

JERSEY / JUDGMENT

Robertson v Slous [2002]

JRC 117 (11 June 2002)

[2002] JRC 117

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judgment

the deputy bailiff: 1. This is an application by the Representor John Robertson ("Mr Robertson") for an order under Article 143 of the Companies (Jersey) Law 1991 ("the 1991 Law") that the First Respondent, Mr Gerald Henry Slous ("Mr Slous"), should purchase Mr Robertson's 50% shareholding in a Jersey company called Thermal Transfer Services Limited ("TTS") at a price determined by the Court. Factual background 2. Mr Robertson is a plumber by trade. In 1985 he entered into an agreement with Mr Slous whereby they would carry on a plumbing business in partnership through the medium of a company. The company incorporated was TTS and each was to own 50% of the company. Mr Robertson was to perform and organise the plumbing work and Mr Slous was to deal with the administrative and financial affairs of the company. Mr Robertson was to be paid a salary but otherwise neither party was to draw any profits. The evidence of Mr Robertson was that he was paid £200 per week although he accepted that this increased to £250 at some stage. During the course of the hearing we were shown some social security contribution forms and information supplied to the Comptroller of Income Tax, which suggested that Mr Robertson's salary started at £200 per week in 1985 but had increased to £17,136 per annum (i.e. £330 per week) by 1992. When these figures were put to Mr Robertson he accepted that this must have been the case, although he could not recall it. 3. No shares of TTS were registered in Mr Robertson's name; nor was he a director of the company. Mr Slous and a colleague of his were directors at all times and in 1989 another colleague of Mr Slous became an additional director. In 1992 Mr Robertson expressed concern to Mr Slous at the manner in which Mr Slous was running the company. As a result in January 1993 Mr Slous informed Mr Robertson that their relationship was at an end and that Mr Robertson should cease to have any involvement in the company. Essentially TTS ceased thereafter to undertake any material business. At one stage it was struck off but we were advised that it has been reinstated pending the outcome of these proceedings. 4. Mr Slous denied that Mr Robertson had any shareholding in the company. Accordingly Mr Robertson instituted legal proceedings and after a seven-day hearing, the Royal Court delivered a judgment on 23 rd January 1995 which found that Mr Robertson was indeed entitled to a 50% shareholding in TTS from the date of incorporation. 5. The history of the steps taken to resolve the position since then is tortuous in the extreme. In November 1996 Mr Robertson instituted an action against Mr Slous claiming £64,792 as his share of the profits of TTS

from incorporation to the end of 1992. This action was struck out on 13 th February 1998 by the Greffier Substitute as being in contravention of the rule in Foss -v- Harbottle

(1843) 2 Hare 461 . 6. In 1998 Mr Robertson issued an order of justice against Mr Slous seeking Norwich Pharmacal relief so as to obtain financial information about TTS from Mr Slous . That relief was granted and documents and information obtained as a result. 7. On 5 th November 1999 Mr Robertson issued a further order of justice against Mr Slous . This was based on two grounds. There was a personal claim against Mr Slous which was broadly the same as that which had been struck out on 13 th February 1998. Not surprisingly it was struck out again. Additionally Mr Robertson sought to bring a representative action on behalf of TTS under one of the exceptions in the rule in Foss -v- Harbottle , claiming sums due to TTS by Mr Slous . Advocate Grace, who appeared for Mr Slous then as he does now, argued before the Greffier Substitute that a shareholder could only be allowed to sue on behalf of a company if he was bringing an action for a wrong to the company for which no other remedy would be available. Mr Grace submitted to the Greffier that there were other remedies available for Mr Robertson; in particular he referred to the powers under articles 141 and 143 of the 1991 Law. The Greffier Substitute accepted his arguments and on 8 th June 2000, struck out the derivative claim as well as the personal claim. 8. Finally, in February 2001 Mr Robertson issued the present proceedings by representation. This sought an order under article 143(2)(d) of the 1991 Law that Mr Slous should be ordered to purchase Mr Robertson's shareholding in TTS at a price based upon net asset value. As an alternative, he sought an order that he be authorised to issue representative proceedings on behalf of TTS seeking the restoration to TTS of amounts removed by Mr Slous by way of management charges. It is that representation which is now before us. The management fees 9. The accounts of TTS show an accumulated loss from commencement of business to 31 st December 1992 (being the nearest balance sheet date prior to Mr Robertson ceasing to have any connection with the company in January 1993) of £21,294. The reason for the continuing dispute between the parties arises from the fact that, in those accounts, there is a debit for management fees in the aggregate sum of £133,124. It is not disputed that this sum was paid to GHS Holdings ("GHS"), the holding company of Mr Slous ' group of companies. Nor is it disputed that these fees were paid at a level that was not related to the value of any management services provided by GHS to TTS. The management charge was fixed after the year end upon the advice of the accountants to the GHS group in order to mitigate the tax burden of the group. In some countries it is possible to offset a loss in one group company against the profit of another so as to reduce the overall tax burden on the group. There is no statutory provision to this effect in Jersey, but, at the relevant time, by concession, the Comptroller of Income Tax would allow "management fees" to be charged against the profits of the profitable company in a group in favour of a loss-making company in the group. It is accepted that the management fees in this case were fixed at a level intended simply to reduce the overall tax burden on the GHS group to a minimum. 10. This would, of course, have been unexceptionable had the companies been in common ownership. But in the case of TTS, 50% was owned by Mr Robertson. Accordingly, to strip

