were on occasion wrong or misguided, they do not rise to the level of seriousness such as to justify winding up, much less the winding up of a profitable and successful company.

25. The primary factual issues for the Court are these, against the background and context of these events, what were the acts and or omissions of Mr. Drankiewicz and Ms. Macias in their capacity as directors of the Company and the motives and intentions behind these as best as can be determined. I bear in mind as I consider the evidence that Ms. Macias is a professional in her own right. Ms. Macias holds a Bachelor of Arts in Economics. She has experience in commercial real estate investment and in private equity and esoteric asset securitization.

THE SEQUENCE OF EVENTS

26. The broad sequence of factual events is not in dispute between the parties. Following the introduction of the investment by Mr. Bours Laborin, in or around July 2018, the Petitioner was provided with a copy of the Company's CEM which set out details of possible investments in the Company. The Petitioner's investment carried with it certain voting rights under the Company's amended Memorandum and Articles of Association dated December 2014, ("MAA") and certain rights to information under the CEM as follows: -

> *"Each Shareholder will receive unaudited reports of the performance of the Fund monthly, letters quarterly and audited year-end financial statements annually with the Fund's first audit to be completed after the fiscal year ending December 31, 2015.*[8]

[8]Hearing Bundle, Tab 8, page 190, CEM

27. Beginning in February 2020, the Petitioner sought information from the Company including as to its percentage shareholding in the Company, the annual report, and financial statements. There followed a series of emails between them.

28. Two capital calls were made by the Company in August 2019 and April 2020. In response the Petitioner made payments on the 27th September 2019 of $162,689.91 and on the 20th June 2020 of $148,422.87. The Petitioner was reluctant to pay the second Capital Call and requested information as to the basis for these calls and how the Petitioner's share was calculated. It says that it received no substantive response to these inquiries. Mr. Drankiewicz says that he subsequently received legal advice that the Company had no basis to make capital calls. The Petitioner has been credited with shares in return for the amounts paid.

29. The 25th June 2020 was another fateful day. By mistake Mr. Drankiewicz was copied in on a chain of emails between Mr. Bours Laborin and attorneys for the Petitioner, (the "leaked emails".) These are also described as privileged emails and included one on the 25th June 2020 in which Mr. Bours Laborin stated: -

> *"Moreover, the overall goal of the Trust is to gain more control and oversight over its Investment primarily (in our own view) through three sequential lines of action:*
> *i) exercising our rights to receive information on the state of our investment and the partnership, ii) determining the proportional equity stake that the Trust holds in order to ascertain our corporate rights (pursuant to the majority thresholds set out in the corporate documents),*
>
> *iii) If a majority stake is indeed confirmed at the fund and/or share class levels, to explore the possibility and merits of appointing an independent inspector at the very least and/or designating additional directors to gain more control over the investment and/or removing the sole director altogether, possibly forcing a wind down (the nuclear option).*
>
> *The main purpose of pursuing these actions is to gain control over redemption rights, so that we can exit the investment at our discretion or to at least get comfortable with the state in the investment by having more of a say over its destiny. We believe we can achieve this either judicially or through negotiation with the fund's principal and GP."*

30. Four days later, on the 29th June 2020, the Company gave notice that it intended to compulsorily redeem all the Petitioner's shares pursuant to Article 12.1 of the MAA. As the Shares were subject to the lock up period, the effect of this was that the Petitioner would no longer be a shareholder but could not access the shares until after the lock up period ended.

31. The Petitioner asserts that the power was not sought to be exercised for proper purpose because the Company relied on the inadvertent disclosure of the email, discriminated against the Petitioner, and the directors acted for personal reasons to preserve their positions and sought to alter and deprive it of its voting rights.

32. On the 9th July 2020, the Petitioner issued Writ proceedings and an injunction was granted by the Grand Court which restrained the Company from redeeming the Petitioner's shares. On the 27th August 2020 the Company confirmed that it would not compulsorily redeem the Petitioner's shares and the status quo was maintained.

33. On the 31st July 2020 the Auditors signed off on the 2019 financial statements. On the 4th September 2020 these were provided to the Petitioner.

34. On the 31st December 2020, the lock up period for the Accolade shares ended and the share price rose exponentially to a high of $59.09 on 22nd January 2021.

35. On the 11th January 2021, Mr. Drankiewicz indicated to shareholders the proposed redemption of 20% of their shares.

36. On the 12th January 2021, the Petitioner agreed to the full redemption of its shares on the 15th January 2021. Mr. Drankiewicz replied saying that it was only a partial redemption of 20% and proceeded to effect this. According to the Petitioner this was despite the misunderstanding as to the level of redemption which was to be made.

37. On the 28th January 2021, the Petitioner and two other shareholders, JI Family Holdings Limited and Juan Diaz Brown, ("the Requisitionists") requested that the Company convene an extraordinary general meeting ("EGM") and proposed the appointment of four new directors to include Mr. Ferrer. The Requisitionists believed that they held a majority of the voting shares of the Company both by reference to the NAV per common shares and on the basis of one share one vote. On the 5th February 2021, the Requisitionists requested that the meeting be convened on the 15th February 2021 and that notification be provided to all shareholders.

38. On the 9th February 2021, the Company's attorneys advised the Requisitionists that they held an insufficient number of shares to convene an EGM. On the 16th February 2021 the Company said that the Requisitionists held less than 35% of the number of voting shares and that a majority of the voting shares for the purpose of calling a meeting is not by reference to the NAV per common shares as was stated in the CEM.

39. On the 19th February 2021, by Originating Summons filed in FSD 46 of 2021 (CRJ) the Petitioner sought an order that the Company convene an EGM or provide information so that the Petitioner could do so.

40. On the 23rd February 2021, Mr. Drankiewicz said that the Company would redeem 50% of the Petitioner's shares on the 28th February 2021.

41. On the 4th March 2021, Mr. Drankiewicz gave notice that the Company would convert the Petitioner's shares to non-voting shares pursuant to Article 29.3 of the MAA.

42. According to the evidence of Mr. Guilfoyle the value of the partial redemption of 20% was US$4.5 million. The second partial redemption on 23rd February 2021 of 50% was valued at approximately US$7.79 million.

43. The share price had declined since then from $49.96 per share to $7.40 per share as at 30th June 2022. As at that date the Petitioner held an economic stake of 11.56% in the Company.

THE PETITION

44. The Re-Amended Petition is verified by the Affidavit of Mr. Ferrer dated 8th March 2021. It asserts that the affairs of the Company have been mismanaged such that the Petitioner has lost faith and confidence in the probity with which its affairs are being conducted. With reference to the broad sequence of events outlined above, eight specific factual matters are relied on in support of this contention. These are that the Company has:-

i) Unreasonably refused to provide information in response to information requests.

ii) Acted in breach of the MAA in demanding capital calls.

iii) Acted for improper purpose and or in breach of MAA in the compulsory redemption of the Petitioner's shares.

iv) Acted contrary to the expressed understanding of the Petitioner by proceeding with a partial redemption of shares in January 2021.

v) Acted in breach of the MAA and contrary to the representations in the CEM in refusing to convene an EGM.

vi) Attempted to obfuscate the flawed basis on which it was refusing to convene an EGM.

vii) Acted for improper purpose and/or in breach of the MAA in the removal of the Petitioner's voting rights pursuant to the Conversion Notice.

viii) Provided financial information indicative of apparent financial irregularities.

45. The financial irregularities which are said not to have been satisfactorily explained are in summary that in the 2019 statements, 2.16% of expenses had been allocated to Accolade and in the 2020 statements 3.7%. The Petitioner states that it appears that it has been charged excessive management fees. Prior to 2017 early investors including the two directors had the benefit of a re-imbursement agreement from which they were being re-imbursed. Additionally, it is said that the monthly investor statements were possibly misleading. The value at September 2020 of the Petitioner's interest was $5 million less than publicly available information. In November to December 2020 the value increased to more than 69% compared to publicly available information and management fees were calculated on the basis of this.

46. The Petitioner's case is that by the Subscription Agreement, ("SA"), the Petitioner's shares were to be held on terms stated in the CEM, MAA and the SA. ("the constitutional documents".) It is claimed that each of the eight matters amounts to a breach of its legal rights and *"substantially impaired the rights and protections to which it is entitled as a shareholder" and that they constitute an obvious and visible departure "from the standards of fair dealing and violations of the conditions of fair play on which a shareholder entrusting money to a company is entitled to rely*". It is submitted that they show a lack of probity, and that the Petitioner has justifiably lost trust and confidence in the management of the Company such that the winding up of the Company is justified.

47. The Company in robust response argues that none of the eight allegations individually or collectively provide a proper basis for winding up the Company. It is submitted that the allegations of bad faith and dishonesty are demonstrably wrong. The allegations of financial irregularities are careless allegations of bad faith that should never have been brought. Counsel relies on the case of ***RCB v Thai Asia Fund***[9] and says that this is a subjective loss of confidence arising from dissatisfaction about the conduct of the Company following the events of 17th January 2020 between Mr. Bours Laborin and Mr. Drankiewicz. Counsel describes the Petition as *"scatter gun allegations of mismanagement which are borne out of personal animosity in the hope that one or more will stick."*

LEGAL PRINCIPLES - JUST AND EQUITABLE WINDING UP

48. In the case of ***Tianrui (International) Holding Company Limited v. China Shanshui Cement Group Limited,***[10] the Cayman Islands Court of Appeal ("CICA") stated that it is well settled that a company may be wound up on the just and equitable ground if it is established that there has been a justifiable loss of confidence in management. Examples of this include where there is established to be serious misconduct or serious mismanagement of the company's affairs by the directors or majority shareholders[11]. In that case the appellant Tianrui was one of four significant shareholders of the company, China Shanshui Cement Group Limited. It petitioned for the winding up of the company on the just and equitable ground and alleged that arrangements had been made to prevent it from taking control of the company. Its percentage shareholding had been reduced by the issue of certain convertible bonds. It appealed the strike out of its petition which had been done on the basis that it had other remedies which could be pursued.

49. The CICA noted that this was not simply a case of a minority being unhappy with the actions of a majority and described the petition as raising serious allegations of conspiracy to damage the appellant including the taking of successive steps to dilute its shareholding. The conclusion was that Tianrui had a statutory right to petition on the just and equitable ground, "*if the actions of the company, prompted by directors appointed at the instance of a majority of its*

[9] [1996] CILR 9
[10] [2019] (1) CILR 481
[11] Ibid paragraph 22

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

50. The CICA cited with approval the case of ***Loch v Blackwood***[12]. In that case the Privy Council was concerned with an appeal against the dismissal of a petition for winding up of a company on the just and equitable ground which had been presented under s.127 of the Barbados ***Companies Act*** 1910. This was identical to s.129 of the English ***Companies (Consolidated) Act*** 1908. The company in question had been established by a testator. It was a family business which the Court described as practically a domestic concern. Following his death, there were questions about the way in which it was being managed, whether those in charge were seeking to keep the petitioners ignorant of the true state of affairs of the company. No general meetings had been held. No balance sheets and books of account had been submitted. The Court noted that a calling of meetings of shareholders would lead to failure because control rested with the majority.

51. The Court said that a consideration of the justice and equity of making an order for winding up ought to be on all the facts of the case and should include circumstances which bear upon the problem of continuing or stopping courses of conduct which substantially impair those rights and protections to which shareholders are entitled both under statute and contract. Circumstances to do with the domestic policy of the company are insufficient. In summary, while the circumstances or categories which may ground an order for winding up under this limb are not restricted, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs in regard to the company's business and not private affairs. A lack of confidence may be justified by a lack of probity in the conduct of the company's affairs. The Court said this: -

> *"It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up."*[13]

[12] [1924] AC 783
[13] Ibid page 788

52. The Court cited with approval the discussion of Lord Clyde in ***Baird v. Lees***[14]

> *"I have no intention of attempting a definition of the circumstances which amount to a 'just and equitable' cause. But I think I may say this. A shareholder puts his money into a company on certain conditions. The first of them is that the business in which he invests shall be limited to certain definite objects. The second is that it shall be carried on by certain persons elected in a specified way. And the third is that the business shall be conducted in accordance with certain principles of commercial administration defined in the statute, which provide some guarantee of commercial probity and efficiency. If shareholders find that these conditions or some of them are deliberately and consistently violated and set aside by the action of a member and official of the company who wields an overwhelming voting power, and if the result of that is that, for the extrication of their rights as shareholders, they are deprived of the ordinary facilities which compliance with the Companies Acts would provide them with, then there does arise, in my opinion, a situation in which it may be just and equitable for the Court to wind up the company."*

53. The Court concluded that the directors had laid themselves open to the suspicion that by omitting to hold general meetings, submit accounts, and recommend a dividend, the object was to keep the petitioners in ignorance of the truth and acquire their shares at an undervalue.

54. In the instant case the Company asserts that there was a valid exercise of the powers under the constitutional documents. The Petitioner argues that the powers were exercised for an improper purpose. In the case of ***RCB v. Thai Asia Fund***[15], the Court explained the applicable principle derived from the leading case of ***Ebrahimi v Westbourne Galleries Ltd.***[16] There may be circumstances where a power though validly exercise is nevertheless "entirely outside of what was contemplated by the members when they subscribed." This the Court described as the 'something more' which triggers the imposition of equitable considerations. The Court said: -

> *"The basic principle is that a petition to wind up on the "just and equitable" ground will not succeed if what is complained of is merely a valid exercise of the powers conferred by the articles. Otherwise, members would seek to exact entitlements not vested by the contractual obligation entered into with the company and with the other members and as defined by the articles. There may however be circumstances where the subject of the complaint is a valid exercise of the powers conferred by the articles but which, none the less, is entirely outside of what was contemplated by the members when they subscribed.*
>
> *In such cases, the fact that the exercise of power is within the articles will not necessarily be an answer to the petition for winding up. That statement of the basic principles is a*

[14] Ibid page 793, [1824] S.C. 83, 92

[15] [1996] CILR 9
[16] [1973] A.C. 360

paraphrase of a passage from the earlier Australian case of In re Wondoflex Textiles Pty, Ltd., (16) which was cited with approval in Ebrahimi's case (5) by Ltd Wilberforce. He went on to observe ([1973] A.C. at 379):

> *"The words ['just and equitable'] are a recognition of the fact that a limited company is more than a mere legal entity with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disagree the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.*
>
> *It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of the association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more ...." [Emphasis supplied.]"*

55. As I understand it, the task of the trial judge faced with assertions as to the reason for the exercise of a power, is to determine whether it is established on a balance of probability that the directors were actuated by an impermissible purpose. (See ***Harlowe's Nominees Pty. Ltd. v Woodside (Lakes Entrance) Oil Co. N.L.***[17]*)*

56. The Court in ***Howard Smith v Ampol***[18] stated that the necessary starting point is to ascertain on a fair view the nature of the power in question and the limits within which it may be exercised. It is then necessary for the court, if the exercise of the power is challenged, to examine the substantial purpose for which it was exercised and to reach a conclusion whether that purpose was proper or not. In doing so the court should give credit to the bona fide opinion of the directors if this is found to exist.[19]

[17] [1968] 121 CLR 483
[18] [1974] AC 821
[19] Ibid page 835

57. In ***Cumberland Holdings Ltd. v Washington H Soul Pattinson & Co*. Ltd.,**[20] the Privy Council considered an appeal from the Supreme Court of New South Wales against the rejection of a petition for winding up. There were factual assertions of a long-term plan to squeeze out the minority shareholders, and of oppression or unfair or unjust conduct. The majority had made an offer which the minority was free to accept or reject. The Privy Council held *inter alia* that to wind up a successful and prosperous company and one which is properly managed must clearly be an extreme step and must require a strong case to be made out.

