BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2007/0227

BETWEEN:

BRANTLEY INC.

Applicant/Claimant

-and-

ANTARCTICA ASSET MANAGEMENT LTD.

Respondent/Defendant

Appearances:

Mr Christopher Young of Harney Westwood and Riegels for the Applicant/Claimant
Mr Jack Husbands and Ms Annabel Gillham of Walkers for the Respondent/Defendant

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2007: November 15, 16
2007: November 16; 2008: May 09

JUDGMENT

Introductory

[1] **HARIPRASHAD-CHARLES J:** On 16 November 2007, this Court made the following order namely:

1. Paragraph 2 of the Amended Statement of Claim and paragraph 2 of the Defence be amended by the substitution therein of 78,615 for 62,893;

2. The Defendant has designated Deloitte & Touche to be an appraiser pursuant to section 179(9) (a) of the BVI Business Companies Act, 2004 as amended ("the Act");

3. Navigant Capital Advisors LLC and Deloitte & Touche shall by 10 December 2007 designate a third appraiser pursuant to section 179 (9)(b) of the Act;

4. The parties and the appraisers shall comply with sections 179(9)(c) and (d) of the Act;

5. Judgment be reserved in respect of paragraph 1 of the Application;

6. There be liberty to the parties and to the appraisers to apply;

7. Costs be reserved.

[2] This judgment focuses on the sole remaining issue which is contained in paragraph 1 of the Notice of Application filed on 9 October 2007. The Applicant, Brantley Inc. ("Brantley") applies for summary judgment for the relief set out in paragraph 1 of the Claim Form pursuant to CPR 15 seeking a declaration that unless or until the shares of Brantley in the Respondent Company, Antarctica Asset Management Ltd ("AAM") have been acquired through agreement as to their fair value pursuant to section 179(8) of the Act or following an appraisal of their fair value pursuant to section 179(9) the redemption of the shares has not been completed. It is my understanding that the Court's decision on this issue will be a significant precedent as there does not appear to be any existing case law on the meaning and effect of section 179. For that reason, I am indebted to both parties for their equanimity in this long-awaited judgment.

Background

[3] Brantley is a company organized under the laws of the Republic of Panama. AAM was incorporated on 21 May 2001 as an International Business Company and re-registered under the Act on 1 March 2006. Its registered office is at Citco Building, Wickhams Cay, Road Town, Tortola, British Virgin Islands ("BVI"). AAM is the fund manager and investment advisor of Antarctica Market Neutral Fund Limited ("the Fund") which is a fund of hedge funds organized in the BVI as an open-end investment company. The management of the Fund is the main activity of AAM although the company has extended its business to investment advisory and management mandates of smaller hedge funds.

[4] Brantley was at all material times the owner of 78,615 Class B non-voting participating shares in AAM[1] ("the Shares"). On 29 March 2007, AAM purported to redeem the Shares compulsorily pursuant to instructions received by AAM from its majority shareholders under section 176 of the Act.

[5] Mr Clifford Tsan ("Mr Tsan") and Ms Debora Oppenheimer ("Ms Oppenheimer") swore affidavits on behalf of Brantley while Mr Hernán Lopez Mazzeo ("Mr Mazzeo") swore to an affidavit on behalf of AAM. There is some dispute as to how Brantley became the owner of shares in AAM but this is not important in order to determine the issue which is before the Court.

Chronological history of events

[6] The chronological history of events appears altogether undisputed. On 13 March 2007[2], Mr Mazzeo, on behalf of the directors of AAM wrote to Brantley offering to purchase the Shares at a price of US$6 per share. A valuation report prepared by Deloitte & Touche, Tortola ("The D&T Report") at 31 December 2006 was enclosed[3]. The letter stated that Brantley would still be entitled to any dividend income relating to its shareholding up until the date that AAM purchases its Shares.[4] The letter concluded that Brantley need not take any action if it does not want to tender its shares.

[7] On 29 March 2007, Mr Mazzeo wrote again to Brantley. In the letter, he indicated that AAM had received instructions from 100% of its holders of the outstanding Class A shares and 90% or more of its holders of the outstanding Class B shares in AAM requesting it to redeem certain Class B shares which included Brantley's Shares. Brantley was also informed of the following:

> "The Instructions were submitted pursuant to section 176 of the BVI Business Companies Act, 2004 (as amended) (the "Act") the provisions of which require the Company to redeem your Class B shareholding as of the date hereof. In

[1] AAM avers that until 29 March 2007, Brantley was the owner of 78,615 Class B non-voting participating shares.
[2] See Certificate of Exhibit "CT1"in the affidavit to Mr. Clifford Tsan at pages 21-22- Tab 6 of Hearing Bundle.
[3] Ibid- pages 28 - 40.
[4] Ibid –page 21-completion date is slated to be by 26 March 2007 and payment date on 15 April 2007.