out the profit of TTS by way of a management fee for the benefit of the GHS group was to prejudice Mr Robertson. In essence, Mr Robertson alleges that any excess management fee must be notionally returned to TTS and the accounts recalculated in order to assess the true value of TTS. He is then entitled to 50% of that true value. The law 11. Article 141(1) of 1991 Law provides as follows:- "Power for member to apply to Court A member of a company may apply to the court for an order under Article 143 on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself)" 12. Article 143 (so far as relevant) provides as follows:- "Powers of Court

- (1) If the court is satisfied that an application under Article 141 or 142 is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.
- (2) Without prejudice to the generality of paragraph (1), the court's order may:-
 - (a).....; (b).....; [c] authorize civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;
 - (d) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly." 13. In our judgment Mr Grace correctly summarised the issues which the Court must consider:- (1) Have the affairs of TTS been conducted in a manner which is unfairly prejudicial to Mr Robertson? (2) If so, is the correct remedy in this case an authority to Mr Robertson to bring proceedings in the name of the company to recover the relevant sum from Mr Slous or GHS (under article 143(2)(c)) or is it an order for the purchase of Mr Robertson's shares in TTS by Mr Slous under article 143(2)(d)? (3) If the latter, what is the value of the company so as to assess the purchase price? 14. There was however a slight hiccough during the course of the hearing as to the procedure to be followed. The papers provided to the Court in advance of the hearing contained, amongst other matters, the skeleton argument produced by Mr Pearmain, various authorities and two expert accountancy reports; one by Mr Christopher Moulder of Reads & Co on behalf of Mr Robertson and one by Mr Nicholas Bone of BBA on behalf of Mr Slous . The report of Mr Moulder indicated his view of the value of TTS and the report of Mr Bone outlined his view that TTS was valueless. There being no order for the trial of any preliminary issues nor any indication in the papers to the contrary, the Court took the view that it was being asked to resolve all three questions outlined in the preceding paragraph. That appeared also to be the view of Mr Pearmain. He duly called Mr Robertson and Mr Moulder to give evidence. Mr Grace on behalf of Mr Slous called no evidence. However his pleading had made it clear that Mr Slous was not going to contest the allegation of unfair prejudice and was suggesting that the correct remedy was the authorising of a representative action on behalf of the company by Mr Robertson rather than a sale. Mr Pearmain then made his closing submissions submitting that the Court should make an order for purchase at the price stated by Mr

Moulder. 15. Mr Grace then began his closing

submissions.