THE COMPANY DOCUMENTS

58. With these general principles in mind, I turn now to consider the evidence in the case. I set out below some of the relevant provisions of the documents of the Company. Paragraph 3 of the Subscription Agreement provides as follows: -

> *"3. The Subscriber agrees that any Common Shares hereby subscribed for will be held subject to the terms and conditions of the Explanatory Memorandum, the Memorandum and Articles of Association of the Fund, as amended from time to time and this Subscription Agreement and Revocable Proxy (this "Agreement") and recognizes that the Fund will protect and indemnify its officers, directors and other representatives against liability to the extent set forth in the Articles of Association.*[21]*"*

Paragraph 26 provides: -

> *"26. The Subscriber agrees that it shall not file a winding up petition on the just and equitable ground against the Fund in the Grand Court of the Cayman Islands or make any other equivalent application before the courts of any other jurisdiction in connection with the Fund's suspension of any of the calculation of net asset value, the Subscriber's redemption rights or the Subscriber's right to receive redemption proceeds."*[22]

59. The relevant provisions of the MAA include the following:

> "***12 Compulsory Redemption***
> *12.1 The Directors may cause the Company to redeem any or all of the Shares held by any person at the appropriate Redemption Price at any time and for any reason. If the Directors determine compulsorily to redeem any Shares under this Article they shall give the holder of the Shares such notice of the redemption as they shall have disclosed to the Member at the time of its subscription for Shares or, in the absence of any such disclosure, within such period as the Directors shall determine.*

[20] [1977] 13 ALR 561
[21] Hearing Bundle, page 1147
[22] Hearing Bundle, page 1161

12.2 The Directors may cause a compulsory redemption during any period for which a Suspension of the right of Members to require redemption of their Shares has been declared."[23]

"26 General Meetings
26.4 The Directors shall, on a Members' requisition, forthwith proceed to convene an extraordinary general meeting of the Company. A Members' requisition is a requisition of the Members ***holding a simple majority of the Voting Shares as at the date of deposit of the requisition.*** (My emphasis).
…
26.6. If the Directors do not, within seven days from the date of the deposit of the requisition, duly proceed to convene a general meeting to be held within a further twenty-one days, the Requisitionists, or any of them representing more than one-half of the total voting rights of all of them, may themselves convene a general meeting, …."[24]

"29 Votes of Members
*29.1 Although all Shares generally have voting rights ("**Voting Shares**"), the Directors in their sole discretion, may designate certain Shares as non-voting ("**Non-Voting Shares**") in order to avoid certain adverse tax or regularly consequences, holding limitations, filing or other requirements or to accommodate a Member request. The status of the Shares as Non-Voting Shares shall be fully disclosed to the Investor at the time of its subscription and any such investor will be allowed to revoke its subscription upon notification of such classification.*

29.2 If a Share is designated as a Non-Voting Share, the holder thereof shall not be entitled to receive notice of or attend and vote at general meetings of the Company. Except with regard to such voting rights and as otherwise provided in these Articles, such Non-Voting Shares shall rank pari passu in all respects with a Voting Share of the same class, sub-class or series for which the investor had originally applied.

29.3 In addition, existing Members who have been issued Voting Shares may have such Shares converted to Non-Voting Shares ***if the Directors determine, at their discretion, that such conversion is necessary or advisable*** *to avoid possible adverse consequences with respect to the Company or a particular Member; provided that the Member will be granted the right to redeem such Shares prior to conversion.* (My emphasis).

29.4 Subject to any rights or restrictions attached to any Shares, on a show of hands every Member holding Voting Shares who (being an individual) is present in person or by proxy or, if a corporation or other non-natural person, is present by its duly authorised representative or by proxy, shall have one vote ***and on a poll*** *the voting rights attributable to each Share carrying the right to vote on the matter in question* ***shall be calculated by reference to the Net Asset Value per Share (calculated as at the most recent Valuation Date) and not on the basis of one Share, one vote****."*[25] (My emphasis).

"48 Books of Account
48.1 The Directors shall cause proper books of account …to be kept …

[23] Hearing Bundle, page 153
[24] Hearing Bundle, page 161
[25] Hearing Bundle pages 163-164

48.2 …no Member (not being a Director) shall have any right of inspecting any account or book or document of the Company except as conferred by Statute or authorised by the Directors or by the Company in general meeting."[26]

60. Under the CEM the Accolade Shares are not redeemable[27]. Other relevant provisions of the CEM include a default provision if a shareholder fails to make a required capital call contribution: -

"Upon the failure of a Shareholder to fund a required capital contribution to the Fund, the Shareholder will be in default and may be subject to customary default provisions and penalties in the discretion of the General Partner, as specified in the Management Agreement, including, but not limited to, (i) forfeiture of up to 100% of the value of its capital account in the Fund … (iv) exclusion from the right to participate in certain votes and consents of the Shareholders and…"[28]

There are also provisions for the conversion of voting shares and the calling of general meetings:-

"***SPECIAL DESIGNATION AS NON-VOTING SHARES***

While the Fund's Common Shares generally have voting rights ("Voting Common Shares"), the Fund, at its discretion, may designate certain Common Shares as non-voting ("Non-Voting Common Shares") in order to avoid the Fund or a particular investor from incurring certain adverse tax or regulatory consequences, holding limitations, filling or other requirements. …In addition, existing Shareholders who have been issued Voting Common Shares may have such shares converted to Non-Voting Common if the Fund determines, at its discretion, that such conversion is necessary or advisable; provided that the Shareholder will be granted the right to redeem such shares prior to conversion…"[29]

"Rights of Shareholders
All Shareholders are entitled to the benefit of, are bound by and are deemed to have notice of the provisions of the Articles.
…
General meetings of the voting Shareholders may be called by the Directors and will be called at the request of the Shareholders holding Common Shares that, in aggregate, represent not less than one half of the votes entitled to be cast on a poll at a general meeting of the business to be considered at the meeting. …

At any meeting of the Shareholders, each Shareholder shall have one vote. At a meeting, any Shareholder may demand a poll, and on a poll, the voting rights attributable to each Common

[26] Hearing Bundle page 173
[27] Hearing bundle page 231, paragraph 22 of the CEM
[28] Hearing Bundle page 198
[29] Hearing Bundle page 209

Share shall be calculated by reference to be net asset value per Common Share (calculated as the most recent valuation day) and not on the basis of one Common Share, one vote…"[30]

THE EVIDENCE

61. I will summarise the evidence in respect of each of the allegations raised in turn. The Petitioner's evidence comes primarily from Mr. Ferrer. He has provided four affidavits in English.[31] He gave evidence by video link at the hearing during which he relied extensively on a Court appointed Spanish interpreter. Counsel for the Company has invited me to consider with care the level of weight to be given to his evidence by reference to the relevant practice direction[32]. Counsel submits that given his language difficulties it is evident that the affidavits are not entirely his own product.

62. I bear this in mind but note that much of Mr. Ferrer's evidence is supported by the documentation produced and that there is no challenge to this documentation. I accept the submission of Counsel for the Petitioner that it is not unusual for non-English speakers faced with the pressure of Court proceedings to be anxious not to get it wrong and to be more comfortable with giving evidence in their native language.

I) UNREASONABLE REFUSAL TO PROVIDE INFORMATION

63. There are three aspects to the complaint as to refusal to provide information. There is said to be a failure to provide the Petitioner with information as to i) its percentage equity stake, ii) financial statements and iii) the details as to the basis for capital calls.

64. In summary the Petitioner says that it made repeated requests between February 2020 and May 2020 for the first and received no substantive response. This, they say, was information which was easily available to Mr. Drankiewicz. The Company says that the requests made from February to March were not clear as to what was being sought and that the CEM provides the rights to information which are limited. This was information to which the Petitioner was not entitled or already had. As to the second, a one-month extension was obtained from the

[30] Hearing Bundle pages 209 -210
[31] First Affidavit in FSD 155/2020 dated 8th July 2021, First Affidavit in FSD 46 of 2021 dated 19th February 2021, First Affidavit dated 4th March 2021, Second Affidavit dated 10th December 2021
[32] Practice Direction No. 4 of 2015

Regulator for the audited financial statements for 2019. These were filed not on the 30th June 2020 as per the legal requirement but on the 31st July 2020. Those statements were not provided to the Petitioner until five weeks later on the 4th September 2020. The Petitioner points to this as excessive delay designed to achieve an objective and notes that what occurred in the interim is that additional shares were issued which had the effect of diluting its majority. The Company says that the delay was a matter for the Administrator who is responsible for issuing the financial statements and that Mr. Drankiewicz could not have provided the Petitioner with these statements in advance of other shareholders. As to the third matter, in summary it is said that the Petitioner was never provided with any details as to the capital calls. The Company responds by saying that while it cannot point to a specific comprehensive response, general information had been promptly provided and that there had been ongoing dialogue with the Petitioner, some of which was without prejudice communication.

65. Of the three witnesses who gave oral evidence on this aspect, I was less inclined to believe Mr. Drankiewicz. I did not find him to be a credible witness having seen and observed him as he testified. Moreover, for the reasons set out below, his answers on some points were implausible and or surprising.

66. I will review the evidence of each witness in turn. As each side relies on the timeline and nature of the responses provided, I shall try to set this out in some detail. The Petitioner points to them to show the absence of a response over a lengthy period. The Company points to them to show the helpful, polite and courteous responses of Mr. Drankiewicz.

EVIDENCE OF DANIEL FERRER

67. On 12th February 2020, Mr. Ferrer requested four items from Mr. Drankiewicz: -

i. Share certificates that reflect the Trust's equity participation of its shares.
ii. Share certificates that reflect Javier Bours' equity participation of 1000 shares.
iii. Articles of Incorporation and corporation documents that refer to the obligations of the Company as well as the Master Fund.
iv. Latest annual reports and audited financial statements of both.

68. There was a response from Mr. Drankiewicz on the following day that he would gather the requested materials and provide them in the next few days. On 20th February 2020 he provided three contract notes, the CEM, the 2018 financial statements, the Certificate of Incorporation for the Company and audited financial statements for the Master Fund. Mr. Ferrer accepted in cross-examination that within six working days Mr. Drankiewicz had provided seven documents.

69. On the 25th February 2020, Eduardo Crespo, general counsel to the Petitioner, wrote to Mr. Drankiewicz requesting essentially the same documents. Mr. Ferrer agreed that the same documents had been requested again but that there was no explanation as to the reason that these did not comply with the request. On the same day Mr. Drankiewicz replied that he was resending the documents previously sent and that the contract notes serve as share certificates for the two investments. He provided the CEM as documenting the nature of the feeder fund's investment in the Master Fund and outlining the rights and obligations of LPs, the Articles of Incorporation and the 2018 audit. Mr. Ferrer agreed that this was a prompt response.

70. On the 26th February 2020, Mr. Crespo replied to say that this did not fulfil the request. Mr. Drankiewicz replied the same day to say please provide an example of what you are looking for and I can work with the Administrator to see if they can produce those items for you.

71. On the 28th February 2020, Mr. Drankiewicz wrote saying that each of the items previously sent should match the request made. On 3rd March 2020, Mr. Crespo wrote back saying that the documents sent do not match the items in the request. He said that no share certificates, no documentation as to the equity stake in the Master Fund and no financial information for 2019 had been received. He asked for all corporate documents in order to ascertain the rights and obligations of the general and limited partners and the latest financial information even if unaudited.

72. On 4th March 2020, Mr. Drankiewicz replied stating in part that as the fund is private the Administrator does not issue share certificates, and that the 2019 audit was in process but had not been finalised.

73. Mr. Ferrer accepted that the Administrator does not issue share certificates and that there is no limited partnership agreement. It was put to him that despite the explanations provided by Mr.

Drankiewicz, on the same day an hour and a half thereafter, Mr. Crespo wrote directly to the Administrator asking for the same documents. Mr. Ferrer's response was that we have a lot of reasons to have doubt about what Mr. Drankiewicz said.

74. Mr. Ferrer acknowledged that the Administrator provided the very same contract notes that had been provided on 20th February and explained that the 2019 audit was not yet complete. It was put to him that there was nothing that suggested that Mr. Drankiewicz was being unreasonable and obstructive in failing to provide information in the light of this response from the Administrator. Mr. Ferrer replied that the information that was requested was provided but that there was a lot of information that was missing.

75. On 6th March 2020, Mr. Drankiewicz said that he had followed up with the Administrator and was waiting to hear if they have any further documentation. He attached launch resolutions and articles. On 20th March 2020, Mr. Crespo wrote identifying an incorrect reference number in one of the contract notes provided and asked for the latest financials at the fund level at least up to the third quarter and the latest register of members and their corresponding equity stake. In particular, he asked for: -

> *"As holders of said equity stake, we would like to receive the latest register of members and their corresponding equity stake as should have been represented at the last annual meeting (which to our understanding was not held)."*

76. Mr. Drankiewicz responded within minutes explaining that the reference number had been corrected, that the annual reports would be ready before the third quarter numbers could be produced and that 'he would check with Cayman but that he believed that member level information was confidential'. Mr. Ferrer replied that the only reason for asking was to know their own ownership, no one else.

77. On the 27th March 2020 Mr. Drankiewicz said that he had checked and had been told that they had a duty to keep partner information confidential. He asked to be advised of what was being sought and perhaps to get it from another source. In response to the question whether it was being claimed that Mr. Drankiewicz was lying about this, Mr. Ferrer's response was that they were seeking to find out their incorporation rights and that was not answered.

78. On the said day Mr. Crespo asserted a right to inspect the register of members pursuant to s.44 of the ***Companies Act***. On the 30th March 2020, Mr. Drankiewicz replied that s.44 excludes exempted companies.

79. On the 31st March 2020, Mr. Crespo wrote in part that: -

> *"As members we should be able to ascertain our shareholder rights which as you know may vary depending on the equity stake within a particular share class and within the Company itself. Please confirm our equity stake at both the share class and at the Company level."*

80. On the 7th April 2020 Mr. Crespo wrote seeking an update. On the 9th April 2020 Mr. Drankiewicz responded to say that he did not have the figures to hand and that this is an operational question and 'he would ask the COO and revert'. On the 13th April 2020 Mr. Drankiewicz said that he had received the value figure, the Trust has 5,514.23 shares and an equity value of $7,825,590.40. The suggestion to Mr. Ferrer, which he did not appear to fully accept, is that Mr. Drankiewicz did by this response answer their question. He said that it just gave the amount but said that it is correct that this was the equity stake that the Petitioner owned in the Fund.

81. Mr. Crespo replied on the 14th April 2020 to say that this was information that they receive in their monthly statements as Mr. Drankiewicz knew. He then said: -

> *"My question is how much does that equate to from an equity stake perspective within our share class and overall in that entity.*
> *Let me know if you need further clarification."*

82. Mr. Crespo sent a further email of the same day saying to clarify, what was specifically requested is the percentage equity stake that the Trust holds at both the entity and share class levels. He said also that this would determine the corporate rights that they have by themselves or along with a larger group of stakeholders to among other things *"convene a general meeting in the short term."* It was suggested to Mr. Ferrer that two months after the requests began this was the first one in which Mr. Crespo asked for the percentage equity stake. His reply was that this seemed to be the case.