> accordance with Section 179 of the Act, you are entitled to receive fair value for your shareholding upon its redemption. Based on our valuations, "fair value" equates to an amount of US$6 per Share and hence a total of US$471,690 in respect of your entire shareholding (the "Redemption Amount").
>
> Please advise us at your earliest convenience using the attached form as to how you wish to receive the Redemption Amount. Upon receiving these details we will deliver the Redemption Amount to you. Unless or until we receive the returned form or alternatively, notice under Section 179 of the Act, the Redemption Amount will be held on trust by the Company to your account."

[8] On 11 April 2007, Brantley responded through its US Counsel, Becker, Glynn, Melamed & Muffly LLP ("Becker").[5] In the letter, Becker stated that it disagreed with the valuation of US$6 per share; referred to section 179 of the Act and suggested that a meeting be held to discuss the fair value of the Shares.[6] Concomitatly, Becker wrote to AAM requesting (a) a copy of the register of members of AAM; (b) copies of the letters from the members requesting the company to redeem certain Class B shares and (c) copies of instructions to redeem sent to any remaining members of the Company whose shares are subject to redemption under section 176 of the Act. Becker stated that the reason for the request was to confirm that the requirements of Section 176 have been met.[7]

[9] Two weeks later, on 25 April 2007, Walkers wrote to Becker. The letter was succinct. Essentially, Walkers stated that they act as legal advisers for AAM in the BVI; they are taking instructions and will revert as soon as possible.

[10] Brantley did not receive any substantive response until 10 May 2007. This was nearly a month later. In that letter, Walkers contended that US$6 was a fair value and that the valuation was fair. The letter goes on to say "*Our client will, of course, comply with the spirit of section 179 of the Act, but at the same time will continue to monitor carefully any conduct on your client's part which it considers to be (i) contrary to section 179 and/or (ii) prejudicial to the interests of AAM and/or its shareholders."*

[5] See Certificate of Exhibit to Mr. Clifford Tsan at pages 44 - 45 – Tab 6 of Hearing Bundle.
[6] Ibid, see pages 44 -45.
[7] Ibid, see pages 46 -47.

[11] The letter continues:

> "We note your client's suggestion for a telephone call or meeting with Mr Moncho Lobo. Whilst our client has instructed us to handle any further communication with Brantley Inc. we would strongly encourage your client first to consider the valuation report with the assistance of outside advisers (if it has not already done so), and to do so as a matter of urgency. Based on (i) the valuation work AAM itself has carried out and (ii) the external valuation report rendered by Deloitte, AAM believes that your client's inquiry may stop there."

[12] It seems to me that the letter was suggesting that the valuation work carried out by AAM and the external valuation report by Deloitte were sacrosanct and Brantley should accept the valuation without protest. In that letter, Walkers also stated that based on instructions, all of Brantley's shares were redeemed on 29 March 2007 and as such, Brantley is no longer a shareholder of AAM and is therefore not entitled to any of the information that it requested. Walkers also indicated that even if Brantley were a shareholder, it would still not be entitled to inspect or take copies of the last two documents that were requested and additionally, the directors of AAM would deem it contrary to the company's interest to allow Brantley to inspect its register of members.

[13] The letter concluded: "o*ur client will seek to recover from your client any further costs and expenses (including, but not limited to, legal fees) which it may incur in relation to this matter, whether pursuant to the section 179 procedure or otherwise."*

[14] By letter dated 23 May 2007, Becker wrote to Walkers giving reasons why the US$6 per share was a gross undervalue of its shares.[8] On the issue of the documents that were requested, Becker stated that regardless of whether Brantley has ceased to be a shareholder of AAM, Brantley is directly affected by the instructions from the holders of Class A and Class B shares and is simply asking for documents to verify the accuracy of what it is claiming. In the concluding paragraph of the letter, Becker stated: "*We are open to discussing the matter with you to see if a mutually acceptable value can be found. If that is not possible, our client is fully prepared to protect its rights".*

[8] Ibid, see pages 52 -54 of the Hearing Bundle.

[15] On 1 June 2007, Walkers responded to the reasons given by Brantley for its assertion that US$6 per share was not the fair market value of the Shares. It also reiterated its client's definite position that the value of US$6 per share was a fair value.