Having outlined the three issues referred to above, he then caused some considerable surprise to the Court by indicating that the third issue (if it arose) was a matter for another day. On questioning by the Court, it transpired that Mr Grace was under the impression that the third issue would not be dealt with at the hearing. The Court was not entirely clear as to why Mr Grace was under this impression and was not referred to any correspondence between the parties whereby it was agreed that this should be the case. The Court was most concerned that this long running litigation should be brought to a conclusion. Accordingly we gave leave to Mr Grace to re-open his case. Mr Robertson and Mr Moulder were recalled so that Mr Grace could cross-examine them on issue (3). Furthermore Mr Grace made contact with Mr Bone and arranged to call Mr Slous and Mr Bone as witnesses. After they had given evidence Mr Moulder was again recalled for further cross-examination so as to deal with certain matters which had not been put to him. Finally, Mr Pearmain supplemented his original closing submissions in the light of the evidence which had been heard following which Mr Grace delivered his closing address. 16. We do not know how this misunderstanding arose. But in order to avoid similar problems arising in future we have to say that it is incumbent upon counsel to agree a limitation upon the scope of the hearing if that is intended and to make this limitation clear to the Court (obtaining the Court's approval if necessary). There is no order for the hearing of a preliminary issue in this case, the evidence filed addressed all three issues and there was nothing in the papers to suggest that it was intended not to deal with issue (3). We appreciate that, once the problem became clear, Mr Grace and his client took urgent steps to secure the attendance of Mr Bone and generally to progress the resolution of the third issue. We acknowledge their assistance. Nevertheless we have to say that, on the material which has been made known to us, counsel should not have assumed that the third issue was not to be dealt with. Unfair prejudice 17. Not many cases under articles 141 and 143 have come before the Jersey courts. We think it may be helpful therefore to outline some of the principal considerations. Article 141 is identical to section 459 of the English Companies Act 1985. It follows that English judicial authority on the interpretation of section 459 will be of assistance in relation to article 141. 18. In *re R A Noble & Sons (Clothing) Limited*

(1983) BCLC 273, Nourse J., at page 290, approved the following statement of Slade J. in *re Bovey Hotel Ventures Limited* (31 st July 1981 Unreported) in relation to unfair prejudice:- "I do not think it necessary or appropriate in this judgment to attempt any comprehensive exposition of the situations which may give rise to the court's jurisdiction under s75. Broadly, however, I would say this. Without prejudice to the generality of the wording of the section, which may cover many other situations, a member of a company will be able to bring himself within the section if he can show that the value of his shareholding in the company has been seriously diminished or at least seriously jeopardised by reason of a course of conduct on the part of those persons who have had de facto control of the company, which has been unfair to the member concerned. The test of unfairness must, I think, be an objective, not a subjective, one. In other words it is not necessary for the

petitioner to show that the persons who have had de facto control of the company have acted as they did in the conscious knowledge that this was unfair to the petitioner or that they were acting in bad faith; the test, I think, is whether a reasonable bystander observing the consequences of their conduct, would regard it as having unfairly prejudiced the petitioner's interests." 19. In *O'Neill -v- Phillips*

- (1999) 2 All ER 961 , Lord Hoffmann had the following to say concerning unfair prejudice at 996:-
- " Unfairly prejudicial In s459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history (which I discussed in *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 17-20) that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. As Warner J said in *Re J E Cade & Son Ltd* [1992] BCLC 213 at 227: "The court has a very wide discretion, but it does not sit under a palm tree." Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others ('it's not cricket') it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important. In the case of s459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman *societas* , as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law. The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith." 20. In our judgment the principles described in these two extracts are equally relevant when considering article 141 of the 1991 Law. 21. In this case, although Mr Robertson and Mr Slous were 50% shareholders, Mr Slous was in charge of