83. Mr. Drankiewicz replied on the 20th April 2020 to say that the document request is more clear now and offered to set up a call as they had been doing with other investors. Mr. Crespo said that a call would be helpful but that in the interim the information requested would suffice. On the 27th April 2020, Mr. Drankiewicz said this:-

> *"For the percentage equity stake requested, I checked with the admin and they do not provide the percentage shares issued or value by class or in total. The general meetings are a figment of corporate structuring as you know and don't help much from an investment fund context so that is part of the reason we'll hold calls/meeting on ad hoc basis with each investor."*[33]

84. Mr. Crespo responded on 29th April 2020[34], asking for specific details of the administrative person. He said: -

> *"As discussed, we are trying to ascertain our corporate rights within the corporation we bought into and are your partners in which you well know are contingent upon the proportion of the equity stake at both the share class and corporate levels."*

85. To the suggestion that the 15th April 2020 was the first time that they had requested the percentage equity stake, Mr. Ferrer responded that by that day this was clarified but it had been requested before.

86. On 4th May 2020 Mr. Crespo wrote to the Administrator seeking the percentage equity stake with a view to exercising corporate rights to convene a general meeting. He said that they were prepared to initiate legal action.[35] To this the Administrator replied that it does not respond directly to requests for information and re-directed him to the Company, its directors or Investment Manager.

87. Mr. Crespo reverted to Mr. Drankiewicz on 8th May 2020 stating that the Petitioner was only concerned with its own equity position. On 12th May Mr. Drankiewicz wrote: -

> *"My apologies for the confusion. Percentage ownership is not a metric we readily provide. We have provided information in the past for certain partners that need documentation showing they did not form or acquire a comingled fund for their exclusive benefit.*

[33] Hearing Bundle page 453
[34] Hearing Bundle page 453
[35] Hearing Bundle page 457

You have asked for details related to other partners, information that is extremely confidential. I am sure you can appreciate we would never disclose your information. The request is inappropriate and unbecoming.

Again, we have forwarded your requests on to CIMA have not received a positive response.

The 2019 audit is underway and I have not seen a completion date yet. You will receive the materials as they are finalized."[36]

88. To the suggestion that this 12th May email was three months after the information requests started on 12th February and that Mr. Drankiewicz was still corresponding constructively and promptly to their information requests, Mr. Ferrer agreed but said that this was without giving them an answer. He said he could not accept that Mr. Drankiewicz was trying to be as helpful as possible. He maintained that the emails disclose obstructive behaviour. He denied that there had been a confrontational tone in threatening litigation and said that it was only seeking information that they felt that they had a right to. As to the right to information being limited to the specific information listed in the CEM and not having a right to the specific proportion of equity stake in the fund, he said that he was not speaking about the right of law but the right of the investment. He agreed that the rights to information were as stated in the CEM[37] and that Article 48 of the MAA gave no right of inspection of the books of account.

CROSS-EXAMINATION OF MARIO BOURS LABORIN

89. The cross-examination of Mr. Bours Laborin on this aspect was in part designed to show that the information requests began after the falling out of the two men and was in fact orchestrated by him. He testified that he is not a beneficiary of the Trust and that he had told Mr. Drankiewicz that he would facilitate investments in return for a third of the earnings from the investment. He said that he had no complaints over the first twenty-month period and was entirely content with the management of the Fund up to October 2019.

90. He said that the Accolade investment was a passive investment and not one that required much management. It was suggested to him that ordinary investors did not have someone working for the Investment Manager full-time. He said that finance is a business of trust and the

[36] Hearing Bundle page 455
[37] Tab 8, page 181 provided at page 190.

investors that he brought in were comforted by the fact of his job and felt reassured that he was there[38].

91. He said that at a meeting on 20th November 2019 in Chicago he told Mr. Drankiewicz that he was leaving because he had reason to believe that he was not in fact going to put their agreement in writing. He said that he was trying to get out of it as cleanly as possible and to take the opportunity for the investors that came in because of him to get out themselves.[39] He explained the absence of mention of this agreement in subsequent correspondence from Mr. Drankiewicz on 21st November and his reply of 23rd November 2019 by saying that they did not mention the existing Accolade investment agreement or a 15% partnership interest because that was separate and apart and that they always treated this separately because it was prior to the partnership agreement[40].

92. He said that his follow up email on the 26th November 2019 does mention 33% in Accolade and that he would guarantee that the investors he brought in would remain in the Fund. Mr. Drankiewicz's reply of 27th November 2019 was that his email would violate security laws.

93. On 9th January 2020 he discovered news of the pending IPO of Accolade which he sent to his father and uncle. This information was well received by them. This was because a potential IPO was likely to mean two things. The investment would be realised and they could exit the investment. He said that his relationship with the Investment Manager up to January 2020 was not closed and he still had access to his emails.

94. Mr. Bours Laborin agreed that as of the 17th January 2020 the relationship between Mr. Drankiewicz and the Petitioner was a good one and said that there were no problems to his knowledge. He denied that he had threatened to fight Mr. Drankiewicz at a meeting on that day and that this is what this Petition is all about.

95. The answers that he next gave are at the heart of the issues to be determined at this hearing. He said that he is fighting Mr. Drankiewicz in New York but that has always been kept separate and apart. He said that he made a point of that. He said that after the falling out with Mr. Drankiewicz, what changed is that he became aware of his dishonesty. He said that the 17th

[38] Transcript 2, Page 104
[39] Transcript 2, Page 109
[40] Transcript 2, Page 111

January 2020 is the date that he formed the view that Mr. Drankiewicz is dishonest[41]. He felt that he had a moral responsibility to go to the Petitioner and all of the investors that he had brought into the Company to tell them that he had misjudged Mr. Drankiewicz's character. He told them that he would assist them, but he would never put his own claim first and he will never accept for the claims to be bundled together. These are separate issues which he has been careful to keep that way. He said that he came to the view that Mr. Drankiewicz is seriously dishonest because of his reneging on the promised agreement and the 15% partnership interest he had made to him and on his agreement to give the investors he had brought into the Fund an out where they could have the choice of remaining or not.

EVIDENCE OF KRISTOPHER DRANKIEWICZ

96. Mr. Drankiewicz in his evidence states that the Company has an independent administrator, and its accounts are audited annually by an independent auditor. It makes regular monthly reports to investors and provides annual audited financial statements. He states further that the level of detail provided in the monthly statements is standard and that no complaints from the Petitioner had been received prior to February 2020. No complaints had been received from any other investors.

97. He states that the annual audited financial statements are issued within six months of the previous financial year as required by Cayman Islands law and the CEM to wit by 30th June of the following year. They provide detailed information as to the number of shares held by each investor and the NAV of the Fund and of the shares as calculated by the Administrator. Also provided is an aggregate figure for the net incomes. This includes an expense component showing the total deductions. These are readily ascertainable as the Petitioner was the sole investor. To the Petitioner's repeated requests for information as to the percentage equity stake, he said that they do not provide the break outs and that with additional assets and appreciation there would be dilution.

98. In cross-examination Mr. Drankiewicz was taken to the financial statements for December 2018.[42] He said that the total amount issued in December 2018 was US$7 million of which US$5.5 million was invested by the Petitioner. The net asset balance at the start of the year was

[41] Transcript 2, Page 137
[42] Hearing Bundle page 652 et seq.

US$3,096,000. He agreed that when the Petitioner put in US$5.5 million that was the largest investment that he had received in the feeder fund to that date. In August 2019 he received a further investment of US$1 million from Javier Bours. By the end of 2019, the Bours family was the largest investor. He did tell the family that it was an honour to manage their capital. He agreed that in response to Mr. Crespo he had said that he received some value figures based on the number of shares and equity value. He said yes, by this point it was clear that Mr. Crespo was not asking for information about other shareholders and the reason given was to know whether the Petitioner had a right to convene a general meeting.

99. He said he and his wife were both controlling directors. He did not know how many shares had been issued by the Company. He would have had to look this up. He would have had to look at documents to figure out over the course of three years how many shares the Company had issued. He agreed that he could ask the Administrator who has that information and that it would be a straightforward exercise to work out the percentage that Mr. Crespo was asking for if he knew the number of shares that the Company had issued. He knew how many shares the Trust had. The Administrator reported every month on the true NAVs so he knew that month by month. He agreed that if he wanted to work out the percentage equity stake by value, he could just divide one by the other and this was something that he could easily have obtained.

100. He agreed that looking at the position in December 2019, 11,122 shares had been issued[43]. As at April 2020 no new shares had been issued. The Trust had 5,630 shares. He agreed that it had a slight majority by number of shares of 50.6%. With the further investment of 1,000 shares by another member of the Bours family, between them they had 59.6% of the shares. By NAV this was $7,864 million. This meant that at the end of 2019 the Trust had 72% stake by value. He agreed that despite fluctuations in value that this was still a comfortable majority in April 2020.

101. He agreed that the percentage equity stake figure is one that he could easily have obtained and that if he had obtained it, it would have shown that the Petitioner had a majority both by number of shares and value of shares. He agreed that he knew that they were a majority shareholding both by value and number. He said these were figures which he knew or could easily find out, but this was information which he was not prepared to tell Mr. Crespo. He said that he did not tell them because he thought that on a real time basis it was selective disclosure to provide

[43] Transcript 2- page 175

information to one investor but not to all. He thought it was against some statute or regulation to tell Mr. Crespo that the Trust had 50.6 percent investment.

102. Mr. Drankiewicz explained his earlier provision of such information to the Petitioner on its initial investment by saying that he had *'goofed'*. He said that what has changed over the years is the Securities and Exchange Commission emphasis on selective disclosure. He said that he does not know the regulation under Cayman law that prevents him from giving this information. It was suggested to him that he was making this up. He denied this and said that he does this for a living and that he is very worried about breaking the law.

103. He was asked about his response to Mr. Crespo that general meetings are a figment of corporate structuring[44]. He accepted that such meetings are important because for shareholders it is their only method of having any control over the governance of the Company. He said that the Company had not held any general meetings in five years. The reason is that no investor had asked for a meeting.

104. He agreed that the Administrator had effectively sent Mr. Crespo back to him but had not said that providing such information is unlawful. He agreed that in his response to Mr. Crespo that he does not mention the regulation prohibiting him from giving the information. He said that he is not aware of it exactly but accepted that he could have asked his attorneys.

105. He accepted that the information about the Trust percentage equity stake is not confidential information. He said confidentiality did not prevent him from answering the request for the equity stake, but it would fall under selective disclosure. Confidentiality relates to the request for the register of members which he believes is on the same email chain. He said that he thought that the request was unreasonable because a large investor should not get preferential treatment. He said that he thought that Mr. Crespo's email was a bullying email and is still of that view.

106. He said that he had described a number of requests of Mr. Ferrer and Mr. Crespo to the Regulator and they did not respond. In further emails he did not tell Mr. Crespo that it was because the law prohibits it. He assumed that the law prohibited him from telling Mr. Crespo the reason that he was not able to provide the information.

[44] Hearing Bundle page 472

107. He was cross-examined about the letter provided in 2018 in which he told the Trust that it had 29.5% interest and asked how he had arrived at that figure when the actual figure was closer to 50%. His explanation was that the 29.5% interest was calculated as interest in the Master Fund. To the question that the Trust was only ever a shareholder in the feeder fund and the suggestion that this was a misleading letter, he said that he had made a mistake and apologises. He said that his evidence is that he was not sure which fund he was talking about. As of today, he knows that the 29.5% applies to the Master Fund and not to the feeder fund. He said that when he wrote 29.5% that was a *'goof'* but the 2018 audit confirms that the Trust held the majority stake.

108. It was put to him that at that point in 2020, as an honest director he should have told Mr. Crespo that the actual 2018 figure was 58% and not 29.5%. His answer was *"okay, point taken now"*. He said that the 29% was a mistaken reference to the Master Fund and it was his mistake. He denied the suggestion that the reason that he did not tell him that he had made a mistake is that he did not want him to know.

109. It was suggested to him that in his response to Mr. Crespo, the impression that he was giving them is that they started with 29.5% which had been diluted and he would not tell them on an interim basis pending the issue of the annual financial statement what the position now was. He was giving the impression that they did not have a majority. He said that he now sees that the 29.5% was irrelevant to the question that they were asking. He denied being deliberately obstructive or stonewalling so that he could put them off from calling a general meeting.

EVIDENCE RE INFORMATION COMPLAINT AS TO FINANCIAL STATEMENTS

110. In cross-examination Mr. Ferrer accepted that the CEM provides a timeline for the provision of audited financial statements. He said that unaudited statements were received every month, but they were not sufficient for them to know the financial state of the Fund. He accepted that the 2021 statements were signed off by the Auditors on the 28th July 2022 and were provided to the Petitioner on the 15th August 2022. The 2020 statements were sent to the Petitioner two days after filing. The 2019 statements were sent five weeks after filing on the 4th September 2020 and the 2021 statements were sent two weeks after filing. It was put to him by Counsel that these timeframes are not a basis for a complaint of serious mismanagement. He replied that the lack of confidence is not only as to the financial operation.

111. Mr. Drankiewicz's evidence is that the requests for information all came after the breakdown of the relationship with Mr. Bours Laborin and were repetitive in nature. He said that the Petitioner was seeking information that it had already received, to which it was not entitled under the governing documents or information which could not be shared due to United States Security laws, being material non-public information.

112. He states that when Mr. Bours Laborin was working with an affiliate of the Investment Manager, upon receiving investor requests for information about their investments he referred them to the monthly investor statements. He states his belief that the Petitioner's actions were taken to exert pressure on him to yield to Mr. Bours Laborin's demands for him to receive a portion of the profits of the investment and that the threats made on 17th January 2020 demonstrate the true reason that the Petitioner started its "campaign of relentlessly questioning the Fund and demanding more information than that to which it was entitled."

113. Mr. Drankiewicz agreed in cross-examination that the 2019 statements were completed on 31st July 2020 and had them in his hands either on that day or on 1st August 2020. He was asked why they had not been sent out until September, a five-week gap. He denied holding them back and said that there were several administrative things to be done before the Administrator eventually sends it out. He said that he could have violated the selective disclosure principle and sent it to the Trust but as a matter of process he does not send these out, it is an administrative report. He agreed that between the time of receipt and sending out the statements, the Company issued new shares. He said that it is correct that the effect of this is that the Trust ceased to have a majority by number of shares. He denied holding back the statements so that the Trust would not find out about all the new shares that were issued until sometime thereafter.

INFORMATION COMPLAINT RE CAPITAL CALLS

114. The Petitioner received a request for a second Capital Call in 2020 on the 28th April, 13th May and 18th May. It was due to be paid on the 1st May 2020. This request led the Petitioner to seek information as to the timing, breakdown, and basis for the capital call. In making the request for information on the 21st May 2020, Mr. Ferrer stated that the scheduling seemed random. He repeated the request for information as to their partnership rights and said that if a response was not received, they would be forced to take legal action. On the 26th May 2020 Mr. Drankiewicz commented that the document requests appeared to have taken on an increasingly

confrontational tone. He explained that capital calls are made in line with the expected liabilities of the Fund and were made up of management fees and operating expenses.

115. On the 26th June 2020 the Petitioner's attorneys sent a detailed request for information as to the legal basis for the capital calls. Mr. Ferrer's evidence is that neither the Company nor Mr. Drankiewicz provided a substantive response to this.

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116. Counsel for the Petitioner submits that the Company did not provide the correct share percentage. This affected the Petitioner's ability to understand and exercise its voting rights. By correspondence between 21st May 2020 and 22nd June 2020, the Petitioner requested information as to capital calls which it did not receive.

