IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal No. 004 of 2022
(ON APPEAL FROM FSD 005 OF 2020 (MRHJ))

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE M ATTER OF VIRGINIA SOLUTION SPC LTD

BETWEEN

AUGUSTA HEALTHCARE, INC.

Appellant

-and-

VALLEY HEALTH SYSTEM

Respondent

Before: **The Rt. Hon. Sir John Goldring, President**
The Hon. John Martin KC, Justice of Appeal
The Rt. Hon. Sir Alan Moses, Justice of Appeal

Appearances: **Alex Potts KC instructed by Jonathon Milne and Spencer Vickers of Conyers Dill & Pearman LLP for the Appellant**

Robert Levy KC instructed by Liam Faulkner and Sam Keogh of Campbells LLP for the Respondent

Date of Hearing: **22 and 23 November 2022**

Draft Judgment Circulated: **10 July 2023**

Judgment Delivered: **28 July 2023**

JUDGMENT

Martin, JA

Introduction

1. This is an appeal from a winding up order made on 10 February 2022 by Ramsay-Hale J (as she then was) in respect of Virginia Solution SPC Ltd ("the Company"). The order was made

pursuant to section 92(e) of the Companies Act on the petition of Valley Health System ("Valley"), one of two shareholders in the Company. The other shareholder, Augusta Healthcare Inc ("Augusta"), was the respondent to the petition and is the appellant on this appeal, Valley being the respondent to the appeal. The winding up order was made on the basis that it was just and equitable to do so, the judge having held that it was a "paradigm case" of a quasi-partnership, that Augusta's actions in relation to the declaration of dividends had irreparably damaged the relationship of trust and confidence between the shareholders, that there were no adequate alternative remedies available to Valley, and that there were no public policy or public interest considerations sufficient to prevent the making of a winding up order.

Background

2. At various points in the judgment (notably paragraphs 1-7, 45-48, 53-114, and 117-183), the judge set out in detail the genesis and development of the Company and the origins of the disputes that led to the petition. Although Augusta complained that the judge's recital paid too little attention to the detail of the Company's constitutional documents, and – as the judge herself mentioned in paragraph 116 – disagreed with the emphasis placed by the judge on some of the events and the inferences she drew, her exposition of the factual background appears to me, on the basis of the documents we have seen, to be accurate, and I gratefully adopt it. What follows is merely a sufficient summary to enable this judgment to be understood.

3. Since prior to 2003, Augusta and Valley have been regional community health systems operating in the State of Virginia in the United States. They provide public healthcare on a non-profit basis. Valley has six hospitals, 60 physician practices and more than 5300 employees. Augusta has one hospital, numerous primary care and speciality practices, urgent care clinics, and about 2100 employees. Each of them is governed by a board of volunteer directors or trustees, consisting of a diverse group of community leaders, business executives, and physicians, appointed by members of the community which it serves. The judge recorded that Valley's annual consolidated revenue was in the region of US$1 billion, Augusta's in the region of US $350 million.

4. In 2003, Reciprocal of America, a Virginia-based professional liability insurer through whom Augusta and Valley had obtained insurance cover for their healthcare systems, collapsed. Augusta, Valley and three other Virginia-based not-for-profit healthcare providers – Rockingham Memorial Hospital, Halifax Regional Hospital Inc and Martha Jefferson Hospital - established the Company in the Cayman Islands on 29 June 2004 as an exempted segregated portfolio company with a view to the Company operating as a captive insurance company providing insurance cover for the participants. The Company has at all relevant times been licensed to conduct insurance business in the Cayman Islands. It has only ever had one segregated portfolio.

5. In February 2004 representatives of the five participating healthcare providers met Mark Cain, an actuary who the judge said could fairly be regarded as the architect of the captive insurer that the Company became. On 13 February 2004 Mr Cain sent an email to the founding members recording what had been agreed at the meeting. So far as relevant, it was in the following terms.