the company. His staff kept the books; he and his colleagues were the directors. Mr Robertson left everything to Mr Slous . For reasons quite unconnected with the interests of TTS (namely for the purpose of mitigating the tax burden on the GHS group) Mr Slous extracted an aggregate of £133,124 from TTS over the relevant period and transferred this sum to GHS. The sum in question bore no relation to the value of any services provided to TTS by GHS. The imposition of the management fee in this sum has the consequence that, instead of showing an aggregate profit over the period of £111,830, TTS shows an aggregate loss of £21,294. The answer filed on behalf of Mr Slous does not contest that such conduct was unfairly prejudicial but Mr Grace made it clear that there was no admission as such; Mr Robertson still had to satisfy the Court that unfair prejudice had indeed been caused. We have no difficulty in concluding that the extraction of £133,124 from a company which was jointly owned by Mr Robertson and Mr Slous to a company which was wholly owned by Mr Slous for the sole advantage of Mr Slous ' group of companies was conduct which was unfairly prejudicial to Mr Robertson. Accordingly the Court's jurisdiction under article 143 is engaged and we must turn to consider the appropriate remedy. Should the Court order representative proceedings on behalf of TTS or a sale of shares? 22. Mr Grace argued that the most appropriate remedy was that envisaged by article 143(2)(c) and that Mr Robertson should be authorised to bring proceedings on behalf of TTS against Mr Slous or GHS, as the case may be. He relied on a number of points in support. 23. Firstly, he said that such an action reflected the real nature of the allegations made against Mr Slous . It was said that GHS Holdings had received funds wrongly from TTS. The logical corrective action was for TTS to sue GHS for recovery of any monies so extracted. Secondly, he was concerned that discovery had not taken place in these proceedings. We were informed that there were apparently filing cabinets in Mr Slous ' office which contained voluminous papers. Such papers might well contain material relevant to the dispute. Thirdly, a sale was more appropriate where the company was a going concern. This company had long since ceased to trade and was dormant. The better course was therefore for the correct sum of money (whatever that might be) to be reinstated to the company by appropriate civil action. 24. We have carefully considered Mr Grace's arguments but we are in no doubt that an order for sale of shares is the correct order to be made in this case. Our reasons are as follows:- (i) The parties severed their relationship concerning TTS in January 1993 i.e. over nine years ago. The Royal Court found that Mr Robertson was a 50% shareholder in January 1995 over 7 years ago. The amounts involved are not particularly large and it is high time that this dispute was finally resolved. The course suggested by Mr Grace would require the launching of new proceedings with consequent delay and further costs. Conversely, a sale at valuation would bring the matter finally to an end. We would require strong reasons for choosing a solution which would lead to further costs and delay when the matter has already been running for an unacceptably long time. (ii) In our judgment, none of the matters relied upon by Mr Grace comes near providing such reasons. We do not see why the fact that a company is dormant means that the sale route is necessarily less appropriate. On the contrary, it means that the valuation process will be straightforward. Both experts were agreed that the fact that the

sole asset of TTS was a chose in action against Mr Slous /GHS meant that valuation was not difficult. We do not therefore accept Mr Grace's further argument that the nature of the allegation (involving extraction of funds) means that we should necessarily grant a remedy under paragraph (c) rather than under paragraph (d) of article 143(2). (iii) We have carefully considered Mr Grace's submission that fairness requires that there be full discovery. However the strength of the submission is somewhat weakened by the fact that all the files to which he wishes to have access are those belonging to Mr Slous and are apparently to be found in Mr Slous ' filing cabinets. Mr Slous has not inspected them and therefore has no knowledge of any particular documents in the files which might be material. Nevertheless he wishes to have the opportunity of going through them in order to see if there is anything relevant. In our judgment, he should have done this much earlier. This case has been going on for many years and this particular representation was issued in February 2001. We do not see why Mr Robertson should be put to the time and expense of instituting a new action simply so that Mr Slous can do something which he ought to have done already. There has in any event been very substantial discovery in that, according to the report of Mr Moulder, 103 files of Mr Slous were obtained as a result of the Norwich Pharmacal order in 1998. (iv) In any event, it does not seem to us that resolution of the issues in question in this case is likely to be assisted by further discovery. Both accountants were agreed that the value of the company should be based upon its net asset value; that the net asset value of the company was its recalculated aggregate profit (if any); and that that sum was equal to the value of its chose in action against GHS. In other words, whether one is valuing the company or authorising the company to bring a claim against GHS, the figure will be the same. (v) Both accountants further agree that GHS is entitled to charge a reasonable management fee for the services which it provided. The essential difference between them relates to how such a management fee should be calculated. We will deal with that further in due course but it seems to us that that is essentially a matter of judgment. Its determination does not depend upon any factual material which might appear from documents not yet available. We accept that it is theoretically possible that some documentary evidence could be discovered which might throw light on some of the subsidiary issues (such as whether interest should be charged on inter-company balances) but that is outweighed by the fact that the discovery which Mr Grace wishes to undertake is of Mr Slous ' own documents, which would have been in his possession throughout these long proceedings. (vi) We cannot help but note the irony of Mr Slous ' present stance. In relation to the 1999 proceedings, Mr Grace succeeded, on Mr Slous ' behalf, in striking out not only the personal action by Mr Robertson but also the representative action which Mr Robertson sought to bring on behalf of TTS. One of the main grounds relied upon was that there was an alternative remedy under article 141. Now, in proceedings under article 141, he argues that the right course is for Mr Robertson to bring a representative action on behalf of TTS. In other words he wishes Mr Robertson to undertake the very action which Mr Robertson sought to do in the 1999 proceedings but which was struck out. We accept that the 1999 proceedings purported to rely upon an exception to the rule in *Foss -v- Harbottle* whereas the representative proceedings in this