[16] In a conversation between Becker and Walkers on 19 June 2007, Becker proposed that a joint appraiser of its choice, (Navigant Capital Advisors ("Navigant"), a New York firm with whom AAM was supposedly familiar) should be engaged to conduct an appraisal, with AAM supplying such information as may reasonably be required to Navigant and both parties to be bound by Navigant's findings. AAM did not accept that proposal and informed Becker of the same on or about 3 July 2007.[9]

[17] Correspondence between these two law firms did not cease. On 19 July 2007, Becker again wrote to Walkers providing additional reasons for Brantley's disagreement with US$6 per share. Reference was also made to conversations between Counsel from both firms and prior correspondence in which, on behalf of Brantley, it was suggested that a single appraiser be appointed to save costs but AAM had rejected that proposal. The letter concluded" *If we do not receive a favorable response within seven days, our client will designate its appraiser in accordance with section 179 of the Act. If the Company does not adhere to its obligations under Section 179 of the Act, our instructions are to commence suit."*

[18] The letter educed a response on 2 August 2007.[10] On that day, Walkers wrote stating that Becker's comments that AAM was "unwilling to proceed with the appraisal process" are entirely inaccurate and misleading. They pointed out that they took the precaution of specifically reserving AAM's rights to object to the delays by Brantley in proceeding with the statutory process. Walkers accused Brantley of making no effort to take the appraisal process forward since it invoked it on 11 April 2007 and Brantley had not (up to the date of their letter) appointed an appraiser. Walkers contended for the first time that the appraisal process was no longer applicable and that the right to utilize that process had

[9] See paragraph 41 of First Affidavit of Hernán Lopez Mazzeo at Tab 7 of Hearing Bundle.
[10] Ibid, pages 76 – 78 of the Hearing Bundle.

expired on 18 May 2007. They added that having received the letter of 11 April 2007 from Becker, they had alerted Deloitte to the fact that it may be required to act as an appraiser under section 179 of the Act.[11]

[19] On 13 August 2007, Becker responded and rejected Walkers' assertion that they have waived or lost any rights under section 179 of the Act. They also advised Walkers that Brantley had appointed Navigant as its appraiser and asked Walkers to advise immediately of AAM's appraiser.[12]

[20] Two days later, Walkers wrote repeating AAM's contention contained in their letter of 2 August 2007 that the appraisal process was no longer available.[13]

[21] On 9 October 2007, Brantley instituted these proceedings by way of a Claim Form as well as by an application. It applied for summary judgment for the relief set out in paragraph 1 of the Claim Form pursuant to CPR 15 which essentially is a declaration that the redemption of the shares has not been completed unless or until the shares of Brantley in AAM have been acquired through agreement as to their fair value pursuant to section 179(8) of the Act or following an appraisal of their fair value pursuant to section 179(9).

The Summary Judgment Test

[22] CPR 15 sets out a procedure by which the Court may decide a claim or a particular issue without a trial. CPR 15.2 sets out the grounds for summary judgment. It provides:

> "The court may give summary judgment on the claim or on a particular issue if it considers that –
>
> a) the claimant has no real prospect of succeeding on the claim or the issue; or

[11] Such notification to a person privately that he may be required to act as an appraiser cannot amount to the appointment of such a person as an appraiser. Nor is the absence of any notification of the appointment to the other party be regarded as the commencement of the appraisal process envisaged in section 179((9).
[12] Ibid, see page 80 of the Hearing Bundle.
[13] Ibid, see pages 81-82 of the Hearing Bundle.

b) the defendant has no real prospect of successfully defending the claim or the issue."

[23] Under CPR 15.2, the court has a very salutary power to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims and defences which have no real prospect of being successful.

[24] CPR 15.2 (b) states that the Court may give summary judgment on a claim or an issue if it considers that the defendant has no real prospect of successfully defending a claim or issue. In **Swain v Hillman and another**[14], Lord Woolf MR said that "the words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success." At page 95b, Lord Woolf MR went on to say that summary judgment applications have to be kept to their proper role. They are not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. Further, summary judgment hearings should not be mini-trials. They are simply to enable the Court to dispose of cases where there is no real prospect of success. The Court has to caution itself against the exercise of a preliminary trial of the matter without discovery, oral examination and cross-examination.

[25] In **Boston Life and Annuity Company Limited v Dijon Holdings Limited**[15], the Court, in considering an application for summary judgment cited the elucidating judgment of Judge LJ in the **Swain case**, at page 96a-c where he said:

> "To give summary judgment against a litigant on paper without permitting him to advance his case before the hearing is a serious step. The interests of justice overall will sometimes so require. Hence the discretion to the court to give summary judgment….If there is a real prospect of success, the discretion to give summary judgment does not arise merely because the court concludes that success is improbable. If that were the court's conclusion, then it is provided with a different discretion, which is that the case should proceed but subject to appropriate conditions imposed by the court."