> "1. The Board will be made up of one member from each institution. The Chairman will rotate periodically. In addition, each Board Member will have one vote.
>
> 2. Dividends will be declared by the Board based on capital needs and profitability. Profits will be distributed to each member in two ways. One half of the profit will go to each member in proportion to their capital. One half will be distributed to each member based on loss experience. The loss experience formula will have two steps. First, for the period that generated the profits, only those members that have contributed more in premium over that period compared to their incurred losses for that period will be eligible. For the eligible members, the dividend will be in proportion to the amount that the member's premium exceeded their losses. I should add that with any new venture, we should not expect to pay dividends for the first five years. In general it will take that long before we establish a track record for our loss experience and can better estimate profits.
>
> 3. New members will be treated like existing members. They will be required to make a capital contribution calculated under the same basis as the existing members. In addition they will pay an amount similar to the existing members' share of the start-up costs.
>
> 4. If a member leaves the captive their stock will be converted to non-voting stock. The captive will keep their capital for a minimum of five years. After five years, the captive will retain only enough capital to support the outstanding losses for that member. One question that comes to mind. Are members that left eligible for dividends? I would suggest that they are not. If they are, it puts the captive in a difficult position in a soft market. That is, a member could leave for a lower premium and still get paid a dividend by the captive. That creates a strong financial incentive to leave.
>
> 5. Future capital needs. The captive will not have an automatic assessment provision. The intent is to run the captive in a conservative manner, and ensure that premiums are adequate and initial capital is sufficient. If additional capital is needed, the captive will need to present a business plan describing the need for

the capital and the corrective actions taken to ensure the financial strength. As we discussed, this further emphasizes the need for strong Board leadership and involvement. Toward that end, the group agreed that the Board Members must be an officer of each respective hospital.

6. The group agreed that the capital will be in cash, not debt or a letter of credit. From a timing standpoint, each member will need to submit a capital deposit prior to the start of the captive. The balance will be due when the member starts to purchase insurance from the captive."

6. At much the same time as the Company was incorporated, a further company – Solution Services Corporation ("SSC") - was incorporated to administer and operate the insurance programmes and assist the members of the Company with their duties and obligations as such members and as insureds under the insurance programmes. Each member of the Company had one voting share in SSC and the right to appoint two directors of SSC, one of whom was required to be the CEO of the member.

7. In 2006 Mr Cain proposed a dividend methodology. He stressed that it was appropriate to establish a policy for dividends at that point, even though he did not recommend that dividends should be paid then. He set out certain core principles: the Company was established to protect its members for the long run, and members contributed capital to protect the Company at 90% probability; the members shared in each other's loss experience; in the long run, each member would pay its fair share; and the Company would enforce sound underwriting and risk management principles to minimise losses. With those principles in mind, he recommended a three-stage dividend formula, involving actuarial determination if the total funding (loss reserves plus capital) exceeded the funding necessary at 90% probability level, declaration of all or a portion of the excess funds as a dividend, and allocation of the dividend to each of the members, either as a cash dividend or a credit to future premiums. He added this: "it is in Step 3 [allocation of the dividend] where we typically see diversity in methodologies. Typically, there are two extremes used for the allocation of the dividends to individual members. The first allocates the dividend strictly based on the amount of capital contributed. The second allocates the dividend strictly on the loss performance of each member…. In my experience, most programs will recognise both allocation methods have merit, and will give weight to each. This allows the dividend to recognise loss experience, retain the pooling concept and provide for a return on the capital investments".

8. At a Board Meeting of the Company on 23 May 2007, the Company approved a dividend basis combining capital and loss, and resolved that that formula be used at such time, if any, as the Company declared a dividend.

9. At the same Board Meeting, it was resolved that SSC and Mr Cain would work together to prepare a feasibility study to assess the financial impact of new members joining the Company.

10. At a Board Meeting of the Company on 12-13 May 2008, a special committee of SSC was established to review the Company's Articles of Association, draft a Shareholders' Agreement, review or draft the Company's mission and corporate guiding principles, develop the process and procedures for adding new members, and review and revise all other governing documents that might be impacted by the addition of one or more new members.