case would be brought under the authority of the court under article 143. But they would be essentially the same action and we do not think it would be appropriate to accede to Mr Grace's argument that a representative action should be authorised when he succeeded in having just such an action struck out at an earlier stage. 25. In summary, we are satisfied that an order for sale at a valuation will bring this matter to a conclusion and is the fair and proper way of resolving the dispute between these parties. The valuation 26. It is clear from the English authorities (e.g. *Bird Precision Bellows Limited*

(1984) 3 All ER 444) that the price to be fixed by the court should be a fair price. What constitutes a fair price will depend upon the facts of the particular case. Mr Grace was initially inclined to argue that it would be appropriate to defer carrying out the valuation. He argued that it might be that, if the experts were to consult further, they would be able to agree on more matters. Alternatively some of the material which might emerge on discovery might be relevant. However, ultimately he accepted that if the Court resolved to pursue the sale route rather than the representative action route, it had sufficient information to proceed and should fix the price at this stage. He withdrew his submission that the Court should defer fixing the purchase price. 27. Both experts were agreed on a number of matters. Thus they agreed that TTS should be valued on the basis of its net assets; that the net assets were reflected by the restated accumulated profit (if any); and that Mr Robertson's shares should be valued at 50% of the net asset value. They were further agreed that the aggregate management fees of £133,124 should be added back and that the amended accumulated profit (or loss) should be calculated by substituting a reasonable management fee to GHS to reflect the administrative costs of TTS. Having heard their evidence, it seems to us that the following matters require resolution by the Court:- (i) What should be the substituted management fee to reflect administrative costs? (ii) Should interest be charged on the loan account balances between TTS and GHS? (iii) Should interest be charged on trade balances between TTS and other companies and entities belonging to Mr Slous? We will take each of these in turn. (i) The correct level of management fee 28. This was the main area of difference between the two experts. It arises in this way. Mr Robertson carried out the pricing of jobs and was responsible for the management of the tradesmen employed by TTS. Mr Slous' staff at the office of GHS were responsible for taking telephone enquiries, sending out invoices, paying invoices, handling the payroll and carrying out other book-keeping and accounting functions. GHS also carried out this function for a number of other companies in Mr Slous' group. It was in effect a central service company providing an administrative service to companies belonging to Mr Slous. 29. Mr Moulder pointed out that TTS was a plumbing and heating business of modest size employing an average of about four tradesmen (including Mr Robertson) although temporary labour for particular jobs sometimes increased this up to a maximum of about eight. The average turnover for the years to 31 st December 1992 was approximately £120,000. The only way that a small business such as this could prosper was to keep administrative overheads to a minimum. Thus, such a business's "office" would often comprise simply a desk in a corner of a room in the proprietor's home, often