[14] [2001] 1 All ER 91 at page 92.
[15] BVIHCV2006/0070-per Hariprashad-Charles – judgment delivered on 14 May 2007 [unreported].

[26] In **WB Nominees Limited and others v Blue Ribbon Assets Limited**[16] Rawlins J [as he then was] stated that:

> "The court should be cautious, however, since it is a serious step to enter summary judgment. It provides finality without the opportunity for trial on the merits with evidence tested on cross-examination. Yet, a Claimant is entitled to summary judgment if the Defendant does not have a good or viable Defence to a claim. This is in keeping with the overriding objective stated in **Part 1 of the Rules**. This rule enjoins the court to deal with cases justly, by, among other things, saving unnecessary expense and ensuring that cases are dealt with expeditiously. A Defendant cannot be permitted to continue a case on a defence, which offers no real prospect of successfully defending the claim."

[27] In **ED & F Man Liquid Products Ltd v Patel and Another**[17] Potter LJ held that the only significant difference between the provisions of CPR 24.2 (which deals with summary judgments in England and Wales) and 13.3 (1) (which deals with default judgments), is that under the former the overall burden of proof rests upon the claimant to establish that there are grounds for his belief that the respondent has no real prospect of success whereas, under the latter, the burden rests upon the defendant to satisfy the court that there is a good reason why a judgment regularly obtained should be set aside. He added that a defendant applying under CPR 13.3 (1) may encounter a court less receptive to applying the test in his favour than if he were a defendant advancing a timely ground of resistance to summary judgment.

[28] Therefore, the Court has to be wary since it is a serious step to give summary judgment. Nonetheless, a claimant is entitled to summary judgment if the defendant does not have a good or viable defence to a claim: see the cases of **Pentium (BVI) Limited and Landcleve Corporation v The Bank of Bermuda Limited**[18] and **Royal Bank of Canada v Helenair Caribbean Limited**[19]. This is also in keeping with the overriding objective of the CPR 2000 to deal with cases justly by saving unnecessary expense and ensuring timely and expeditious disposal of cases. It is also part of the Court's active

[16] BVI HCV2002/0154 and BVIHCV2004/0030 - judgment delivered on 31 August 2004 [unreported].
[17] [2003] EWCA Civil 472
[18] BVIHCV2002/0122 –per Rawlins J (as he then was) at paragraph 5 –judgment delivered on 30 April 2003 [unreported].
[19] St Lucia High Court Civil Claim No. 654 of 2001 –per Hariprashad-Charles J –judgment delivered on 23 September 2002 [unreported].

case management role to ascertain the issues at an early stage and to decide what issues need full investigation at trial and to dispose summarily of the others.[20]

[29] In a nutshell, a defendant cannot be permitted to continue a case on a defence which has no real prospect of being successful. If the Court does not order summary judgment, it may treat the hearing as a case management conference: CPR15.6. It is on these principles that I will consider the merits of the application which is before me.

[30] It might however be an opportune time to look at the principles which guide us in construing statutory provisions.

Principles of Statutory Interpretation

[31] The dominant purpose in construing statutory provisions is to ascertain the intention of the Legislature as expressed in the statute, considering it as a whole and in its context. The intention is primarily to be sought in the words used in the statute itself, which must, if they are plain and unambiguous, be applied as they stand, however strongly it may be suspected that the result does not represent the real intention of Parliament.[21] If the words of the Statute are not clear, that is where it becomes necessary to enlist aids for interpretation.[22]

[32] In **Charles Savarin v John William**[23] Sir Vincent Flossaic C.J. expresses the principles thus:

> "I start with the basic principle that the interpretation of every word or phrase of a statutory provision is derived from the legislative intention in regard to the meaning which that word or phrase should bear. That legislative intention is an inference drawn from the primary meaning of the word or phrase with such modifications to that meaning as may be necessary to make it concordant with the statutory context. In this regard the statutory context comprises every other word or phrase used in the statute, all implications there from and all relevant

[20] See Vijay Kirtlal Mehta v Rajesh Kishor Mehta, BVIHCV2006/0176, BVIHCV2006/0177 and BVIHCV2006/0178 –per Joseph-Olivetti J- judgment delivered on 10 November 2006 [unreported].
[21] Halsbury's Laws of England, 4th edition Volume 44, paragraph 856
[22] See: Universal Caribbean Establishment v James Harrison Court of Appeal No. 21 of 1993 (Antigua and Barbuda)-per Byron CJ.
[23] (1995) 51 W.I.R. 75 at 79

surrounding circumstances which may properly be regarded as indications of the legislative intention."