11. At a Board Meeting of the Company on 1-2 December 2008, the Company adopted a document proposed by the special committee recording the Company's Mission and Guiding Principles. Relevant principles are those under the headings Governance ("Each Member will have one vote on the Board of Directors, regardless of size or capitalisation and will adhere to the highest standards of corporate governance and behaviour"); Stability ("Members will be committed to participate in spite of competitive pressure for inexpensive insurance"); Equity ("While losses are pooled amongst the Members, the objective is that in the long run each member will pay its fair share. This is accomplished through experience rating on the front end, and loss-based dividends on the back end"); and Growth ("Growth is not a primary objective of the Company. New Members will only be added if they meet the following criteria: (a) acceptable loss experience; (b) commitment to longer-term participation; (c) shared values of the existing members; (d) history of strong financial performance; (b) based in Virginia; and (f) operate as a not-for-profit system").

12. At a Board Meeting of the Company on 14-15 May 2009, the Company resolved to approve a Participation Agreement, Dividend Policy and amendments to the Articles of Association proposed by the special committee.

13. The Participation Agreement is an important document. The version we were shown was the Fourth Amended and Restated Participation Agreement dated 1 January 2017. By that date, the only remaining members were Augusta and Valley, and in that respect at least – and also in relation to special provisions relating to preservation of the position of Augusta and Valley in the event that new members joined, and in relation to termination of membership when there were only two members – it differs from the original iteration dated (according to a recital in the 2017

version) 15 May 2009. In all important respects, however, the relevant provisions remain the same or to similar effect. The agreement is made between the Company itself and the members, and recites the desire of the members "to set forth their mutual covenants and agreements regarding the operation of the Company and its insurance program and certain other matters". In its 2017 version, the agreement runs to 26 pages, and – as presaged in the recital – deals with a wide variety of matters relating to acquisition and termination of membership, dividends and the operation of the Company's affairs. Overall, it represents an attempt to provide a comprehensive consensual regime for participation by the members in the Company's affairs; and it is striking that the judge recites only the provision contained in it relating to dividends. Those clauses which appear to me to be of particular relevance are as follows. Clause 1.3 provided that in the event of any conflict between the provisions of the agreement and the Company's Memorandum or Articles, the terms of the agreement should control and be binding on the Company and the members. Clause 2.2 made reference to the statement of Mission and Guiding Principles. Clause 4.1 required each member to take or cause to be taken such actions as should be reasonably necessary or proper to enable the Company to implement the objectives and obligations set out in the agreement. Clause 6.3 dealt with dividends in the following terms: "Any dividends declared by the Board of Directors pursuant to the Articles of Association are subject to the approval of the Members as provided in the Articles of Association and the approval of the Cayman Islands Monetary Authority and must be declared in accordance with the Policy regarding Dividends attached hereto as Exhibit 1". Clause 6.6 provided that "in the event of dissolution of the Company, following the satisfaction of the Company's liabilities, all amounts remaining to the credit of the Company in excess of the Company's contributed share capital and surplus shall be distributed to its Members in accordance with the Policy regarding Dividends attached hereto as Exhibit 1". Clause 6.8 (introduced in 2017) dealt with the sole and exclusive entitlement of Augusta and Valley in relation to the distribution of Founding Member Retained Earnings in the event that a new member were admitted to the Company, it being provided that distributions of such retained earnings "shall be made as provided in the Dividend Policy". Clause 10.1 is an arbitration clause providing that, in the event of disputes between the parties with respect to the terms and conditions of the Agreement which could not be resolved by discussion and negotiation, such disputes should be resolved by arbitration. Clause 11.4 is an entire agreement clause, providing that "except as expressly provided in this Agreement to the contrary, this Agreement and any schedules and exhibits attached hereto constitute the entire agreement of the parties with respect to the subject matter hereof".

14. Paragraph B 1 of the Dividend Policy exhibited to the Participation Agreement is in the following terms:

> "On an annual basis, the Board of Directors shall review the financial performance of the Company and determine, with the advice of the Actuary (i) whether or not to declare a

dividend out of retained earnings based on the dividend formula and process set forth in Paragraph C below; and (ii) the total amount of any such dividend. In making such determinations, the Board of Directors shall take into account the extent to which the Company is funded in excess of the 90% confidence level, the Retained Earnings Minimum Goal, the historic financial performance of the Company, projected future activities and business of the Company and potential changes in membership. The decision to declare a dividend shall be made by the Board of Directors in its sole discretion and the Board shall not be required to declare a dividend even if the annual review would suggest that amounts are available to distribute as dividends."