117. In response, the Company questions the legal basis for the seeking of some of this information and relies on the response provided by Mr. Drankiewicz that the percentage equity position in the Fund is not information that is provided. The CEM states what is provided. As to the financial statements, Counsel for the Company submitted that the financial statements had been provided within reasonable timeframes after the completion of the annual audits. On information as to the capital calls, Counsel submits that Mr. Drankiewicz provided prompt responses on the 21st May 2020, 26th May 2020, 5th June 2020 and 22nd June 2020 which gave general information as to the need to cover the liabilities of the Fund, administrative, audit, tax and other costs but declined to provide further level of detail as to itemised breakdown of operational expenses and pro rata calculation. It is said that he gave complete responses as far as he was able.

118. My own view of this aspect of the evidence is that Mr. Drankiewicz was giving the Trust the polite runaround as to their percentage equity stake. It is claimed that there was a lack of clarity as to what was being requested which was not addressed until April 2020. This is doubtful. The explanation which he gives for not providing the information is singularly unconvincing. Aside from not believing him on this aspect, having observed him as he gave evidence, it is unconvincing and implausible for two reasons. Firstly, he had already provided the Trust with a percentage equity stake on their entry into the Fund. He now says that he ought not to have done that and describes it as a *"goof"*. Secondly, he says that he is prevented from telling them

their equity stake because of regulations or laws which he cannot name and that he is also prevented by these regulations or laws from stating that such laws or regulations are the reason why he cannot do so. I found this answer to be a contrivance designed to offer an explanation for what was inexplicable.

119. While he was quick to say that he had made a mistake when he had given them the initial interest figure which was wrong, it is surprising that he would have made such a mistake to refer to the Master Fund when they had not invested in this Fund.

120. My overall impression is that he responded in the way he did, not because he did not understand what was being requested or was insistent on adhering the rights to which the shareholders were entitled but because he was doing his best to "stonewall" as Counsel for the Petitioner submitted. The falling out as it has been described was clearly front and center in his mind. That he was on the alert for possible impact on the Company is evident from his own internal note on the 17th January 2020. Far from being helpful, he was being obstructive. While he accounts for the five-week delay in the provision of the 2019 financial statements as the responsibility of the Administrator, I note that it was the longest period between sign off and provision over the four-year time span. The fact that new shares were issued during this period, which had the effect of reducing the numerical majority of the Petitioner's interest is very likely not a coincidence.

II) ACTED IN BREACH OF THE MAA IN DEMANDING CAPITAL CALLS

121. Mr. Ferrer's evidence is that the Petitioner accepted the first Capital Call in 2019, saw nothing wrong with it and was content to accept that there were operational expenses which needed to be funded by this means. He said that it was correct that at the time Mr. Bours Laborin was working there, and they had a lot of confidence that he would 'look in' and take care of their investment.

122. In cross-examination Mr. Ferrer's attention was drawn to the default provision in respect of capital calls in the CEM[45]. He did not agree that this suggested that there was an obligation on

[45] Hearing Bundle page 198

a shareholder to make capital contributions. He accepted that in April 2020 the Trust was issued with shares of value that corresponded with the second Capital Call.

EVIDENCE OF KRISTOPHER DRANKIEWICZ

123. Mr. Drankiewicz's evidence is that during the third quarter of 2019 Mr. Bours Laborin agreed with him that a capital call should be made and was party to the correspondence with the Petitioner about this. The purpose was to fund standard operational expenses as it was not in the best interest to sell shares at that time. The Call was paid without objection by all shareholders in the class. He was not aware that there was no legal right to make such calls. In cross-examination Mr. Drankiewicz said that he did enquire into the Capital Calls and only realised a year later that there was no legal basis to make them. When he became aware of this about a year later, the Petitioner was credited with an additional 115.8802 and 107.3328 shares in return for the full value of the two calls made.

124. He also states that the Petitioner's reliance on the fact that capital calls were not made of two shareholders, Roberto Brown and Javier Bours Costello, is misplaced. The two held investments in different share classes. Those share classes meet their expenses through cash. The Petitioner subscribed to an illiquid venture capital share class. It is customary for capital calls to be made to fund operational expenses given the nature of those investments.

125. Mr. Guilfoyle provides important evidence on this aspect. He states that the Company issued capital calls for funding from investors who were invested in illiquid securities of which Accolade was one. There would have been no need to request further funding from investors holding liquid shares as the underlying assets could be realised for cash.

THE ARGUMENTS – BREACH OF MAA RE CAPITAL CALLS

126. Counsel on behalf of the Petitioner notes that the Company accepts that there is no right to levy capital calls on the Petitioner given the provisions of the CEM[46] and MAA[47]. The CEM provides that *"Under the terms of the Articles, the liability of the Shareholders is limited to any amount unpaid on their Common Shares. As the Common Shares can only be issued if they are*

[46] Hearing Bundle, page 209, page 24 of CEM
[47] Paragraph 4

fully paid, the Shareholders will not be liable for any debt, obligation or default of the Fund beyond their interest in the Fund." The Petitioner submits that the Company made demands in breach of its constitutional documents and that Mr. Drankiewicz did not explain the basis for the demands and threatened the Petitioner about non-payment of the second Capital Call.

127. The Company in response relies on the evidence of Mr. Guilfoyle to say that the Administrator undertook the calculations for the capital calls. Counsel's submission is that Mr. Drankiewicz made an honest mistake. This was not identified until 26th June 2020 by his Attorneys. There is no detriment to the Petitioner. It was given full credit for the amounts paid. This does not rise to the level of serious misconduct to justify winding up. The Petitioner had no complaint about the first Capital Call and only raised this issue nine months thereafter.

128. On this aspect I accept the evidence of Mr. Drankiewicz when he says that he was not aware that there was no legal right to make such calls. I do not find that he deliberately flouted the provisions of the constitutional documents. Two circumstances support this conclusion. The fact of the default provision although an outlier, may well have led him into error. Secondly, Mr. Bours Laborin was with the Investment Manager when the first Capital Call was made, and he raised no issue with it at the time. I also note that Mr. Ferrer's query arose partly because of what he termed the random way in which the calls were being made. That said, there is also the unchallenged evidence of Mr. Guilfoyle as to how the calculations were done and the accepted fact that the shares at the time were illiquid. I accept the submission of Counsel for the Company that this may have been a genuine mistake on the part of Mr. Drankiewicz. I do not think that the making of these Calls or the fact that he provided general rather than specific information about this rises to the level of serious misconduct.

III) ACTED FOR IMPROPER PURPOSE AND OR IN BREACH OF THE MAA IN COMPULSORY REDEMPTION

EVIDENCE OF DANIEL FERRER

129. On the 25th June 2020 at 12:28pm, the privileged email chain from Mr. Bours Laborin to one of the attorneys of the Petitioner was inadvertently copied to Mr. Drankiewicz[48]. About six hours later on the same day the Petitioner's attorneys wrote to Mr. Drankiewicz: -

[48] Hearing bundle, Page 490

> "*You just received in error an email from Mario Bours that contains confidential and attorney-client privileged information. Please disregard such email and immediately delete it.*"

130. On the 29th June 2020, the Company issued a Notice of Compulsory Redemption pursuant to Article 12.1 of the MAA effective 9th July 2020[49]. The Notice stated in part that it was an honour to manage the capital of the family Trust but that: -

> *"Unfortunately, recent communications, which I am sure you are aware of, detail your intention to gain control over the fund, circumvent aspects of the Memorandum meant to protect partners, remove directors, and force a wind down of the fund. Not once has anyone expressed any concern with our management of your capital and the underlying, investment, and we have provided you with all the information set forth in the Memorandum. I want to remain focused on managing your capital. Continuing to deal with these matters risks your investment and is no longer sustainable."*

131. The Notice explained that the redemption price would be satisfied by the establishment of a reserve account which could not be accessed until the six-month lockup period ended after an initial public offering.

132. There followed calls between the Attorneys for the Petitioner and Mr. Drankiewicz on the 6th and 7th July, all in an attempt to reassure Mr. Drankiewicz that the Petitioner did not intend to take over the Company and was only seeking information as to its rights. Mr. Ferrer spoke with him on the 7th July 2020 and sought to reassure him. Mr. Ferrer followed up with an email asking whether in light of the 9th July deadline, they could be advised whether the redemption Notice would be withdrawn. Mr. Drankiewicz replied that the Fund would discontinue the Notice in conjunction with moving the Trust to a participating non-voting class. The Petitioner replied that this offer was unacceptable[50]. Mr. Drankiewicz replied that this was not an attempt to target the Trust but was more in line with other funds and would apply to all shareholders. The Petitioner requested that the status quo be maintained.

133. On the 9th July the Petitioner obtained an injunction restraining the Company from proceeding with the redemption. There followed without prejudice settlement discussions between the parties. These did not bear fruit. On the 24th February 2021 the Petitioner gave notice terminating its participation in these.

[49] Hearing Bundle, page 499
[50] Hearing Bundle, page 514

134. In the interim on the 27th August 2020, the Company unconditionally withdrew the Notice and advised that the status quo was maintained[51]. In tandem, notice was given that it is likely that in the future there would be redemptions once the Master Fund sold the underlying shares after the end of the lock up period on 29th December 2020.

135. In cross-examination Mr. Ferrer's attention was drawn to the references to taking legal action in the correspondence of Mr. Crespo on 4th May 2020 and on 21st May 2020. He said that these were not threats. They were just "trying to manifest their rights". He accepted that Mr. Drankiewicz was right to say that the correspondence was becoming confrontational on the 26th May 2020. He said that it is a fair summary of the position that by the final week of June 2020 he and the Petitioner had become increasingly frustrated with Mr. Drankiewicz.

136. It was put directly to him that his strategy and that of Mr. Bours Laborin was to try to gain control over redemption rights. This was his answer: -

> *"We also search for or look for the information of when to come out of the investment. As a relevant shareholder we always expected to have all the information and the comfort of the management and to know the moments when we should withdraw. That is why we want to have control of the management of the fund, mainly because of the lack of confidence that we had in the administration."*[52]

He said that the strategy was to leave the investment when they thought it was convenient.

137. Paragraph 22 of the CEM was put to him which states in part that the Accolade Inc shares are not redeemable. He said that the strategy and objective was to leave when they felt it was necessary. When pressed he agreed that the Petitioner knew that these were non-redeemable shares. He said that when Mr. Laborin in the privileged email referred to gaining control over redemption rights, he did not at that moment know that was not something to which it was entitled[53].

138. He said that the leaked email was a conversation between Mr. Bours Laborin and their lawyers and it did not mean that was the plan of the Petitioner.

> *"Q. The email from Mr. Laborin to Ms. Ertze had detailed an intention to gain control?*

[51] Hearing Bundle, page 1028
[52] Transcript 1, page 175 lines 6 to 13
[53] Transcript 1, page 177

Ans. As I have already said that was not the intention of Fideicomiso. It was a communication between Mario Laborin and the lawyers.
Q. Well it was obviously from the text of the email, the intention of Mr. Laborin, wasn't it, because it's what he says.
Ans. I cannot say that. Ask him."

139. Mr. Ferrer added that when the investment was presented to them what was attractive was that there was a possibility to exit once the Accolade company became public. He referred to a presentation document from Mr. Drankiewicz, which at page 16 under the heading, Fee Structure and Term stated, *"Upon IPO – investor option of managed distribution or managed investment in public market*".[54]

140. He said that Mr. Drankiewicz did confirm that they would discontinue the redemption process but with a condition that was not acceptable which was to move to non-voting shares. He said that was not convenient for the Petitioner because the IPO had not been done.

141. He agreed that Mr. Drankiewicz remained polite and that there was no hostility or aggression in his language but said there was in his actions. He said that as a major shareholder the least they would expect is enough information to feel comfortable with the fund administration. He said that he had clarified the position of the Petitioner on a phone call with Mr. Drankiewicz and that he is responsible for the Trust not Mr. Bours Laborin. He said that he did not know the reason that Mr. Drankiewicz remained concerned. He accepted that the Shares were never redeemed pursuant to the Notice.

EVIDENCE OF KRISTOPHER DRANKIEWICZ

142. Mr. Drankiewicz states that his interpretation of the inadvertently disclosed email was that the Petitioner was seeking to exert pressure over the Fund in order to obtain what it knew that it was not entitled to and potentially hijack the Fund. He said this was of concern to him given his duties to the Fund and its shareholders generally. This concern gave rise to the 29th June 2020 letter giving notice of an intention to redeem.

143. In cross-examination Mr. Drankiewicz said that he did wonder on receiving the email why he was on the conversation between Mr. Bours Laborin and his lawyer. He did not delete the

[54] Supplemental Bundle Tab 2, page 16

email and spent ten minutes reading it. In response to questions as to the reason that he did not delete the email, he said that the Company has a self-imposed legal hold policy in respect of all emails.

144. He agreed that shareholders could vote to dissolve classes of shares. It was suggested to him that there was nothing in the email that was wrong and that there is nothing wrong to explore options with one's lawyers. He responded that it is wrong *"if he is going to drop a nuclear bomb on the Fund and hurt other investor that is a problem"*.

145. He said that it is correct that by the proposal in the notice the Trust would receive neither cash nor shares and that in the meantime they would no longer be shareholders or have the right to convene an EGM. He said that they viewed them as a threat to other investors in the Fund and wanted them out of the Fund as of 9th July 2020. There was no communication between receiving the leaked email on the 25th June and issuing the Notice on the 29th June. This was a decision made by himself and Ms. Macias. He denied the suggestion that the reason he did this was not to protect investors but to protect his own position.

146. He said that he did not remove voting rights of any other shareholders and no other shareholders have been converted. It was suggested to Mr. Drankiewicz that after he issued the Notice and Mr. Ferrer asked what comfort could be given by him in relation to the concerns, he did not reply, he allowed the time to run out. His response to this was *"I don't know"*.

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147. Counsel for the Petitioner submits that despite the immediate request to delete the email chain, Mr. Drankiewicz chose to read and act on the contents of them. Counsel points to the way in which the Notice was framed in referring to the emails. It is said that Mr. Drankiewicz's interpretation of them is incorrect and unreasonable. Counsel submits that the correspondence clearly stated that information should be requested to which the Petitioner has a right, there was no express intention to hijack the Company. There was reference to resolving the issues through negotiation and the nuclear option was expressed as a last resort. Counsel argues that even if the Petitioner had been seeking to exercise its voting rights to take control of the Company, these were rights granted to it by the Company and it cannot therefore complain.

148. Counsel for the Petitioner submits that the power of compulsory redemption was clearly sought to be exercised for an improper purpose. This was for the purpose of altering shareholder rights and not for a legitimate purpose such as in the usual course of a managed wind down or in order to address regulatory matters. The issue of the Notice was therefore oppressive and discriminated against the Petitioner.

149. Counsel on behalf of the Company says that this complaint as to compulsory redemption is historical in nature. The compulsory redemption did not in fact proceed. Counsel noted that while the power to redeem in Article 12.1 may be exercised for any reason, the law of proper purpose as stated in the case of ***Howard Smith v. Ampol*** can prohibit even an honest exercise of a discretionary power to issue shares. The Court in that case concluded that it was unconstitutional for the directors to use their fiduciary powers for the purpose of destroying an existing majority or creating a new majority. Counsel said that the Company's position is that the Petitioner had no majority position which could be destroyed or altered by the exercise of the power in Article 12. It had just 34.5% of the shares.