manned by an answerphone for most of the week as the proprietor and other members of staff would be working "on site". Typically, the administration, including the raising of invoices and the payment of bills would either be carried out by the proprietor "after hours" or, as is common, a book-keeper would be employed for two or three mornings a week. 30. In his opinion, in order to assess the fair value of TTS, one should impute to it the "normal" administrative costs of such a company. A monthly sum of £130.84 was in fact charged by GHS. This would equate to a book-keeper being employed ten hours a week at £3.00 per hour. He considered that to be a reasonable estimate for "normal" administrative costs of such a company. Accordingly the annual sum of £1,568 should be provided for by way of management fee. 31. In addition, until 1991, storage facilities for TTS had been provided by Mr Slous at one or more of his properties in Jersey. From a date in 1991 onwards, TTS had rented storage facilities from a third party at the rate of £1,733 per annum. Mr Moulder considered it reasonable that that figure should be used for the purposes of calculating a reasonable charge for the GHS group to make to TTS in respect of the provision of storage facilities for the period up to 1991. The combined effect of these two figures resulted in an aggregate management fee to be made to GHS (in place of the original management fee) of £24,239 over the period. 32. Mr Bone, on the other hand, took the view that you had to take the company as you found it. It was not administered in the conventional way as Mr Moulder had described. It was administered as part of the GHS group and derived the benefit of central administrative services provided by GHS. It would be reasonable for GHS to seek to recover from the companies which it administered its overheads in providing those services. Accordingly Mr Bone had undertaken the exercise of stripping out certain overheads of GHS which he felt should not be recharged to the client companies, following which he had, after discussion with Mr Slous, allocated 15% of the overheads of GHS to TTS. They had based this upon the size and activity of TTS in relation to the other group companies administered by GHS. On this basis a reasonable management fee for the period was an aggregate sum of £93,265. By way of a check Mr Bone had related the figure to turnover for the period and the aggregate management fee amounted to 10% of the aggregate turnover. Mr Bone accepted that there was no "right" figure but he felt that the figure which he put forward was reasonable having regard to the way in which TTS was in fact administered. 33. In our judgement, Mr Moulder's approach is to be preferred in this case. This was a small plumbing and heating company owned equally by Mr Robertson and Mr Slous. Mr Bone did not dissent from Mr Moulder's view that such companies were normally administered in the way described by Mr Moulder. It is true that this company was not administered in that way; it was administered by GHS as a central service company. But that was a decision of Mr Slous taken at a time when, as he admitted in evidence, he considered that he owned 100% of TTS. He did not therefore take any account of Mr Robertson's 50% interest. We have to assess the fair value of the company and that involves calculating its "real" profitability. If we were to adopt Mr Bone's approach, we would be allowing one partner (Mr Slous) to extract and retain for his benefit by way of administration fees more than is normal for a company of this nature. This would depress the profit figure. In essence, it would mean that, because of the way in

which Mr Slous chose to set up and run the administration of TTS, Mr Slous would receive more than half of the "real" profit of the company because he would receive the "excess" administration charges and he would also receive 50% of the remaining profit. Accordingly we hold that, in order to assess the fair value of this company for the purposes of a sale by Mr Robertson to Mr Slous, we should adopt the approach favoured by Mr Moulder of making an allowance for the normal level of administrative expenses for a company such as TTS. 34. But having accepted Mr Moulder's general approach, we must still consider whether the figure which he gives for normal administrative expenses is reasonable. Mr Bone thought that, even on the approach of Mr Moulder, the figure was on the low side although he was unable to be specific. In this respect we noted Mr Robertson's evidence that his present plumbing company is administered by his wife, who does the book-keeping, invoicing etc. She spends eight hours a week on the task. The company employs four plumbers (three until recently). Its annual turnover is £250-300,000. In our view, this provides support for Mr Moulder's view that a book-keeper working ten hours a week would have been sufficient for provision of the usual administrative services to TTS. We therefore accept that evidence. 35. He gave a figure of £3 per hour as the cost of a book-keeper. In the absence of evidence to the contrary we accept that evidence. However he carried that figure through from 1985 to 1992. We do not think that this was reasonable. Appendix 7 of the Mr Bone's report suggests that the base rate varied from 9% to 14% between 1985 and 1992, which in turn suggests that inflation was by no means negligible. We think we can take judicial notice of the fact that wages in Jersey would have risen at least in accordance with inflation. If £3 per hour were reasonable in 1985, it would have become too low by 1992 in view of inflation. Had matters rested there, we would have ordered that the profits be recalculated by adjusting the figure of £3 per hour for inflation between 1985 and 1992. But the rental figure of £1,733 was taken from the 1991 figure and was then applied by Mr Moulder back to 1985. Allowing for inflation, the rental figure would have presumably been less in 1985 by the inflation factor. In essence therefore, by not making any allowance for inflation, Mr Moulder has understated the management fee but overstated the rental cost. Bearing in mind that the former is carried at £1,568 and the latter of £1,733, we think that any adjustment would broadly cancel itself out and we do not think that any remaining difference would justify the cost of undertaking the exercise. In the overall context of attempting to reach a fair valuation for the company we think it reasonable to leave Mr Moulder's figures unaltered in view of these counter-balancing factors. (ii) Should interest be charged on the loan account between GHS and TTS? 36. Both accountants felt that interest should be charged on the loan account and that the appropriate rate was 3% over base rate. It is fair to say that on Mr Bone's figures the balance was always in favour of GHS i.e. GHS was funding TTS. But, in evidence, he accepted that, if the figures changed so that at times TTS was funding GHS, then, for the purposes of fixing a fair sale price between Mr Robertson and Mr Slous, it would be right to charge the same interest rate in both directions. Accordingly we accept that interest at 3% over base rate should be charged on the balance of the loan account between GHS and TTS. Mr Moulder calculated interest on the average balance between the opening and