15. The Articles also dealt with dividends. Section 13.1 in article XIII provided that "subject to any dividend formula adopted by the Board and to the Companies Law, the Company, in general meeting, may by Special Resolution declare dividends, but no dividend shall exceed the amount recommended by the Board".

16. As the judge pointed out, in the current situation – where Augusta and Valley are the only remaining members, each providing one of the two directors of the Company – no recommendation can be made by the Board, and no special resolution passed by the Company, except unanimously. That was not, however, the case when the Participation Agreement, Dividend Policy and amended Articles were adopted in 2009.

17. With effect from 1 June 2010, Fauquier Health System Inc became a member of the Company.

18. Martha Jefferson and Rockingham withdrew in 2012; Fauquier was expelled in 2013; and Halifax withdrew in 2014. The Company thereupon became a two-member captive, Augusta and Valley being the only members.

19. A review was conducted in 2014 of the existing governance documents to take account of the Company becoming a two-member captive, and against the possibility of a new member or members joining the Company. A second iteration of the Participation Agreement was executed on 14 November 2014, and the Articles amended on the same occasion.

20. In 2015 advice was sought as to the implications of one of the two remaining members withdrawing from the Company. The advice received pointed out the possibility that the remaining member would obtain a substantial financial windfall after the withdrawal of the other member, primarily as a result of the Company's policy of retaining the capital of former members, and income on that capital, against future claims for a period that might be as much as 20 years. The advice included statements that the relevant provisions "could operate to create an

incentive for one member to force another to withdraw (for example, by being uncooperative and blocking actions)"; and that "the potential for windfall creates an incentive for one member to "behave badly", for example by blocking actions or not attending meetings, to force the other to conclude it should withdraw". Consequent on the advice, new rules for dealing with the expulsion or withdrawal of one of the two remaining members were recorded in a third iteration of the Participation Agreement on 11 December 2015.

21. By June 2016 the Company had cumulative retained earnings of about US $18 million. Augusta and Valley were concerned that, if new members were to join, they would be entitled to share in these retained earnings; and it was agreed that, if new members were to join, a new class of shares would be created carrying the exclusive right to share in the retained earnings, and those shares would be allocated to Augusta and Valley alone. This arrangement was recorded in the fourth iteration of the Participation Agreement with effect from 1 January 2017.

22. By December 2016, the value of the retained earnings had increased to US $24.1 million. On Mr Cain's advice, no dividend was declared for 2016. However, he recommended that a dividend of US $10 million be declared in 2017, to be allocated as to US $1.4 million to Augusta and $8.5 million to Valley. This allocation was in accordance with the Dividend Policy, but was particularly disadvantageous to Augusta because its loss record had been bad in the relevant year. As Mr Cain pointed out, however, that indicated that the dividend formula was working exactly as it should. He also pointed out that a substantial part of the retained earnings had come "from the beneficial closing out" of departed members, and questioned whether "running part of a dividend through the loss based formula, does it make sense to maybe take some of the money and say, okay, not all that is purely normal dividends earned from profits of the company, a big chunk of it is earned from favourable closeout of members that basically left money behind". Following these comments, Augusta asked Mr Cain to identify how much of the retained earnings were attributable to departed members, something which he said he was unable to do. In the event, Augusta did not agree to payment of the recommended dividend.

23. In August 2017 Mr Cain made a revised recommendation that a dividend should be declared in the sum of US $18 million, US $9 million to be paid in November 2017 and the other US $9 million in January 2018. The dividend was to be allocated according to the Dividend Formula. It assumed a notional rebalancing of capital in 2014 and 2017, although the judge said there was no contractual basis for this. Valley approved the recommendation, even though the rebalancing exercise would affect it adversely. However, Augusta opposed the recommendation, instead suggesting that an annual dividend of US $6 million be declared for three years.