Relevant statutory provisions

[33] It is necessary for me to fully recite the relevant statutory provisions.

[34] Section 2 of the Act states that a member in relation to a company means a person who is (a) a shareholder, (b) a guarantee member, or (c) a member of an unlimited company who is not a shareholder.

[35] Section 176 deals with redemption of minority shares. It provides:

> (1) "Subject to the memorandum or articles of a company,
>
> (a) members of the company holding ninety per cent of the votes of the outstanding shares entitled to vote; and
>
> (b) members of the company holding ninety per cent of the votes of the outstanding shares of each class of shares entitled to vote as a class,
>
> may give a written instruction to the company directing it to redeem the shares held by the remaining members.

[36] Section 176(2) states that upon receipt of the written instruction of the holders of 90% of the shares, the company shall redeem the shares of the remaining members. Section 176(3) goes on to state that "the company shall give written notice to each member whose shares are to be redeemed stating the redemption price and the manner in which the redemption is to be effected."

[37] Section 179(1)(d) provides that "a member of a company is entitled to payment of the fair value of his shares upon dissenting from a redemption of his shares by the company pursuant to section 176."

[38] Section 179 states:

> (8) Within seven days immediately following the date of the expiration of the period within which members may give their notices of election to dissent,

or within seven days immediately following the date on which the proposed action is put into effect, whichever is later, the company or, in the case of a merger or consolidation, the surviving company or the consolidated company shall make a written offer to each dissenting member to purchase his shares at a specified price that the company determines to be their fair value; and if, within thirty days immediately following the date on which the offer is made, the company making the offer and the dissenting member agree upon the price to be paid for his shares, the company shall pay to the member the amount in money upon the surrender of the certificates representing his shares.

(9) If the company and a dissenting member fail, within the period of thirty days referred to in subsection (8), to agree on the price to be paid for the shares owned by the member, within twenty days immediately following the date on which the period of thirty days expires, the following shall apply:

(a) the company and the dissenting member shall each designate an appraiser;

(b) the two designated appraisers together shall designate an appraiser;

(c) the three appraisers shall fix the fair value of the shares owned by the dissenting member as of the close of business on the day prior to the date on which the vote of members authorising the action was taken or the date on which written consent of members without a meeting was obtained, excluding any appreciation or depreciation directly or indirectly induced by the action or its proposal, and that value is binding on the company and the dissenting member for all purposes; and

(d) the company shall pay to the member the amount in money upon the surrender by him of the certificates representing his shares.

(10) Shares acquired by the company pursuant to subsection (8) or (9) shall be cancelled but if the shares are shares of a surviving company, they shall be available for reissue.

(11) The enforcement by a member of his entitlement under this section excludes the enforcement by the member of a right to which he might otherwise be entitled by virtue of his holding shares, except that this section does not exclude the right of the member to institute proceedings to obtain relief on the ground that the action is illegal.

(12) Only subsections (1) and (8) to (11) shall apply in the case of a redemption of shares by a company pursuant to the provisions of section 176 and in such case the written offer to be made to the dissenting member pursuant to subsection (8) shall be made within seven days immediately following the direction given to a company pursuant to section **176** to redeem its shares."

The true construction of section 179 (9)

[39] This issue was ventilated at some length on 16 November 2007 to which I have already made an order. It appears that all is well in this regard and that the parties may have complied with the Order of the Court since I have not seen any further applications.

[40] However, I feel duty bound to further address the issue of the true construction of section 179(9) since I am of the view that both Counsel may have fallen into error in their interpretation. I am conscious of the fact that this has no bearing on the present application but feel impelled to assist with the true construction of that section.

[41] Mr Young submitted that the proper purposive (and literal) construction of section 179 (9) is that a company (as well as a dissenting member) is entitled to require the appraisal procedure to be adopted once the statutory aggregate 50 day period (i.e. the 30 days referred to in section 179(8) and the 20 days period immediately following the end of the former referred to in section 179(9)) has expired.

[42] Learned Counsel argued that the 20 day period (following the 30 days referred to in section 179(8) for the parties to try to agree) provides a period in which the parties (once they have failed within the initial 30 days to agree) can investigate and consider whom they might appoint as an appraiser. According to him, the intention of the Legislature is that the company and a dissenting member must each have some time to do this; the result being that neither party can be compelled to appoint an appraiser prior to the expiry of day 20 in section 179(9).