closing balances and this seems reasonable. The loan account figures are of course affected by the restated profit figures following the substituted management fee. On the basis of the management fees put forward by Mr Moulder (which we have accepted) GHS was funding TTS in the early years but thereafter TTS was funding GHS. (iii) Should interest be charged on trade balances between TTS and Mr Slous' companies? 37. TTS undertook considerable work for companies belonging to Mr Slous. This work was done at a discount. We have been shown an affidavit from a former employee of Mr Slous which suggests that some of this work was never charged for. But Mr Moulder gave evidence that, because he had not seen all the underlying documents of the company, he could not form an opinion on whether this was so and accordingly we disregard this affidavit. But Mr Moulder pointed out that members of the GHS group and other entities related to Mr Slous enjoyed high levels of long term credit from TTS, considerably in excess of those available on normal commercial terms. Some debts even straddled two balance sheet dates. This was clearly prejudicial to the financial well-being of TTS which was in effect providing "soft" interest free loans to entities belonging to Mr Slous. It meant that the bank debt of TTS (and the consequent interest paid thereon) was higher than it needed to be. Of course, there would have been no difficulty in this if TTS was in the same ownership as Mr Slous' companies. But it is not because it is 50% owned by Mr Robertson. It seems to us unfair to allow Mr Slous' companies to benefit at the expense of Mr Robertson in this way. In our judgement, for the purposes of arriving at a fair sale price, the profit should be recalculated so as to adjust for this and bring the position back to what it would have been if normal trading conditions had applied and trade debts paid when due. Mr Moulder's evidence was that the appropriate way to do this was to charge interest at 3% over base rate (i.e. at lending rates) on all such balances, whether they were in favour of or against TTS. We accept his proposal and the calculations which he has carried out as a result. The restated profit 38. According to Mr Moulder, after allowing for the revised management fee and interest as described above on the loan account and the trade balances, the revised aggregate profit from the commencement of business in 1985 to 31 st December 1992, after allowance for tax, is £108,554. We have stood back and asked ourselves whether that appears to be reasonable. It amounts to an average profit of approximately £13,500 per annum. We do not think that an unreasonable figure and accordingly we hold that the company should be valued on the basis that, as at 31 st December 1992, it had a net asset value of £108,554. The date of valuation 39. It is clear that the Court can determine the date upon which the company should be valued for the purposes of assessing a fair price. Thus Gore-Browne on Companies (44 th Edition) (Supplement 38) has this to say at paragraph 28.17.6. "The same overriding requirement in valuing shares (that the price should be fair) will govern the choice of date for this purpose. Various dates have been chosen for this purpose (e.g. date of the unfair prejudice, date of the petition, date of the trial, date when the valuation is made, or the date of a consent order that shares should be purchased "at such a price as the court should thereafter determine"). The petitioner's own conduct, though not precluding a finding of unfair prejudice in its favour, may affect the date chosen by the court in exercising its discretion. In the appropriate case, however, fairness