24. On about 19 September 2017 Mr Cain made a third recommendation, which was to declare a dividend of US $16 million to be paid in 2017, to be allocated in accordance with the Dividend Policy. It was also recommended that an additional special dividend of US $6 million be declared, to be allocated between Augusta and Valley based on their shareholders' equity rather than pursuant to the Dividend Policy. Valley approved this recommendation; Augusta did not, instead proposing that US $6 million, which it considered represented the departed members retained earnings, be distributed on a 50/50 basis on the grounds that the departed members' retained earnings had not been produced by capital contributed or premiums paid by Augusta and Valley, and were unaffected by their loss experience, being unanticipated "windfall funds". This led to what the judge held was an impasse.

25. On 20 November 2017, Valley served a demand for arbitration under article 10 of the Participation Agreement, based on what it said was Augusta's wrongful refusal to approve a dividend in accordance with the Dividend Policy. The demand was repeated by letter dated 13 December 2018. Augusta challenged the demand on the ground that declaration of dividends was in the discretion of the Board, so that an arbitrator would have no power to make an effective award. The proposed arbitration does not appear to have proceeded further.

26. On 20 December 2017 a dividend of US $17,467,860 was authorised, to be allocated in accordance with the Dividend Policy and declared in two equal instalments for 2017 and 2018. The dividend assumed a capital rebalancing in 2014 and 2017, with the result that the new capital allocation would be Augusta 31% and Valley 69%, effective from 28 November 2017, instead of the previous 20% to Augusta, 80% to Valley.

27. In May 2018 a dividend of US $2.4 million was authorised, to be allocated in accordance with the Dividend Policy. This was the minimum amount recommended by Mr Cain, who had originally recommended a dividend of US $4.1 million.

28. In the course of 2019 various attempts to compromise the dispute over payment of dividends were made and failed. On about 8 November 2019, a dividend of US $3 million was approved, although Mr Cain had recommended a dividend of US $10,368,921.

29. The petition was filed by Valley on 15 January 2020. It was based on the Company's failure to declare and pay dividends in accordance with the Dividends Policy.

The judge's conclusions

30. (1) Was the Company a quasi-partnership? The judge's answer was yes. Her conclusions on this topic appear most clearly from paragraphs 213-215 of the judgment, which are in the following terms:

> "213. The opinions of the member CEO's may not be determinative on their own perhaps, but taken together with all the other evidence relating to the origin and structure of the Company and how the business of the Company was conducted, the evidence that the Company was established as a quasi-partnership by its founding members, of whom Valley Health and Augusta are the last two to remain, is overwhelming.
>
> 214. The indicia of quasi-partnership, independent of the "personal opinions" of those who were and are the directing minds and will of the Members, include the fact that
>
> (i) the CEOs of the founding members were all known to each other as the Health systems they ran were part of the VHHA, an association in which Valley Health and Augusta remain active members and participants;
>
> (ii) despite their disparate sizes and projected investments in the Portfolio through which their insurance would be purchased, they agreed that they would be equal shareholders and have an equal voice in the governance of the Company and that their investment in the Portfolio would be reflected in the returns on their capital which would be paid out as dividends;
>
> (iii) at the time the Company was established, the entirety of their agreement was not, as in Re Coroin, "fully negotiated and drafted" in "lengthy and complex" contractual documents. The principles by which the Company would be run were agreed in a meeting and summarised by the Actuary in an email;
>
> (iv) these principles were subsequently "clarified and refined" per Mr. Merrill, in 2009 as the Mission and Guiding Principles, in response to the possibility of new members joining the captive;
>
> (v) the criteria for admission which finds expression in the Guiding Principles is 'shared values' which would not be a usual feature of a purely commercial relationship and is consistent with a Company built on a foundation of trust and confidence;
>
> (vi) significantly, even after the Company became a two-member captive, Valley Health and Augusta agreed not to change the structure of the Company, despite the warning from onshore counsel of the potential for bad behaviour, which is consistent with a company whose business is conducted on the basis of mutual trust and confidence.

215. It is, as Mr. Levy says, a paradigm case of quasi-partnership."

(2) Had there been a loss of trust and confidence? The judge's answer was again yes; one might say an emphatic yes. Her conclusions on this aspect appear at paragraphs 185-205 of her judgment.