[43] Mr Young next submitted that if a party fails to appoint an appraiser by the end of day 20, that party can be required to do so in order that *"the following shall apply"*, that is, so

that the steps required by section 179(9)(a) to (d) can be fulfilled. He next submitted that if the parties do not take any steps by the end of day 20 that simply means that they have taken the full time permitted to them to commence the process. According to him, it does not mean that they are no longer entitled nor obliged to take any steps on day 21 so that the appraisal process simply ceases after day 20 to be available to determine the issue between them.

[44] Learned Counsel Mr Husbands argued that the whole appraisal process has to be completed by the end of day 20 and in default thereof, it ceases to be available to the parties. He argued further that there is no statutory basis or any other basis to invoke the inherent jurisdiction of the court or otherwise for the appraisal process to be conducted by the court, though the court retains a supervisory jurisdiction.

[45] It is clear to me that during the first 30 days period, the appraisal process provided for in section 179 (9) will not apply. The question then is whether the appraisal process has to take place immediately after the expiration of the 30 days or after the expiration of the additional 20 days. Mr Young is of the view that the latter is correct. I disagree.

[46] It appears that section 179 was crafted in such a manner to ensure that, once a member dissents, the process which eventually follows in arriving at a fair value is swift. Not only will the dissenting member be promptly paid for its shares but on the other hand, the company could continue its operation with minimal disruption. The drafters, quite knowledgeable of the fact that the parties may wish to attempt to agree on a fair value for the shares and in an effort to reduce costs, (e.g. costs of appraisers) allotted 30 days to embark on the conciliatory process. Section 179(8) limits the time for negotiation to 30 days and not to 50 days. During the additional 20 days provided for by section 179 (9) (which begins immediately following the 30 days), the appraisal process should begin and be completed as Mr Husbands correctly postulated. The additional 20 days is not for further negotiations, the time for that ended after 30 days.

[47] Therefore, immediately after 30 days, it is imperative that both parties commence the appraisal process by appointing an appraiser and informing the other side that it has done so. The procedure outlined in section 179 (9) should follow with the appraisal process to be completed within the 20 days to allow for prompt payment as well as for the surrendering of the share certificate.

[48] An interesting point has now arisen. What is the position in cases, such as the present one, where the time for the appraisal process had long expired before an appraiser was designated due to, for example, intentional or unintentional delays by one party or the other? It appears that the Legislature did not contemplate such cases. Contrary to Mr Husbands' forceful submission, I agree with Mr Young that the jurisdiction of the Court to deal with such situations is not ousted. The Court always has an inherent jurisdiction to deal justly and fairly with matters of such nature. If that were not the case, then a member or shareholder may suffer irreparable loss, through no fault of its own but with the fervent desire that it could have resolved the dispute through negotiation.

Submissions of Counsel

[49] Mr Young submitted that on a true construction of section 179, the redemption of the Shares is not completed unless and until they have been acquired through agreement as to their fair value pursuant to section 179 (8) of the Act or following an appraisal of their fair value pursuant to section 179(9) of the Act. He based his submissions on the following:

1. he relied on the terms "member" and "dissenting member" used in section 179 rather than "former member" and emphasized the definition of "member" in section 2 of the Act; a member being a shareholder.

2. subsections 179(8) and (9)(d) provide for the share certificates to be surrendered only upon payment respectively of an agreed price or a fair value through an appraisal.

3. section 179(10) refers to shares being acquired pursuant to sections 179(8) or 179(9) (that is following the agreement as to price or determination of fair value) and not pursuant to section 176 (3) (which provides for notice to be given to members whose shares are to be redeemed).

[50] Learned Counsel for AAM, Mr Husbands argued that the application for summary judgment i.e. a declaration that the redemption of shares has not been completed is misconceived and flies in the face of the express provisions of sections 176 to 179 of the Act.