150. Counsel submitted further that nevertheless the distinctions are fine ones, and that ***Eclairs Group Ltd. v JDX Oil and Gas Plc***[55] indicates that the Courts will look beyond express or implied restrictions in the articles. Directors will be in breach of the proper purpose rule even if they are acting subjectively honestly and in good faith.

151. Counsel said that on the basis of the leaked email, the events of 17th January 2020 and the threats of Mr. Bours Laborin, Mr. Drankiewicz honestly believed that the Petitioner was acting with hostile intent. The question for the Court said Counsel is if the Court believed that Mr. Drankiewicz and Ms. Macias acted in good faith, does an honest intention which was later abandoned which was arguably in breach of the law of proper purpose constitute such serious misconduct that it requires and justifies the winding up of a successful fund. Counsel argues that it does not come close to justifying such a course of action.

152. For my part, the evidence of Mr. Drankiewicz speaks for itself. He wanted the Petitioner out of the Fund. Even if his interpretation of the emails was reasonable and there is doubt whether it was, he chose to act in a manner which would prevent the Petitioner from exercising its rights as shareholders. In my view he is in breach of the law of proper purpose. I accept that there is

[55] [2015] UKSC 71

a historical aspect to this but consider that it cannot be looked at in isolation. It is part of a series of events occurring over a relatively short period of time which must be considered as a whole.

IV) Acted Contrary to the Expressed Understanding by Proceeding with a Partial Redemption

153. On the 11th January 2021, Mr. Drankiewicz issued a letter in relation to the Accolade investment. He stated that the past few weeks had shown stock volatility with the stock rising that week by 25% to close at $50.00. He stated that looking ahead they planned to opportunistically take advantage of the market process to return capital and that as of Friday's close they would be distributing roughly the initial capital investment. He asked whether the preference was to receive cash or stock.[56] Mr. Ferrer replied on behalf of the Trust saying on 12th January 2021 that the Trust was more than happy to liquidate their investment. Mr. Drankiewicz replied on 15th January 2021 to say that 20% of capital would be returned which is roughly the initial capital investment. The market closing price was $52.35 per share[57].

154. In cross-examination Mr. Ferrer accepted that there was a 180-day lock-up period from 2nd July 2020 to 29th December 2020 and that the share price had doubled from $22.00 to $50.00 by 8th January 2021. To the question that he had replied seeking a full return which is not what Mr. Drankiewicz had offered, he said that is what the Petitioner wanted. It was their initial intent to exit the investment once the IPO was done. He confirmed that between 31st December 2020 and 15th January 2021 the share price rose from US$43.50 to $52.35. The value of its interest in the investment rose from US$5.5 million to US$25 million so its initial capital investment was approximately 20% of that amount.

155. It was put to him that this was not mismanagement, that at that moment it crystallised a very substantial rise in the value of the Petitioner's shares and that this was a piece of well-judged risk management and there was nothing oppressive about it. When asked to explain why he was saying that this amounted to serious mismanagement he said that many things had happened, lack of information and lack of opportunity for information. He said that as a major investor to redeem only 20% was not to hear their needs to be able to exit the Fund completely.

[56] Hearing Bundle, page 1488
[57] Hearing Bundle, page 1030

He said that he did not know if it was dishonest, that is the reason they would wish to have a specialist to investigate the management of the Fund. He explained that he was saying extremely serious mismanagement of the Fund because firstly, they were not given the opportunity to choose. Secondly, because their participation had diminished. They were not able to exit the Fund or make decisions. Thirdly, they were not able to make the position of these shares until a year later. He agreed that this partial redemption was four and a half months after the Compulsory Redemption Notice was withdrawn. He accepted that at that point the Petitioner had not said anything about wanting to appoint new directors, that what they wanted was to exit the fund. He said that this was because they did not listen to them.

EVIDENCE OF KRISTOPHER DRANKIEWICZ

156. On this aspect Mr. Drankiewicz stated that a key feature of Accolade shares is that they are not redeemable at will by shareholders. The CEM communicates the intention to redeem the shares at a suitable time after the lock up period ended, which was on 29th December 2020. He said that the investment has been successful, and the Company has returned the principal plus more than 300%.

157. Mr. Drankiewicz states that it is not true that the Company intended by these redemptions on 11th January 2021 to reduce the number of the Petitioner's voting shares and thus to frustrate attempts to requisition an EGM. He says that it was always intended to exit giving investors the best value for their investment. He states that he considered it in the best interests of investors in the Accolade shares to make the partial redemption of about 20% in January 2021. The Petitioner received US$4.5 million net of carried interest which was close to their investment and meant that they received the capital which had been put in.

158. He said that the further partial redemption in February 2021 of 50% was to take advantage of the announcement of 14th January 2021 of a milestone acquisition of 2nd MD by Accolade and of what he viewed as a very attractive trading price[58]. It was on that second peak in the share price. He considered it in the best interest of investors in the Accolade share class to do this. He said that the decision was made balancing the challenges and long-term opportunity. The Petitioner received a further US$7.79 million. Since that time the trading price of the shares

[58] Hearing Bundle, page 1033

has declined significantly in value. In his oral evidence he said that he did not redeem all the shares because he still thought that the stock would go up.

159. In cross-examination Mr. Drankiewicz was asked about forcing the Petitioners to take only 20% redemption and to stay in for the remaining 80% when they were seeking a 100% liquidation. To the suggestion that he always wants to do the opposite of what the Trust wants and the question as to why as a responsible director, did he not agree to full redemption, when he had earlier sought to do this in June 2020, he said that the shares are not redeemable at their convenience. As the Investment Manager they did not feel that they should redeem the entirety of it.

160. Initially his evidence was that everyone in the Accolade class was redeemed by 20%. In this class were the Petitioner, a May 2018 investor, and an April 2018 investor. His attention was drawn to the financial statements for 2021[59] and he was asked to state the reason that the other investors in Accolade showed no change in their shares. His response was that other investors in Accolade shares put their proceeds back into the Fund. He said that they 'crossed the transaction'. They were neither issued with new shares nor did they redeem shares. It was put to him that the auditors prepare the accounts showing all shares issued and all shares redeemed, and examples detailed to him. He was asked why it was that this was not shown for other Accolade investors other than the Trust. His answer was that the shares of those investors were redeemed and reinvested. He accepted that the statements show that the only Accolade shareholder who was redeemed and did not re-subscribe was the Petitioner. He said that one of the investors in Accolade in August 2021 was a small investor. There was no offer to re-subscribe made to the Trust as they had said they wanted out. He denied that the redemption was targeted at the Trust to make sure that they did not have a majority.

161. He said that his evidence is that the redemption was purely coincidental. He accepted that the announcement re acquisition of 2nd MD was on 14th January 2021 and that this was a month later than that announcement. He said that he waited another month to look at things. He said that this was a compulsory redemption which applied to all Accolade E-1 Shareholders. Everyone else was compulsorily redeemed and then they were given the opportunity to re-invest. The other shareholders have not redeemed. To the suggestion that he did not give the

[59] Supplemental Hearing Bundle, page 174

Trust the opportunity or suggest that they might want to stay in the Fund in respect of this redemption of 50%, he answered that they did not bring it up.

162. He said that the Trust received a lower price in February than it did in January because if the stock went down between January and February that sounds like the NAV would also go down. He said they redeemed the shares because they made a commercial decision that there was great benefit there and great risk so that they should redeem 50%. They made a separate decision to allow others back in again. All other shareholders stayed in.

THE ARGUMENTS

163. Counsel on behalf of the Petitioner submitted that the redemption on 15th January 2020 meant that Petitioner's voting rights were reduced but the Petitioner continued to be a shareholder with liability for management fees. The further 50% redemption on 28th February 2021 was designed to frustrate the Originating Summons procedure which had just been filed a few days before. The Petitioner's voting rights were reduced. Counsel questions the factual basis on which Mr. Drankiewicz claims to have made this further redemption to be because of the acquisition of 2nd MD when this had occurred one month earlier.

164. Counsel on behalf of the Company said that this complaint is groundless and reveals its true nature, it is an aggressive attempt to target the Company because of personal animosity. Counsel exhibited a chart showing the rise and fall in the share price for the Accolade shares. The price peaked on 22nd January 2021 and thereafter continued to fall from a high of US$59.09 to a low of US$11.25 per share. It was submitted that Mr. Drankiewicz's decisions to redeem the shares constituted sound risk management practice and it is questioned whether this could constitute serious mismanagement. Counsel said that at the time of the first partial redemption, no indication had yet been given of the intention to requisition a meeting. It is submitted that the further redemption of 50% on the 23rd February was not to prevent the calling of an EGM, if they never had a simple majority in the first place there was no need to prevent anything.

165. I found the answers given by Mr. Drankiewicz in cross-examination to cast a different light on what on paper appeared to be a reasonable position. While the fact of the peak in the share price is put forward as the reason for the partial redemptions it was evident that the Petitioner was treated differently from other shareholders. Unfortunately, the impression I had was that the explanation about other investors being redeemed and immediately reinvesting was not a

truthful one. It appeared to be contrived on the spur of the moment to explain something which was inconsistent with the evidence that had been earlier given by him that all investors in the calls had been redeemed. It was contrived to explain his evidence which was inconsistent with the financial statements. How is it that other investors, no matter how small, were given the option of disagreeing with the redemption advice that he had given, and the Petitioner was not. Indeed, the Petitioner had specifically asked not to be redeemed.

166. Notwithstanding his argument as to risk reduction, I also found it inconsistent that he said that he did not redeem all the shares in February because he still thought that the stock would go up and yet he was prepared to redeem a further 50% just then. Counsel for the Petitioner points out that the 2nd MD purchase was over a month before. The second partial redemption was within five days of the Originating Summons being filed and significantly it was after the assertion by the Petitioner through its Attorneys that the right to call an EGM was based on the NAV of the shares and not on the number. I do not think that the timing was a coincidence given the fact that the Petitioner was the only shareholder redeemed in this class. I find that if not the first, this second partial redemption was targeted at the Petitioner and that the ulterior motive was to ensure that its majority by value was reduced. It was to ensure that the Petitioner on any view or construction of the documents could not call a general meeting as it was seeking to do.

V) ACTED IN BREACH OF THE MAA AND CEM IN REFUSING TO CONVENE EGM

167. The evidence is that on the 29th January 2021, in the belief that they held a majority of shares the Petitioner and two other shareholders, JI Family Holdings Limited and Juan Gonzales Diaz Brown gave notice of requisition of an EGM pursuant to Article 26. This was stated to be for the purpose of considering the appointment of four new directors, Mr. Ferrer, Mr. Crespo, Jorge Gonzalez and Paula Vazquez[60].

168. On the 9th February 2021, the Company's attorneys advised that the requisition and subsequent meeting notice sent on the 5th February 2021 were invalid as the Requistionists did not hold sufficient shares to convene an EGM and held fewer than a majority of the voting shares in the Company. They further advised that the directors did not consider it to be in the best interests

[60] Hearing Bundle, Page 729

of the Company to convene such a meeting as this was "a naked attempt to stack the board with persons affiliated with the Petitioner". Moreover, these were persons without the relevant experience as Cayman Islands fund directors and in the technology sector. Additionally, it was said that these were persons who were managers of or affiliated with public companies and or connected with Mr. Arturo Bours Griffith, a political figure in Mexico.

169. The Attorneys for the Petitioner disagreed and in their letter of 11th February 2021 by reference to the rights of shareholders as set out in the CEM, stated that the representation made was that the general meetings could be requisitioned by shareholders with not less than one half the voting shares by reason of the NAV per share. This they said was supported by Article 29.4, where on a poll the vote is carried by the NAV per share and not on the basis of one share one vote. It was suggested that Article 29.4, which refers to a requisition of members holding a simple majority of the votes was to be interpreted in the light of this. It was urged that the Petitioner held a majority by NAV, this given the initial value of its shares and the recent performance of the share class.

170. The response which they received on 16th February 2021 is that the Requisitionists between them held fewer than 35% of the voting shares as defined in Article 29.1 and that Article 26.4 provided for the convening of a meeting at the request of members holding a simple majority of the shares. The Petitioner's argument is that in asserting this, the Company had resiled from the representation made in the CEM and was interpreting the MAA in a manner which is inconsistent with the CEM[61]. Consequently, on the 19th February 2021, the Petitioner filed an Originating Summons in relation to the failure to convene an EGM.

171. On the 23rd February 2021, Mr. Drankiewicz wrote advising of the further partial redemption of 50% of the shares. The Petitioner requested but the Company refused to provide an undertaking not to redeem any additional shares pending the hearing of the Originating Summons. Attorneys on behalf of the Company advised the Petitioner that the redemption would affect all investors in the Fund and was being done for financial reasons and the Petitioner was not being targeted.

[61] Paragraphs 67 of the Affidavit of Mr. Ferrer dated 8th March 2021

172. The evidence of Mr. Guilfoyle confirms that as at 29th January 2021, the Requisitionists had investments of $18.9 million which was 62.4% by value of the Fund's net assets but only 35.4% of the shares. Together they held 5,689 shares out of a total of 16,063 shares.

173. I shall consider the issue of construction in the section below.

VI) ATTEMPTED TO OBFUSCATE THE FLAWED BASIS FOR REFUSAL

174. Two factual issues emerge with respect to this ground. Both parties agree that there is an issue as to the construction of the provisions of the CEM and MAA. By Article 26.4 of the MAA a meeting may be called by shareholders holding a simple majority of the shares, one share, one vote. Article 29.4 states that on a poll, voting rights are calculated by reference to the NAV. However, the CEM states that general meetings of the voting Shareholders will be called at the request of the Shareholders holding Common Shares that in aggregate represent not less than one half of the votes entitled to be cast on a poll at a general meeting[62].

175. The factual issue arising is whether as at February 2021 after the first partial redemption the Trust had a majority of shares in number or in NAV. The Petitioner's position is that the CEM applied and that as at that date before the second partial redemption it held a majority by NAV, its case is that the second partial redemption was designed to remove its majority. The Company's argument in part is that the Articles apply and before the second partial redemption, the Petitioner had no majority by number which was capable of being destroyed.

176. Mr. Drankiewicz's evidence[63] on this is that the Requisitionists did not hold a simple majority of the shares. They held only 5,689 of the 16,063 voting shares. He refers to the audited financial statements for 2019 and states that their analysis that they held the majority of voting shares does not take into account the partial redemption in January 2021 and the fact that the Company had gained additional investors since August 2018.

[62] Hearing Bundle, page 210, CEM at page 25
[63] Hearing Bundle, pages 959 and 960, First Affidavit of Kristopher Drankiewicz dated 1st April 2021, para-92

THE ARGUMENTS

177. Counsel for the Petitioner submitted that the MAA must be read as a whole. Article 29.4 plainly says that the calculation is based on the NAV and that to interpret it differently would mean one interpretation for voting and another for convening an EGM. Counsel submits further that *"the Company's erroneous approach would allow shareholders who had no prospect of passing resolutions at the EGM to convene an EGM, and at the same time deprive shareholders who had sufficient votes to pass resolutions to call an EGM for that purpose."* The Petitioner says that even if the interpretation is different and the Company is correct that it is one share, one vote, the Company is in breach of the representation made in the CEM.

178. Counsel for the Petitioner also submitted that on the 9th February 2021 when the Company said that the Petitioner did not have enough shareholding to convene an EGM, it did not say how it had counted the votes, it did not say that it had counted the votes on a different basis than the NAV. It was not until 16th February 2021 that the Company said that the basis was one share one vote, and this was after the Petitioner had sought further information.