It is sufficient to quote the following:

> "185. Having heard and seen the witnesses and considered all the evidence, including the witness statements which stood as their evidence-in-chief and the documents exhibited thereto, I say I am satisfied and find that there has been an irretrievable breakdown in the relationship between Valley Health and Augusta. There is no question that Augusta's stance on the question of the "departed members retained earnings" caused Valley Health to lose all confidence that Augusta was willing to comply with the spirit and intent of the Dividend Policy as the means of taking the retained earnings out of the Portfolio and to consider that it would be impossible to reach agreement with Augusta on the issue of dividends - and latterly, on overhead costs – going forward. …
>
> 187. It was Augusta which was opposed and its opposition went beyond "an intermittent disagreement". It was the playing out of a policy adopted by Ms Mannix - Augusta - to drive Valley Health out of the Company and remain "the last man standing". Augusta refused to retreat from its position that the so-called "departed members retained earnings" should be distributed 50:50 and it made a decision to approve dividends at the historic level of $2 million or so a year, whatever the Actuary's advice to the contrary, in the hope that Valley Health would withdraw.
>
> 188. This policy was exposed in the disclosure by Augusta of divers intra-company documents which demonstrated quite forcefully that Valley Health was correct to apprehend that their "partner" - as Valley Health and Augusta both referred to each other - was not acting in good faith and was seeking to use its veto power to force Valley Health into capitulating on the matter of the departed members retained earnings if it wished to have dividends declared in accordance with the Actuary's recommendation.
>
> 189. The document entitled "Confidential Debrief" which was written by Ms Mannix for her team in October 2017, a little over 6 months after the issue of the departed members retained earnings was first raised at the Finance Committee meeting, makes it quite clear that the posture adopted by Augusta was intended to exert what Ms Mannix described as

> "leverage". This leverage was sought to be exercised to gain an additional $3 million in profits for Augusta to which it was not entitled and/or to force Valley Health to withdraw from the Company and gain that windfall identified by onshore Counsel because "(i) the remaining member is under no obligation to declare dividends to be credited in part to former members, and consequently could "wait it out," never declaring a dividend until after payment of the former member's separate account, which would then consist only of its paid in capital, with no interest": supra para 102.
>
> 190. I say 'not entitled' because it is agreed by Augusta and its advisers that the only way to take Retained Earnings out of the Portfolio is through the Dividend Policy. The Board had in the past by special resolution dealt with the capital left behind by Fauquier according to each Member's equity in the Portfolio, exceptionally and by agreement, but that resolution at least respected the policy to reward Members for their long term investment in the Company. What Augusta proposed - a 50:50 split based on their shareholding in the Company - was unprincipled and proposed simply because Augusta did not think that it was fair for Valley Health to get the larger share of what might be the earnings on capital left behind by departed members. That is not to say that Augusta's later attempt to force agreement on a split according to each Member's equity in the Portfolio on the basis of precedent, by holding the $6 million hostage, was principled. It was not."

The judge also said this at paragraph 202:

> "Given Augusta's conduct and the contents of Ms Mannix's Confidential Debrief, I adopt Mr. Levy's submission that it is difficult really to see what there is between the parties on the Petition as they are in "violent agreement" that they do not get on and do not trust each other to manage the affairs of Virginia."

(3) Was there a "legitimate expectation" that dividends would be paid in accordance with the Dividend Policy? The judge said this:

> "216. I should not think it necessary to address the question of whether Valley Health had a legitimate expectation that dividends would be paid in accordance with the Dividend Policy when the evidence so clearly demonstrates that Augusta was acting in bad faith in refusing to follow the Actuary's advice with respect to the amount to be declared and had

decided to "stand still" and approve dividends at the historical level in the hope that Valley Health would capitulate to its demands that the departed members retained earnings be allocated on a 50:50 basis, contrary to that Policy, or withdraw.