[51] Mr Husbands asserted that section 176(2) provides that upon receipt of the written instruction of the holders of 90% of the shares, the company shall redeem the shares of the remaining members and section 176(3) states that the company shall notify the persons whose shares are to be redeemed of the redemption price and the manner in which the redemption is to be effected. Learned Counsel submitted that this point is buttressed by section 179(11) which excludes a dissenting member's rights as a member on the enforcement by him of his entitlement to be paid a fair value. He proffered the following reasons:

1. given its ordinary meaning, a 'redemption' of shares entails that the shares are acquired by the company, the share certificates should be cancelled, the share register rectified and the shares (normally) available for re-issue;

2. once the company receives instructions from the required percentage of shareholders under section 176, the company is bound to act on those instructions. In addition, the purpose of the provision is to allow the majority to "mop up" any minority holdings. It is not intended to be a two-way process under which the minority is entitled to object to the *fact* of the redemption;

3. though the minority can assert a right to be paid fair value for their shareholding and to have the value attributed to the shareholding independently appraised, they do not remain members of the company;

4. the construction put forward by Brantley will lead to unsatisfactory results, especially from a company administration perspective. There is an overriding need for the company to be certain as to the number and identity of its shareholders at any given time and this would not be possible if a redeemed minority shareholder could still claim to be a quasi-member in circumstances where the company has re-issued the redeemed shares. The result would be that there are two entities claiming shareholder rights attaching to the same shares.

[52] In summary, Mr Husbands insisted that subsections 179(8) and (9) of the Act could not have the consequence advanced by Brantley, namely that it is a condition precedent to the completion of a redemption that the share certificates be surrendered or cancelled at the end of the appraisal process or an agreement of the parties in lieu of the appraisal process. According to him, the redemption of shares is completed at the time when the company gives to shareholder whose shares are being redeemed notice of the redemption under section 176 of the Act.

[53] He next submitted that in any event, Brantley had by letter from Becker dated 19 July 2007, acknowledged that its Shares were redeemed at the time of the notice under section 176.

Court analysis –when is redemption of shares completed

[54] Section 176 deals with the redemption of minority shares. Subsections (1) and (2) make it abundantly clear that a company, on receiving written instructions from the requisite majority of members of the company entitled to vote **shall** redeem the shares. This is a mandatory provision. The company has to redeem the shares. None of these subsections address the time period within which redemption is to take place or the procedure to be followed. Section 176(3) shed some light on how the company is to

proceed with the redemption of the shares of minority shareholders. It mandates the company to give written notice to the member whose shares are to be redeemed stating the redemption price and the manner in which the redemption is to take place. The issuance of notice to the member, it appears, does not complete the redemption but merely commences it because in the notice, the company is obligated to state the redemption price and the manner to be followed in redeeming the shares. Additionally, the section speaks to "each member whose shares *are to be redeemed*". The Legislature did not use the term each member whose shares "were" or "are redeemed". Thus, the words used in section 176(3) connote that the redemption is to be done in the future and not on the date of the service of the notice.

[55] Section 176 may be compared to section 62 on which Mr Husbands placed some emphasis. Section 62 deals with redemption at the option of the shareholder. It states that the shares **shall** be redeemed (again a mandatory provision) on the date declared in the notice and in the absence of that declaration, then on the date when the notice is received. The wording of these two sections is completely different. In my judgment, if redemption was intended to take effect automatically on receipt of the notice, then the Legislature would have made it clear as it did in section 62.

[56] As observed by Mr Young, the drafters of the Act did not use "former member" in section 179. The expression used is "member" and "dissenting member". It seems to me that if the Legislature intended that on the receipt of the notice without more, redemption is complete and the minority shareholder is now a former member, then it would have clearly used the words "former member" instead of "member" and "dissenting member". In dealing with the redemption of shares at the option of the member in section 62 of the Act, the drafters used the words "former shareholder". No such terminology is used in section 179. The ineluctable conclusion seems to be that the Legislature intended that the member, whose shares are being compulsorily redeemed, is still a member until the redemption process stipulated in section 179 is completed.

[57] It also appears that the Legislature intended that the redemption process will not be finalized until the fair value for the shares has been agreed (section 179(8)) or determined by the procedure set out in section 179 (9). The concluding words of both sections spell out that the company shall pay the member and the member surrenders the share certificate. In my judgment, if the fair value is agreed within the 30 days provided for in section 179(8), payment and surrendering of the share certificate will follow; at which stage, the redemption would have been completed and the shareholder is no longer a member. If section 179 (9) is invoked, then the redemption process is not completed until the appraisers fix a fair value, payment is made and the share certificate is surrendered. The shareholder continues to be a member until that process is completed.

[58] I do not agree with Mr Husbands that the above interpretation would lead to unsatisfactory results in that if the shares are not considered redeemed during the redemption process then the company cannot re-issue those shares. The company can only re-issue the shares after the redemption process is completed. Completion is at the stage where the fair value has been determined, payment is made to the member and the share certificate is surrendered to the company. This is made even clearer in section 179 (10) which states that the shares acquired from the minority shareholder pursuant to subsections 179 (8) and (9) must be cancelled and in other cases re-issued. It is only at this juncture that the company can re-issue the shares; not at the point when the notice was received by the member.