179. Counsel for the Company submits that the initial request of the Requisitionists of 28th January 2021[64] referred to being the holders of a simple majority of voting shares. This they did not have.

180. I consider the arguments of Counsel for the Company on the point of construction to be strong ones. By reference to Articles 26 and 29, Counsel argues that the Petitioner is conflating rights of requisition with voting rights on a poll if a meeting is convened. Counsel says that while the Petitioner seeks to rely on the CEM, s.25 of the ***Companies Act*** provides for supremacy of articles in stating that such articles shall bind a company. Counsel notes and I accept that the CEM refers to the Articles and states that all shareholders are bound by these. It also states that the CEM does not purport to be a complete description of the Articles.

181. Reliance is placed by the Company on the judgment of the Privy Council in ***Culross Global SPC Limited v Strategic Turnaround Master Partnership Limited.***[65] This is said to confirm the supremacy of articles as definitive of the legal rights and the legal relationship. In the case of ***Culross***, the board of the respondent company voted to suspend all redemptions due to what

[64] Hearing Bundle, page 729
[65] [2010] UKPC 33

it said was the volatile and illiquid state of the relevant sector. The suspension had the effect of retrospectively altering the outcome of a previously issued redemption notice. The respondent relied on certain articles which allowed for the suspension of redemptions, but which were unclear in that they did not appear to relate to circumstances where a notice had already been issued or a redemption date had not passed. The CEM of the company expressly stated that it was not to constitute legal advice and that investors were deemed to have notice and be bound by the provisions of the articles.

182. The Court was of the view that where the articles referred to only one specific provision of the CEM, the argument that both could be read together was not sustainable. The Court noted that this was not a shareholder claiming the benefit of a description of the articles in the CEM but the respondent company seeking an advantage from its own mis-description of the articles in the CEM. It was stated:

> *"The Board adds that it is not concerned with a situation in which an investor is claiming the benefit of the effect of the description of the articles given in the CEM. Despite the disclaimers in the CEM, it may be that an investor who had relied upon the description in the articles might have an arguable case for being entitled in one way or another to do so. In the present case, it is the Respondent itself that is seeking to draw advantage from what appears to the Board to be a discrepancy between its own description of the articles in the CEM and the reality; and in this situation the Board sees no basis for entitling the company to rely in its own favour upon its own mis-description of its own articles." Paragraph 32*

183. With respect to another provision in the CEM which was said to extend power beyond those in the Articles, the Court said that the description in the CEM was of no legal effect as against investors such as the appellant. The Articles applied.

184. Counsel for the Company's final point on this is that even if the Court disagrees, this is no more than different views on a point of construction and does not amount to serious misconduct so as to wind up the Company.

185. In this case, while I accept the argument of the Company that the MAA may be definitive of the position, I also accept the arguments of Counsel for the Petitioner that the Company incorrectly represented the position in the CEM and misled the Petitioner as to its rights. I do not agree with the Company's argument that this is simply a disagreement about construction which cannot rise to the level of seriousness. The fact is that it appears on the evidence that Mr. Drankiewicz acted unilaterally in the face of the disagreement being referred to the Court by

way of the Originating Summons, to ensure that whatever the outcome the Petitioner would not have a majority. At the time he acted there was a majority by value to be destroyed. His action meant that even if the Requisitionists did manage to join with others for a majority by number of shares to be able to call an EGM, they would not have the majority votes on a poll.

VII) ACTED FOR IMPROPER PURPOSE AND OR IN BREACH OF MAA IN THE REMOVAL OF VOTING RIGHTS

186. On the 4th March 2021 the Company issued a Conversion Notice[66] which stated that pursuant to Article 29.3 the shares of the Petitioner were converted to non-voting shares coupled with an entitlement to redeem. The resolution of the Board of Directors signed by Mr. Drankiewicz and Ms. Macias based the decision in part on the non-disclosure of the status of four Bours family members as politically exposed persons. It was stated that the proposed appointment of the four new directors was not in the interests of the Company. This could expose the Company to unacceptable risk, additional regulatory burdens and give the appearance of association with persons who were alleged to be party to certain tax fraud schemes.

187. In cross-examination Mr. Ferrer agreed that part of the basis upon which the Petitioner subscribed for these shares was that the shares could be converted without conditions. He accepted that he had signed the subscription agreement on behalf of the Petitioner on the 1st August 2018 acknowledging that he had read and reviewed the CEM[67]. He also accepted that the agreement contained clause 13 by which the subscriber agreed that "*the Fund in its sole discretion, may issue non-voting shares to the subscriber or convert a Subscriber's voting shares to non-voting shares in each case as set out in the Explanatory Memorandum*" [68].

188. It was put to him that the Articles also provided for conversion in Article 29.5 so that all three constitutional documents demonstrate that the Petitioner invested its money on terms that its voting shares could be converted to non-voting shares. Mr. Ferrer's response was that Article 29 referred to conversion if necessary or advisable to avoid certain adverse effects.

[66] Hearing Bundle, page 1496
[67] Hearing Bundle, page 1147
[68] Hearing Bundle, page 1158

189. Mr. Ferrer's attention was drawn to clause 17 of the subscription agreement[69] which is a provision prohibiting the investment of senior political figures unless the Fund is specifically notified in writing. It was put to him that Mr. Arturo Bours Griffith who is a beneficiary of the Trust had become a sitting Senator and the Company had not been notified. His answer was that just as Mr. Drankiewicz knew that Eduardo Bours, father of Mr. Bours Laborin was a former governor of a Mexican State, he also knew that Arturo Bours was a Senator. There was no written notification. Mr. Drankiewicz knew because of communication with Mr. Bours Laborin. He accepted that Ricardo Bours Castelo is also a beneficiary of the Trust. At the time Mr. Castelo was a registered candidate for the office of Governor, the Petitioner did not inform the Company about this. He accepted that he did not notify the Company in writing that Jose Bours Castelo is a prohibited person. He said that was because he did not know at the time[70].

190. He was asked to state the reason that upon receipt of the Notice of Conversion of 4th March 2021 which offered full redemption, the Petitioner did not take up this offer when it had sought full redemption in January 2021. His answer was that it was because "the moments were different". In January their rights were not taken from them as it was in March. They were seeking the best for the investment and rejected the offer not only because of the terms of the investment but because of all the violations that had been taking place. He denied the absence of commercial rationale behind this decision and denied using it as a personal vendetta against Mr. Drankiewicz. On 5th March 2021 they filed the Petition.

191. His attention was drawn to the subscription agreement by which the Petitioner agreed not to file a winding up petition against the Fund in connection with redemption rights.[71] He said that the Petitioner has not breached its obligations.

EVIDENCE OF MARIO BOURS LABORIN

192. Mr. Bours Laborin's evidence on this aspect is that the notification of the 4th March 2021 of the intention to exercise a power to remove the Petitioner's voting rights all together is consistent with other acts taken by the Company to improperly prevent the Petitioner from exercising its voting rights. He says that the reasons put forward by the Company are not

[69] Hearing Bundle, page 1159
[70] Transcript 2, page 76
[71] Hearing Bundle page 1161

valid.[72] As to the reference to alignment of interest in the Notice, he notes that in 2019 the Petitioner alone held more than 72% of the value in the Company and was the holder of the largest economic interest in it. According to the annual financial statements the Requisitionists together held nearly 80% of the economic interest of the company at the close of 2019.

193. He says that Mr. Arturo Bours Griffith was present at the lunch in Mexico City at which the beneficiaries and representatives of the Petitioner were present. At the time he was a candidate for political office and was referred throughout the luncheon as the Senator and the fact that he was running for political office was discussed. Mr. Bours Laborin says that the suggestion of Mr. Drankiewicz that he was not aware that Mr. Arturo Bours Griffith was a politically exposed person is incorrect. According to Mr. Bours Laborin the Petitioner previously offered to provide further information as to the source of investment funds but the Company never sought this.

194. In cross-examination he said that at the luncheon Mr. Arturo Bours Griffith had just been elected a few weeks past so there was a lot of conversation about the elections. He was asked whether the conversations were in Spanish, and he said that he thinks that they switched back and forth to accommodate Mr. Drankiewicz.

EVIDENCE OF KRISTOPHER DRANKIEWICZ

195. Mr. Drankiewicz's evidence is that the Petitioner's complaint about his role in the management of the Company is not genuine or valid. He details his experience and expertise in investment analysis and management and states that his role and expertise is central in the Company. This is stated in the CEM. He describes it as being akin to that of a portfolio manager and says that this is common and standard industry wide.

196. He says that the Petitioner attempted to take over by seeking to flood the board with affiliates of the family and the 4th March 2021 resolution to convert the Petitioner's shares pursuant to Article 29.3 was passed by the Board in the face of the Petitioner's continued aggression. He believes that this was acting bona fide in the best interest of the Company. In his oral evidence he said also that the Company was moving to be in line with other funds because it is their

[72] Hearing Bundle page 886

understanding that no other funds of similar size have voting shares. He said that the option for full redemption remains open to the Petitioner.

197. Mr. Drankiewicz said that he was aware of past political activity of members of the Bours family but there was a failure to disclose the recent attainment of political office of three members of the family after the investments were made. This is said to be a material breach of the subscription agreement completed by the Petitioner.

198. In cross-examination he agreed that the resolution put forward by the Requisitionists did not involve him being removed as a director or changing the Investment Manager. He did not agree that the proposed new directors would be suitable candidates being senior officers of a public company. He said that the first time he became aware that Arturo Bours Griffith was a senior political figure in Mexico was on 15th June 2020. This was by way of an email from the Administrator who provided information from a world check search[73]. He said that he did not know it to be true that he only raised this in February 2021 and that it is not correct that he knew it prior to that day which is the reason that he did not raise it before.

199. He was cross-examined about the position with the shares as at December 2020 as shown on the audited financial statements.[74] He agreed that treasury shares cannot be voted as per Article 32 of the MAA[75]. His attention was drawn to the statements and a series of calculations put to him. These were that the total number of shares issued as at 31st December 2020 was 14,250.23. Included in this number are 1,324 shares which are identified as Sub-Class Treasury, leaving a balance of 12,926 non-treasury shares. It was further put that the Trust had 5,737.46, 44% of non-treasury shares and JI Family Holdings had 1,000 shares or 7%. Together the two had just over 50% of non-treasury shares. He said that although the 1,324 shares were listed as treasury shares, they were not owned by the Company but by outside investors and thus were voting shares.

200. He said that it is correct that at the end of 2020 the Trust and the other Bours family members did not have a majority by number but they had a majority by value. He said that he remembers that the Trust had filed an Originating Summons on the 18th February 2021 to have the issue

[73] Hearing Bundle page 1497
[74] Supplemental Hearing Bundle page 90
[75] Transcript 3, page 125

determined by the Court. He said that he understood that if the Court found in favour of their interpretation, they would be able to convene an EGM and vote their resolution through. He said it is correct that he did not want the Trust to convene a meeting to nominate directors. This would not be in best interest of the Company. He agreed that five days after the issue of the Originating Summons, he wrote to the Company to redeem their shares.[76] This is what he said:-

"Q. And you didn't want the trust to convene a meeting.
Ans. Yes, we've established that holding a meeting to nominate the directors would not be the best (inaudible).
Q. But ultimately it is a matter for the shareholders, isn't it, as to who they want to vote to be a director?
Ans. Yes. They (Inaudible).
Q. But you didn't want them to vote to nominate new directors.
Ans. We didn't want these directors being nominated."[77]

201. He agreed that the 4th March 2021 Notice was only sent to the Trust and was not applied to any other shareholders[78]. He said that it is correct that at this point the Trust no longer had a majority by number or by value[79].

202. He said that they were being prevented from voting because they did not agree with what they were trying to do. They were minority shareholders trying to harm the Company. These are some of his answers: -

"Q. Now, by this time, as a result of the redemptions, the Trust no longer has a majority, does it, either by number or value of shares?
Ans. That sounds correct.
Q. So what was the point of taking away their voting rights or their remaining minority position?
Ans. It goes back to the July 2020 compulsory redemption.
Q. So this is another attempt at what you tried to do in July 2020.
Ans. Well, we're not getting them out of the fund, we're removing the voting rights. We offered them the opportunity to take their shares.
Q. So even as a minority shareholder you were not prepared to allow them to vote in the fund.
Ans. A minority shareholder that wants to potentially harm other investors (Inaudible).
Q. This is a company, right? Shareholders propose resolutions. Shareholders vote on them. If other shareholders disagreed with the Trust, then they would vote against it, wouldn't they. Why should the Trust be prevented from voting at all?
Ans. They didn't necessarily need to be prevented from voting.

[76] Hearing Bundle page 1033
[77] Transcript 3, page 130
[78] Transcript 3, page 146
[79] Transcript 3, page 147

Q. *Well, you are preventing them from voting?*
Ans. *In this action, yes.*
Q. *And you are preventing them from voting because you don't agree with what they might do if they were allowed to vote?*
Ans. *We didn't agree, when they wrote the letter back in June about the nuclear option, we didn't agree with that. We didn't agree with circumventing the CEM, which would be harmful for other investors. We didn't agree with that, and in the requisition of the meeting we didn't agree - - the requisition that they would push forward, we didn't agree with the directors that they had nominated.*
Q. *So is it your understanding, as a director of the company - - the director is a fiduciary, isn't it. The director has to act in the best interests of a company, and in the interests of the body of shareholders.*
Ans. *Indeed.*
Q. *So is it your understanding that if you, as a director, don't agree with what a shareholder wishes to do, that it's proper for you to stop them voting?*
Ans. *That's incorrect.*
Q. *But that's what you are doing.*
Ans. *I believe that's not the case.*
Q. *I mean, you are depriving them of the ability to vote because you don't like what it is that they would like to do.*
Ans. *We are giving them the option to leave the fund, if they would like to stay in the fund their shares would be converted to non-voting shares, and the reasons are set forth here."*[80]

203. It was put to him that the second person named as a political figure, Mr. Ricardo Bours Castelo was not in fact a senior political figure at that time, he was simply a candidate for election. When asked whether he was elected, Mr. Drankiewicz replied, that he did not know. It was suggested to him that the third person Jose Bours Castelo had not in fact held political office as stated in the Notice. He replied that this was in Google somewhere.

204. He was pressed as to the references in the resolution to other businesses being impacted because of political figures and asked what this had to do with the Bours family, his answer was that he did not know. When questioned as to the rights of shareholders to vote as to whether a particular person should or should not be appointed to the Board, he said that the shareholders did that on the date of their subscription. As to their right to vote on who should be directors, his reply was that it is his job to protect all investors from an investor who wants to flood the board with their affiliated parties and can potentially take negative actions that would hurt the investors.

[80] Transcript 3, pages 147-149

205. He was asked: -

> *"Q. And it is not for you as a director of the company to prevent a shareholder from voting on that question.*
> *Ans. It is my duty as a director to protect all investors in the fund.*
> *Q. And your evidence is that your duty as a director extended to preventing certain shareholders from voting their shareholding?*
> *Ans. In this case, yes.*
> *Q. I mean, the purpose of this entire exercise was to disable the trust from having a voice as a shareholder (Inaudible)?*
> *Ans. The purpose of this was to protect all the investors in the fund."*[81]

206. He denied that his motive through all the sequence of events had been to ensure that the Trust and other shareholders could not displace his control. He denied that he had refused to provide the Trust with information in order to protect his position on the Board.