may sometimes require that the shares be valued at a date earlier than the petition". 40. In the representation, Mr Robertson contended for a valuation as at 31 st December 1993 or such other date as the Court may deem just. In his skeleton argument, Mr Pearmain opted for 31 st December 1992 but then sought interest and/or damages for loss of use of the purchase money to date. He had not, however, claimed such damages in the representation and accordingly we do not think it is open to him at this stage to seek an award of damages. In his closing submissions, possibly prompted by the Court, he opted for a valuation date as at the date of any order for the purchase of shares. 41. This is an unusual case. Normally a shareholder will have had the benefit of his shares up to the relevant application to the Court. That is not so here. The profits of TTS have always been in the hands of Mr Slous . If we were to value the company as at 31 st December 1992 (when, for effective purposes, it ceased to trade) and were to make no allowance for the time that has passed since then, this would be to the benefit of Mr Slous (who has had the use of the money since then) and the prejudice of Mr Robertson (who has been kept out of profits to which he is entitled). That would be wholly unfair to Mr Robertson and points to a different date of valuation. 42. In our judgment, the fair course is to value the company at today's date by taking the net asset value as at 31 st December 1992 and accruing interest which it would be reasonable to deem the company to have earned on that sum to date. As we have said earlier the sole asset of the company consists of a chose in action against GHS. We have already held that it was reasonable for the loan account between GHS and TTS to bear interest at 3% over base rate and it might be thought that that would be the appropriate rate to continue until today's date. However Mr Moulder did not suggest that rate and we agree that once the company ceased to trade - so that presumably there was no longer any bank debt - the argument for such a rate decreases. Nevertheless it is still reasonable to accrue interest upon the chose in action at a reasonable rate and we think that the rate put forward by Mr Moulder in Appendix 6 of his report, namely 1% below the average NatWest base rate calculated on a yearly basis, is a reasonable interest rate to charge upon the amount outstanding by GHS. However, in Appendix 6, Mr Moulder has compounded the interest rate on a yearly basis. It is exceptional to allow compound interest and we do not think that circumstances call for it in this case. Accordingly interest on the sum of £108,554 should be recalculated from 31 st December 1992 to date using the same rates as set out in Appendix 6 but calculating interest on a simple rather than compound basis. 43. In summary, we order Mr Slous to purchase Mr Robertson's 50% interest in TTS at a fair value which we assess as being 50% of the net asset value of TTS as at today's date. The net asset value is to be calculated by adding simple interest to the figure of £108,554 at the rates set out in Appendix 6 to Mr Moulder's report for the period from 1 st January 1993 to today's date. 44. Since preparing this judgment Mr Grace has referred us to the case of *Profinance Trust SA -v- Gladstone*

[2002] 1 WLR 1024 . In that case the English court of appeal confirmed that there was jurisdiction under the English equivalent of article 143 to order a payment of the equivalent of interest when ordering a purchase of shares at a valuation based upon a date earlier than the court

order, but that this was a power which should be exercised with great caution. The court of appeal went on to discuss the appropriate date of valuation. The overriding duty is to take such date as will give a fair valuation in the particular circumstances, but the court stated that the date upon which the court orders a purchase is prima facie the appropriate date of valuation, although there will be many cases in which it will be fairer to take an earlier date. The court went on to give some examples. 45. We understand this case to be consistent with the approach with which we have taken. We have not adopted an earlier valuation date and added quasi-interest although, if we were to hold that Jersey law was the same as English law, Profinance would suggest that there is jurisdiction to do so. Furthermore, we have concluded, on the facts of this case, that the fair date of valuation is indeed the date of the order of the court for a purchase of shares. What we have held is that the valuation must take into account the fact that the purchasing shareholder has been in possession of the company's sole asset since 1993 and that, in assessing the value of the company as at today's date, the company is entitled to claim simple interest on the amount which is owed. In summary, we think that the decision of the English court of appeal is consistent with the approach which we have adopted and nothing in it leads us to change the decision which we have reached. Nevertheless, we are of course grateful to Mr Grace for alerting us to the case which he was quite right to do. Authorities. Companies (Jersey) Law 1991. Foss -v- Harbottle

(1843) 2 Hare 461 . In re R A Noble & Sons (Clothing) Limited (1983) BCLC 273. re Bovey Hotel Ventures Limited (31 st July, 1981) Unreported Judgment of the High Court of England. O'Neill -v- Phillips

(1999) 2 All ER 961 . Bird Precision Bellows Limited (1984) 3 All ER 444. Gore-Browne on Companies (44 th Ed'n) (Supplement 38): paragraph 28.17.6. Profinance Trust SA -v- Gladstone

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