[59] There is a further issue which arises. What are the rights of a minority shareholder during the redemption process, that is, after it had received the notice, dissented and before it received payment and surrendered its share certificate? For convenience, I will refer to such a member/shareholder as a dissenting member.

[60] Section 179(11) seems to limit or restrict the rights of a dissenting member. It appears that it has only residual rights: the right to the procedures outlined in section 179 and the right to institute proceedings on the ground that the action of the company is illegal. It is

clear that the dissenting member cannot enforce any other right it would have been entitled to if the redemption process had not begun. The section makes it clear that a dissenting member is still a member. It is a member but is not entitled to all the rights that a member who holds shares in the company and who has not obtained notice that its shares are to be redeemed.

[61] In my opinion, Mr Husbands posited a strained interpretation to the first part of section 179 (11) which he submitted, is aimed at members dissenting from a consolidation, merger or sale of assets and who are still members of the company and not to redemption. It is plain that the section 1979(11) applies to redemption and not only the first part, as intimated by Mr Husbands.

[62] Learned Counsel also alluded to the fact that section 179(12) excludes subsection (7) in relation to redemption. Subsection 7 does not apply to redemption. It is therefore unnecessary to engage in any discourse of that section since it has no bearing on the issue at hand.

Application of the principles

[63] On 13 March 2007, AAM offered to purchase the Shares owned by Brantley at a price of US$6 per share. It was indicated to Brantley that it need not take any action if it did not wish to tender its Shares. Brantley did not respond, the inference being that it may not have wished to tender its Shares. On 29 March 2007, AAM wrote stating that it had obtained instructions to redeem the Shares held by Brantley. AAM is of the view that those Shares were redeemed on the date of the letter, i.e. 29 March 2007.

[64] The letter of 29 March 2007 can only be considered in light of section 176 as the written notice which AAM is required to give to Brantley that its Shares **are to be redeemed** (emphasis added). To say that the shares were redeemed on 29 March 2007 is without merit. In my judgment, the redemption process was only triggered by the notice.

[65] Where there is a dissenting member, section 179 comes into being. The company and the dissenting member must first employ the procedure set out in section 179(8) before they can proceed to take advantage of that in section 179(9). In the present case, the parties have failed to reach any agreement of the fair value of the Shares within the 30 days provided for in section 179(8). They have also failed within the statutory limitation period of 20 days to appoint their respective appraiser in order to complete the redemption process. In my opinion, until the appraisers have fixed the fair value of the Shares; AAM has paid Brantley for its Shares and Brantley surrenders its share certificate, the redemption of the Shares is not completed and Brantley is still a member with residual rights.

Conclusion

[66] In the **Bank of Bermuda Limited v Pentium (BVI) Limited and Landcleve Limited** [24], Saunders CJ (Ag.) said:

> "A Judge should not allow a matter to proceed to trial where the defendant had produced nothing to persuade the Court that there is a realistic prospect that the defendant will succeed in defeating the claim brought by the claimant. In response to an application for summary judgment, a defendant is not entitled, without more, merely to say that in the course of time something might turn up that would render the claimant's case untenable. To proceed in that vein is to invite speculation and does not demonstrate a real prospect of successfully defending the claim."

[67] In my judgment, the relief sought in paragraph 1 of the Claim Form is purely a question of law. There are no issues, either factual or legal which will necessitate a trial. The issue of when is the redemption of shares completed is a legal one and can be been dealt with summarily. In keeping with the overriding objective of the Rules to deal with cases justly, by saving unnecessary expense, achieve expedition and avoid the prolonged use of the court's resources, AAM cannot be permitted to continue the case on its defence, which offers no real prospect of successfully defending the claim. Accordingly, Brantley is entitled to summary judgment on paragraph 1 of the Claim Form.

[24] BVI Civil Appeal No. 14 of 2003. Judgment delivered on 20 September 2004, per Saunders CJ (acting) with Alleyne JA (as he then was) and Gordon JA concurring.

The Order

[68] In the premises, the Court hereby declares that unless or until the Shares of Brantley in AAM have been acquired through agreement as to their fair value pursuant to section 179(8) of the Act or following an appraisal of their fair value pursuant to section 179(9) the redemption of the Shares has not been completed. I will also award costs to Brantley.

[69] Last but not least, I am extremely grateful to both Mr Young and Mr Husbands for their illuminating arguments on this novel issue.

Indra Hariprashad-Charles

High Court Judge