THE ARGUMENTS

207. Counsel for the Petitioner points out that by the CEM the rights attached to the class of Common Shares may only be varied or abrogated with the consent in writing of the holders by majority vote at a meeting of shareholders of such class[82]. The submission is that the basis for the action was to protect and preserve their personal positions and maintain control of the Company. The action which was taken altered and deprived the Petitioner of its voting rights.

208. Counsel for the Company submits that the Petitioner subscribed in full knowledge and agreement of its powers in the MAA, CEM page 29 and Clause 13 of the Subscription Agreement. These all provided that the power of conversion was in the sole discretion of the Company. The power was exercised for good reason, in good faith, bona fide in the interests of the Company and the option for full redemption was given. This would have meant a value of $7.79 million in contrast to the much lower value as at June 2022. The further submission is that the subscription agreement provided that the Petitioner would not file a just and equitable winding up in connection with its redemption rights.

[81] Transcript 3, pages 154
[82] Hearing Bundle page 210

209. I consider this to be the most serious of the allegations. Having heard the evidence of Mr. Drankiewicz I do not accept that the reasons set out by the Board in giving the Notice of Conversion were genuine. Mr. Drankiewicz well knew at the time of the investment that this was a family with political connections past and present. Mr. Drankiewicz received a world check report in June 2020 from the Administrator as to the political status of one member of the family. While one has to be careful about drawing inferences or conclusions from the absence of evidence, I have seen nothing to suggest that Mr. Drankiewicz did or wrote anything about this. His vague responses when challenged about the status of the others is telling. Perhaps it is a minor detail, but the Trust had not been investing more money over the years for new sources of funds to be the subject of inquiry. I have set out above the detail of Mr. Drankiewicz's answers which appear to show his mindset and the true reason behind the issue of the Notice.

VIII) PROVIDED FINANCIAL INFORMATION INDICATIVE OF APPARENT FINANCIAL IRREGULARITIES

210. The essence of the complaint under this heading is manipulation of valuations and overcharging of expenses as well as a cap on expenses which benefited early investors to the detriment of the Petitioner.

211. The Petitioner says that the valuation of the shares as at September 2020, as reflected on the monthly statement for 30th September 2020[83] was US$13.8 million which was undervalued by $5 million. The December 2020 valuation statement showed a valuation balance of US$19.9 million[84]. The evidence of Mr. Bours Laborin is that the monthly investor statements were misleading because of the valuation dates adopted. He says that the Company appeared to select historical dates which did not accord with the publicly available values of Accolade shares. In the monthly investor statements for November and December 2020, the Company used a higher underlying share price than suggested by publicly available information which meant that its yearly carried interest of 20% was calculated at a higher amount[85].

[83] Hearing Bundle, page 1089
[84] Hearing Bundle, page 1092
[85] First Affidavit dated 22nd April 2021

212. By his Third Affidavit dated 31st August 2022, Mr. Guilfoyle provides an explanation that the reduction in the Company's valuation of the Accolade shares during the last quarter of 2020 was due to a 30% discount to reflect the fact that they were not freely tradeable and the rise in value was due to the fact that the lock up period had ended. Mr. Bours Laborin says that this explanation provides some clarity but does not allay the Petitioner's concerns about the conduct of management during this period. He says that he does not accept that it was necessary to reduce the value of the shares by as much as 30% during that period and to reduce the Petitioner's voting rights.

213. In cross-examination Mr. Bours Laborin's attention was drawn to the financial statements for 2018[86]. He accepted that the complaint is that the management fee charged for that year was 2.16% to 3.37% which had been allocated to Accolade when it should only have been 1.8%. It was put to him that the higher amount was for total expenses, management fees and other expenses such as administrative fees, interest expenses, professional fees and other costs. His response was, "*I think you are right".* When questioned about whether he now accepts that there is no basis for having that concern, he answered that, we do not know that. Then he said that the Petitioner had only been in the Fund for four months in 2018 yet was charged 2.16%.

214. In answer to the question whether he had any evidence that the Company charged the Petitioner more than 1.8% of the management fee he said that he did not have any evidence to the contrary. He said that he can only speak to his Affidavit not to the Petition, the Petition was filed by the Petitioner.

215. He was also asked whether he understands the rationale for capping expenses at 1% for early investors. He said he would question the motives because the early investors were basically Mr. Drankiewicz and his family and it seemed that they were reimbursing themselves. His attention was drawn to Notes to the financials, which indicate that the practice applied up to December 2017. He was asked to explain how this affected those who invested eight months thereafter. He said that he believed this practice continued on while the Petitioner was investing. He was asked to indicate the evidence of this. He said that this is his opinion[87].

[86] Hearing Bundle, pages 629 to 687, 655, 656
[87] Transcript 2, page 149

216. It was suggested to him that the illiquidity valuation discount was a simple explanation for the change in value and that there was no manipulation of the valuations. He said that he did not believe this to be true. He acknowledged and agreed that it is his belief in the dishonesty of Mr. Drankiewicz that convinces him that this is all dishonest. He said that they were aware at the time that the Petitioner wanted to call a shareholder meeting. He thought that this was convenient, that they were allowed to do this but they used that to depress the value so that the Petitioner could not call an EGM. He said that at the time there were negotiations about valuations, and he questions the motives. In response to the suggestion that the EGM was requested on the 28th January 2021, this valuation was a month earlier and so this had nothing to do with the EGM, he said he did not agree because in an email sent earlier over the summer, they said that they wanted to appoint an independent director through an EGM. He says that he believes that the explanation as to the lock up valuation of 30% discount is a convenient explanation and not necessarily the right one.

EVIDENCE OF KRISTOPHER DRANKIEWICZ

217. Mr. Drankiewicz's evidence on this is that the expense reimbursement for early investors was fully disclosed and the Petitioner has misunderstood the nature of this. He said that on behalf of the Investment Manager, he made a decision to limit or cap the expenses payable by early investors. This benefited early investors but was to the detriment of the Investment Manager which did not receive management fees to which it was entitled. He says the capping of expenses, fee offsets and re-imbursements are common practices in the investment management industry.

218. Mr. Drankiewicz was cross-examined about the 2019 financial statements which show that Accolade pays on average 2.61% of fund expenses. This is made up of 1.8% of management fees and 0.81% of the operating expenses. He was asked about the comparison with two other classes, Class A Subclass Next series, they pay 0.76% and Subclass Uno series which pays 0.62% and asked to explain why those classes were paying a much lower management fee than the Accolade class.

219. He said that contract expenses are less for different classes of shares and if they are shares which are receiving counter offsets to expenses, the expenses would not be the same. He denied the suggestion that both these classes are classes of investors who are himself or his affiliates

or affiliates of the Investment Manager. He explained that it is possible that affiliates have much lower fees because they do not pay management fees. The suggestion to him was that classes affiliated with him were getting a much better deal than the Accolade Share Class which was paying all the expenses.

EVIDENCE OF RONAN GUILFOYLE

220. The Company places significant reliance on the unchallenged evidence of Mr. Guilfoyle. I have found this evidence to be a conclusive response to this aspect of the Re-Amended Petition. The evidence comes mainly from his Third Affidavit. He states that as at the 31st August 2022 he had been a director for more than a year and he is satisfied that the Fund had been and continues to operate in a professional manner.

221. Mr. Guilfoyle sets out his extensive qualifications and over fifteen years' experience as a director in the investment funds industry. He details the steps he has taken since appointment to familiarize himself with and to inquire into the affairs of the Company. He says that he has been given unfettered access to the books and records of the Company and of its service providers. He says that he derives a significant level of comfort from the fact that there are three checks and balances on the exercise of calculating the NAV of the Fund, the Administrator, the Auditor and another company which provides support services (IQ-EQ). He says that the Company has received unqualified audit opinions and its financial statements are said to be a fair presentation of accounts and accounting principles are observed.

222. He says that he has looked into the allegations of financial irregularities. On the management fees, he states that he considers the management fee rate of 2% to be standard fees for a fund of this size. He says that investors are also required to contribute towards operational expenses as set out in the CEM. These will be allocated among all share classes. For practical reasons the overall expenses will be higher than the agreed management fee. This is standard practice. The Petitioner's complaint about fees does not take into account that additional fees will be payable.

223. With respect to the reimbursement arrangements, he states that the Petitioner never paid more than 1.8% for management fees. He says that he does not believe that the expense cap for early investors harmed the Petitioner in any way. It ended in December 2017, well before the

Petitioner invested. This means he says that no part of the Petitioner's capital account was ever used to benefit prior investors.

224. As to the alleged manipulation of valuations, he states that the management fee is based on the NAV at the beginning of each calendar quarter. Thus, if the NAV was undervalued it would have resulted in a lower management fee. He also said that the progressive discount of 30% which was capped to the share price during the lock up period is in line with general accounting principles, the valuation practices of other funds invested in Accolade Inc., and the Company's valuation policy. As to the complaint about the different valuations in the monthly statements in November and December 2020, this is due to the changing status of the shares as previously explained. He states that there was no financial incentive to manipulate the valuations as the Investment Manager does not receive an incentive allocation until there is a disposition of the investment.

THE ARGUMENTS

225. The Petitioner says that the explanation provided is belated and it has no trust and confidence in the management of the Company. It says that the explanation should be investigated and verified by an independent liquidator. The Petitioner says that where it is clear that Company management may have acted in breach of their duties, there is no good reason why their explanations should be accepted. An independent liquidator should be appointed.

226. Counsel for the Company submitted that the agreed management fees were 1.8%. This is the amount which was charged. The reimbursement agreement in respect of early investors had no effect on the agreed management fee of the Petitioner. As to the allegation about the investor's statements and the valuations, Counsel refers to the explanation given by Mr. Guilfoyle and submits that there is nothing nefarious about this.

227. In my view the evidence of Mr. Guilfoyle is clear and unchallenged. The evidence of Mr. Bours Laborin on this was vague at best. On the whole of the evidence, there is nothing supportive of financial irregularities which rises to the level of justifying an investigation.

DISCUSSION

228. The first question for consideration is this. Is the Petition filed in breach of the contractual agreement not to file a petition in connection with redemption rights? There is evidence from Mr. Ferrer about not being listened to and seeking "to exit the Fund". Mr. Bours Laborin spoke of wanting to find a way for the investors that he had brought into the Fund to leave. Counsel for the Company submits that on any fair interpretation the Petition is in connection with redemption rights. It is said that the Petition was filed after the Conversion Notice of the 4th March 2021, which gave a full right of redemption. Counsel for the Petitioner says that this was not about redemption rights because the Petitioner never had any such rights.

229. In my view, on a fair interpretation of the evidence this was not about redemption rights. It is correct that the Petitioner did wish to have more management control or greater oversight of the management of the investment. Mr. Ferrer's evidence is that the presentation which had been made to them and which was exhibited, promised the ability to exit once the IPO had taken place. The refusal to allow them to do this in January 2021 must surely have appeared to be confusing and inconsistent with the understanding which they had been given. The action taken thereafter was to try to call an EGM. There was a further partial redemption which proceeded despite the filing of an Originating Summons and a request not to proceed. The Petition was brought following what appears to have been the tipping point which was removal of its voting rights as shareholders. Given the chain of events I do not accept that this Petition was filed in connection with redemption rights and that it is in possible breach of the contractual agreement. On the whole of the evidence I conclude that it is not.

230. Having answered the preliminary question, I turn to the next question which is whether the just and equitable jurisdiction is properly invoked in the circumstances of the instant case.

231. McMillan J in the case of ***In the Matter of Torchlight Fund L.P.***[88] provides a helpful summary of the just and equitable jurisdiction of the Court in the Cayman Islands.

[88] FSD 103 of 2015, judgment dated 25th September 2018

> *"20. First, it concerns courses of conduct which "substantially impair" those protections to which shareholders, both under statute and contract, are entitled.*
> *21. Secondly, we see an allusion to the interplay of statute and contract…*
> *22. Thirdly, there must not merely be a lack of confidence but a "justifiable lack of confidence".*
> *23. Fourthly, this lack of confidence must be grounded on conduct of the directors (or in this instance the GP) in regard to the company's business …*
> *24. Fifthly, it is remarked that whenever the lack of confidence is rested "on a lack of probity in the conduct of the company's affairs", the former is justified by the latter. It would appear from this comment that in the Loch case lack of probity imports some kind of dishonesty or bad faith. Subsequently the term has been given a somewhat wider meaning, so as to encompass what can broadly be termed as very serious issues of mismanagement…*
> *25. Sixthly, at page 796 Lord Shaw states that the application must succeed on the "broad ground" that confidence in the company's management was most justifiably at an end. Hence the Court looks at matters broadly rather than narrowly.*
> *26. In conclusion, this authority emphasises both substantial impairment of shareholders' rights and protections and circumstances where confidence in management is most justifiably at an end. In other words, winding–up is a course of action which a court should only take in an extremely serious situation and not otherwise."*

232. In considering the overall case I am mindful of the high threshold of seriousness which the Petitioner has to satisfy, if there is to be a finding that it is just and equitable that this successful and profitable Company is to be wound up. The Petitioner's case is put on the basis of lack of probity in its wider sense. It is that management has acted improperly and in bad faith. Counsel for the Petitioner said that there is substantial impairment from the uncontradicted facts that in June of 2020, the Petitioner was a majority shareholder. It had 5,540 voting shares, 70% by value in the Company. In March 2021 it is a minority shareholder with only 2,294 non-voting shares.

233. Did management act improperly and in bad faith? I have considered the submissions of Counsel on the evidence. It is correct as Counsel for the Company points out that the events of the 17th January 2020 were pivotal. Counsel goes further to say that everything flows from this and that Mr. Bours Laborin has "got his hand all over" this Petition despite claiming that it is separate. I find it difficult to agree with this submission. Mr. Bours Laborin appeared to me to be an honest and credible witness, as did Mr. Ferrer. In most cases there were contemporaneous documents supportive of their evidence. I did not find the leaked email to be unreasonable in its suggestion and exploration of options. I was particularly struck by the efforts of Mr. Ferrer

to reach out to Mr. Drankiewicz to provide some comfort and reassurance of the Petitioner's position in the aftermath of that email being mistakenly copied to him.

234. Whether the perception of Mr. Drankiewicz's dishonesty was correct or not, I think the focus has to be on the actions of the directors and the motives behind their actions. It is the director who is the fiduciary not the shareholder. In the case of ***Eclairs Group Ltd. v JKX Oil and Gas Plc; Glengary Overseas Limited v JKX Oil and Gas Plc***[89], a case to which I shall return, Lord Sumption said this:

> *"40. ...Shareholders owe no loyalty either to the company or its board. Within broad statutory limits… they are entitled to exercise their rights in their own interest as they see it and to challenge the existing management for good reasons or bad."*

235. In that case the issue before the House of Lords was the circumstances in which the board of JKX could restrict the exercise of rights attaching to shares and the circumstances in which the exercise of the board's power could be challenged on the ground of collateral purpose.

236. Having received a request from Eclairs for the convening of an extraordinary general meeting to consider the appointment of three new directors and the removal of its chief executive and a director, JKX feared that it was the target of a takeover by certain individuals. It responded by issuing disclosure notices to Eclairs and some individuals. Where a statutory disclosure notice had been issued and not complied with, article 42 of the company's memorandum and articles empowered the board to issue a restriction notice. This it did. The effect of the restriction was to suspend the right attached to the shares to vote at a general meeting. The board put forward five resolutions to be considered at the meeting which were opposed by Eclairs. Having heard evidence from six of seven directors who participated in the decision to issue the restriction notices, the Court at first instance concluded that the primary purpose in issuing them was to influence the fate of the five resolutions which the board wished to bring. They saw it as being to the benefit of the company, as "hindering the cause of the raiders." The Court therefore set aside the restriction notices.

237. On the appeal which considered whether the notices should have been set aside by the Judge, the Court gave detailed consideration to the proper purpose rule. The rule is said to be the principle by which equity controls the exercise of a fiduciary's power. Lord Sumption stated:-

[89] [2015] UKSC 71

> *"Ascertaining the purpose of a power where the instrument is silent depends on an inference from the mischief of the provision conferring it, which is itself deduced from its express terms, from an analysis of their effect, and from the court's understanding of the business context."*

238. It was said that "the inescapable inference was that the restriction of shares was ancillary to the statutory power to call for information" Lord Sumption stated that the concern is with an abuse of power, by the fiduciary doing acts which are within the scope of the power but which are done for an improper reason. The test is a subjective one and it is the state of mind and motives of those who acted which are important. It was said that:-

> *"However difficult it may be to draw in practice, there is in principle a clear line between protecting the company and its shareholders against the consequences of non-provision of the information, and seeking to manipulate the fate of particular shareholders' resolutions or to alter the balance of forces at the company's general meetings. The latter are no part of the purpose of article 42. They are matters for the shareholders, not for the board." (paragraph 33)*

239. The role of the proper purpose rule in the governance of companies was said to be fundamental to the constitutional distinction between the respective domains of the board and the shareholders. This is one of the main means by which equity enforces the proper conduct of directors[90]. Lord Sumption stated: -

> *16. A company director differs from an express trustee in having no title to the company's assets. But he is unquestionably a fiduciary and has always been treated as a trustee for the company of his powers. Their exercise is limited to the purpose for which they were conferred. One of the commonest applications of the principle in company law is to prevent the use of the directors' powers for the purpose of influencing the outcome of a general meeting. This is not only an abuse of a power for a collateral purpose. It also offends the constitutional distribution of powers between the different organs of the company, because it involves the use of the board's powers to control or influence a decision which the company's constitution assigns to the general body of shareholders. Thus in Fraser v Whalley (1864) 2 H & M 10, the directors of a statutory railway company were restrained from exercising a power to issue shares for the purpose of defeating a shareholders' resolution for their removal. In Cannon v Trask (1875) LR 20 Eq 669, which concerned the directors' powers to fix a time for the general meeting, Sir James Bacon VC held that it was improper to fix a general meeting at a time when hostile shareholders were known to be unable to attend. In Anglo-Universal Bank v Baragnon (1881) 45 LT 362, Sir George Jessel MR held that if it had been proved that the power to make calls was being exercised for the purpose of disqualifying hostile shareholders at a general meeting, that would be an improper exercise of the directors' powers. In Hogg v Cramphorn Ltd [1967] 1 Ch 254,*

[90] Ibid paragraph 37

Buckley J held that the directors' powers to issue shares could not properly be exercised for the purpose of defeating an unwelcome takeover bid, even if the board was genuinely convinced, as the current management of a company commonly is, that the continuance of its own stewardship was in the company's interest. The company's interest was an additional and not an alternative test for the propriety of a board resolution."

17….But the proper purpose rule, at any rate as applied in company law, has developed in a different direction. Save perhaps in cases where the decision was influenced by dishonest considerations or by the personal interest of the decision-maker, the directors' decision will be set aside only if the primary or dominant purpose for which it was made was improper. To some extent this is a pragmatic response to the range of a director's functions and the conflicts which are sometimes inseparable from his position. The main reason, however, is a principled concern of courts of equity not just to uphold the integrity of the decision-making process, but to limit its intervention in the conduct of a company's affairs to cases in which an injustice has resulted from the directors' having taken irrelevant considerations into account.

21…..One has to focus on the improper purpose and ask whether the decision would have been made if the directors had not been moved by it. If the answer is that without the improper purpose(s) the decision impugned would never have been made, then it would be irrational to allow it to stand simply because the directors had other, proper considerations in mind as well, to which perhaps they attached greater importance. …"

240. In the instant case, on the information requests, Counsel for the Company says that Mr. Drankiewicz was standing on his rights as to the information to which the Petitioner was entitled by the CEM in the face of aggression and threats and that what he displayed was a genuine anxiousness about getting into trouble. Having heard Mr. Drankiewicz I am satisfied that he was being deliberately obstructive.

241. Counsel for the Company argues that the redemption Notice had been withdrawn and that there had been four months of peace, no one had called a meeting in mid-January 2020. There had been no correspondence, the only relevant occurrence was the end of the lock up period. Counsel for the Petitioner argues that Mr. Drankiewicz had simply been awaiting the opportunity to act which arose after the lock up period ended, his earlier attempt at 100% redemption having been stopped by Court intervention. Counsel says that he was now endeavouring to achieve the same objective but to proceed cautiously in smaller steps which were designed to reduce the Petitioner's voting power.

242. Even allowing for the benefit of the doubt on the first partial redemption of 20% in January, the sequence and timing of events with respect to the second gives rise to the inescapable inference that the intent was to ensure that the Petitioner no longer had a majority by value.

The evidence is that despite what was said to be a commercial motive to reduce risk, only the Petitioner's shares were redeemed, and other shareholders were treated differently.

243. It was patently clear from the evidence of Mr. Drankiewicz, particularly in cross-examination, that he was concerned about what he saw as an attempt to take over the Company and how the Trust might vote its shares should it have the opportunity to do so. He does see himself as critical to the Company, and as carrying out an important role which ought not to be disturbed. He was visibly and orally resistant to any suggestion that shareholders had a right to vote and to make choices on the management of the Company after they had subscribed. He does not accept that the appointment of directors to the Board is a matter for shareholders at a general meeting.

244. It is evident that this is a mindset which he held, and which informed and underpinned his actions. Counsel for the Company urged at various stages that no EGM had been requested up to January 2021, that there had been calm. Mr. Bours Laborin in his evidence said that emails in 2020 had raised or foreshadowed the issue. I think that the reasonable and inescapable inference is that Mr. Drankiewicz had been on high alert when he memorialised what he says occurred at the 17th January 2020 meeting. He was very likely suspicious at the repeated requests for information as to their equity stake and even more so on receipt of the privileged email. It was suggested in summary that his character is questionable because he sat and read an email which was obviously not meant for him and claims that it could not be deleted because of Company policy. In response it was urged that it is not fair to say that he should not have read the email. He was not sure whether or not it was part of some plan. It was not dishonest or unethical. He does have duties to others in the Company. For the avoidance of doubt, I make it plain that I do not focus on his conduct in reading the email as a basis for reaching a conclusion about him. I do consider that the contents of the email and the possibility of "a nuclear time bomb" was at the forefront and center of his mind thereafter. The reasonable inference is that it brought into even greater focus his fears about a change in management control.

245. I find that with that mindset he did use his powers to obstruct shareholder participation in the Company beginning as early as 2020. This was the primary or dominant purpose when he refused to provide equity stake information, when he sought to compulsorily redeem 100% of the Petitioner's shares, when he effected a partial redemption of 50% and removed its voting

rights. In this context the exercise of the powers of redemption and removal of voting rights, had nothing to do with regular and ordinary business and everything to do with preventing a shareholder from exercising voting rights. Voting rights which the Petitioner had been granted on subscription. There was and has been substantial impairment of shareholder rights in circumstances where the Petitioner was obstructed in exercising its rights and where its majority was reduced and it no longer has voting shares.

246. In summary I have found the conduct of the directors to be primarily for improper purposes and thus in breach of the proper purpose rule in the following factual areas and grounds for the Re-Amended Petition: -

Deliberate obstruction of reasonable requests for information on its percentage equity stake.

Attempting to compulsorily redeem the Petitioner's shares in order to prevent it from convening and voting at a general meeting.

Refusing to convene a general meeting, compulsorily redeeming 50% of the Petitioners shares for the bad faith purpose of ensuring that the Petitioner could not carry a resolution at any meeting.

Removal of the Petitioner's voting rights.

247. The next question I ask myself is whether the conduct underpinned by the ulterior motives which I have concluded were in fact present, gives rise to a *justifiable* lack of confidence. The Court in ***Elder v Elder and Watson Ltd***[91] said this in describing the jurisdiction:

> *"..the essence of the matter seems to be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrust his money to a company is entitled to rely."*

248. I am also mindful of the discussion in the case of ***Baird v. Lees*** referenced above.

[91] [1952] SC 49

249. Counsel for the Company in summary invites the Court to consider the circumstances to which Mr. Drankiewicz responded; that the Compulsory Redemption Notice was in the face of his belief as to the need to protect the Company from the nuclear option. It is also submitted that the Conversion Notice was issued in the best interest of the Company following noncompliance with reporting requirements and the proposal for the appointment of persons who were unsuitable as directors.

250. In ***Hogg and Cramphorn and others***[92] where an allotment of shares was made in good faith for the primary purpose of preventing a person, B from gaining control of the company and ousting the board, it was held that the power to issue shares was a fiduciary power and if it was exercised for an improper motive, it was immaterial that it had been made in the bona fide belief that it was in the interest of the company. The Court stated that: -

> *"It is not, in my judgment, open to the directors in such a case to say, "We genuinely believe that what we seek to prevent the majority from doing will harm the company and therefore our act in arming ourselves or our party with sufficient shares to outvote the majority is a conscientious exercise of our powers under the articles, which should not be interfered with."*
>
> *Such a belief, even if well founded, would be irrelevant. A majority of shareholders in general meeting is entitled to pursue what course it chooses within the company's powers, however wrong-headed it may appear to others, provided the majority do not unfairly oppress other members of the company. These considerations lead me to the conclusion that the issue of the 5,707 shares, with the special voting rights which the directors purported to attach to them, could not be justified by the view that the directors genuinely believed that it would benefit the company if they could command a majority of the votes in general meetings. The fact that, as I have held, the directors were mistaken in thinking that they could attach to these shares more than one vote each is irrelevant. The power to issue shares was a fiduciary power and if, as I think, it was exercised for an improper motive, the issue of these shares is liable to be set aside."*

251. I find the submissions of Counsel for the Petitioner on the facts and application of the legal principles to be persuasive and compelling. I accept as Counsel for the Petitioner argued that the powers exercised in this case, redemption of shares and removal of voting rights attached to shares are fiduciary powers which ought to be exercised for proper purpose. I accept the submission that:-

[92] [1967] Ch. 254

> *"What is an outright breach of fiduciary duty is to stop someone voting in a nomination because he does not like the way that they might cast their vote and that is what is happening here.*
> *...*
> *"This is a clear example of offending the constitutional distribution "because it abrogates to the board who are supposed to be acting in a fiduciary position something which is the decision of shareholders who are entitled to act in their own interests."*

252. In the instant case the right of participation was granted by the ability to vote at general meetings and the right to influence the nature of the vote on a poll by the NAV of the shares. In my view, obstructing or interfering with those rights is at a level of seriousness which calls for equitable intervention. I do not consider that the conduct in the instant case is any less serious because of the attendant circumstances in particular because the directors believed they were acting in the best interests of the Company. The conduct in my view does amount to a visible departure from the standards of fair dealing.

253. I conclude that the directors acted for an improper bad faith purpose, that collectively the matters identified above evidence a lack of probity in the conduct of the affairs of the Company and that there is a justifiable lack of confidence in the conduct and management of the Company's affairs. Individually, the partial redemption in 2021 and the removal of voting rights thereafter would have led me to the same conclusion.

254. The next question I ask myself is whether this rises to a level of seriousness such that the Company should be wound up. I consider the entirety of the circumstances. Counsel for the Company submitted that possibly Mr. Drankiewicz may have made a wrong call in law but that there has never been any serious misconduct or mismanagement such as would justify the end of a successful and solvent company

255. In the case of ***In re A & B.C. Chewing Gum Ltd.***[93], the English Court held that an entitlement to management participation was a basic obligation that if broken the association had to be dissolved. Where management participation had been ensured by the Petitioner's right to appoint and remove directors, a right which the company had thereafter refused to recognize, it was just and equitable that the company be wound up. I accept the Petitioner's argument that voting rights are at this same level of importance.

[93] [1075 1W.L.R 579.

256. In the balancing exercise are the factors that this is a successful and profitable company and there are twenty-seven other shareholders and no complaints from any of them. These are reasons why the Company should not be wound up. On the other side of the scale, the conduct in interfering with the voting rights of shareholders is of a most serious kind. In my view the balance is in favour of the making of a winding up order.

ALTERNATIVE REMEDIES

257. In circumstances where the Court finds that a winding up order may be made, s.95(3) of the ***Companies Act*** permits the consideration of alternative remedies. The Company submitted that the appointment of independent directors has already been progressed. This is not a route that the Court needs to take any further. As to civil proceedings it is submitted that a better alternative and a much more proportionate one would have been for the Petitioner to have brought an injunction in respect of the Conversion Notice. The alternative which was urged upon the Court is s.95(3) (d), the provision for the purchase of shares. Counsel said that this case is about money. This is a Company which invests. It does not have a significant number of employees and infrastructure as do other companies. The Petitioner remains a shareholder and the proportionate way to end the obvious ill feeling would be an order for the purchase of the shares rather than the destruction of the entire Company to the detriment of all its investors. Counsel said that it is difficult to envisage an insolvency where there are not substantial costs and damage to other investors.

258. Counsel for the Petitioner by reference to the case of ***In re H.R. Harmer Ltd***[94], submitted that the burden of establishing that there is a proper alternative remedy falls on the Company. Counsel submitted that none of the alternatives apply or would address the justice in this case. All the matters complained of have already happened and for the Company to continue would perpetuate the director's impropriety. The real complaint said Counsel is that the two are not fit to be directors of the Company because of the way they have acted. The Petitioner has been deprived of having its say. Counsel said that in principle once the Court has accepted that the directors acted without probity, one expects in normal circumstances it to be intolerable for the Company to continue under the management of these directors. While accepting that this case is different and unusual in that it is the directors who are using their fiduciary powers against a

[94] [1958] 3 All E.R. 689

majority, Counsel said that this case is even stronger, the Petitioner is a majority being oppressed by the Board.

259. This is an aspect of the case which has given me much hesitation. I am concerned that the directors acted without probity but there is now an independent director in place who on the evidence is experienced and has been inquiring into the financial affairs of the Company. Nothing has been identified which requires a wide-ranging and deeply probing financial investigation. Going forward, the independent director will have the ability to act as a check and balance on the other directors.

260. Secondly, the practical reality is this, the Petitioner had always intended to end the investment after the IPO. It was happy to accept full redemption in January 2021, but Mr. Drankiewicz refused. As I understand it, from the documents and the evidence given by Mr. Ferrer, the whole point of seeking to exercise some sort of management oversight or control was to be able to know when to exit the investment. Mr. Bours Laborin's evidence also referred to the investors that he had brought into the Company having the opportunity to leave. I think that this evidence is a relevant consideration at this stage. I again consider the other investors and as Counsel for the Company submitted the likely effect upon them of a winding up and the likely costs involved. Weighing all the factors, I have concluded that the justice of this case can properly be met by the alternative remedy of the making of an order providing for the purchase of the Petitioner's shares.

261. Should Counsel wish they will be afforded the opportunity to make submissions on the terms of the order for purchase if these cannot be agreed and with respect to costs.

Dated this the 28th day of August 2023

The Hon. Justice Cheryll Richards KC
Judge of the Grand Court