217. But I do so find: The payment of dividends to members out of the profit generated by the Portfolio was one of the advantages for establishing a captive insurance company. It was agreed by the members in 2004 that dividends would be declared by the Board based on capital needs and profitability by a formula that would recognise each members' capital contribution. The members had an expectation, based on the Actuary's advice, that once there was sufficient data with respect to the Company's loss experience to permit the Actuary to estimate the company's capital requirements and the profits available for distribution, the Portfolio would start to pay dividends."

(4) Was there functional deadlock? The judge declined to decide this question, saying that it was unnecessary to do so in light of her finding that there was an irretrievable breakdown in mutual trust and confidence (paragraph 244). She cited *Chu v Lau* [2020] UK PC 24 in support of her position. She went on to say this:

"245. Valley Health need not show there is a functional deadlock as the Company is in a state which could not have been contemplated by the parties when the Company was formed.

246. The breakdown in the relationship between Valley Health and Augusta is demonstrably irretrievable and, in so holding, I am content to adopt Ms Mannix's own assessment that is it not realistic to think Valley Health and Augusta can go on from here and continue to build, develop and strengthen this Company. The proper exercise of the Court's discretion is to wind it up."

(5) Were there alternative remedies? The judge thought not, saying this:

254. I accept Mr. Levy's submission, in this instance not hyperbolic, that a voluntary withdrawal as an alternative remedy would be massively to Valley Health's detriment while being of massive benefit to Augusta as "last man standing". In the circumstances where Augusta had set its face against complying with the documents governing the relationship between it and Valley Health with a view to achieving this benefit for itself, ordering Valley Health to withdraw would be to permit Augusta to profit from its own misconduct and would be an inequitable outcome for Valley Health.

255. The fact there is an available remedy does not preclude the making of a winding up order unless the petitioner is acting unreasonably in not pursuing that remedy. Valley Health cannot be said to be acting unreasonably in failing to pursue that remedy. On a winding up, as Mr. Levy submits, each member would receive their contractual share of the surplus assets. Any remedy proposed by Augusta which offered less than that would be properly rejected by Valley Health."

(6) Were there policy reasons not to wind up the Company? The judge said this:

"257. In my judgment, there are no public interest or public policy considerations relevant to the exercise of my discretion. This is a two member captive insurance company whose members can purchase insurance on the open market as they did before the captive was established. The members have fallen out and the irretrievable loss of mutual trust and confidence, under Cayman Islands law, justifies the grant to Valley Health of the remedy it seeks and I make an order that the Company and its Segregated Portfolio A be wound up."

The notice of appeal

31. The notice of appeal seeks dismissal of the petition, and termination of the appointment of the liquidators; alternatively, the making of an alternative order under section 95(3) of the Act; alternatively, remission of the petition to the Grand Court for rehearing.

Grounds of appeal

32. Augusta relies on six grounds of appeal:

(1) there were serious procedural irregularities in the conduct of the hearing and in relation to delivery of the judgment. Augusta complains of the judge's delay in giving judgment, of her failure to give Augusta an opportunity to make additional submissions (particularly in relation to alternative remedies), of her failure to confine Valley to its pleaded case and to admissible evidence, and of her failure to give adequate reasons (including in particular her failure to deal with the question of functional deadlock);

(2) the judge was wrong to hold that the Company was a quasi-partnership;

(3) the judge was wrong to hold that there had been an irretrievable breakdown of mutual trust and confidence between Augusta and Valley as at the date of trial;

(4) the judge was wrong to hold that Augusta had acted in a way contrary to Valley's legitimate expectations;

(5) the judge failed to consider or grant alternative remedies under section 95 (3) of the Act;

(6) the judge was wrong to hold that there were no public interest or public policy considerations relevant to the exercise of her discretion.

Valley's position

33. In essence, Valley's position on the appeal was that the judge was right for the reasons she gave. Its case was summarised at paragraph 13 of its appeal submissions in the following way:

> "The Appellant's complaints on appeal are a mere confection. They pay no attention to the fact that there was overwhelming evidence that the Company was a quasi-partnership. Nor do they explain that by the Appellant's design, it sought, over a protracted period of time, and for its own commercial benefit (and no benefit whatsoever to the Company, in fact, the reverse), to frustrate a contractually agreed dividend distribution policy which resulted in the irretrievable breakdown in the relationship of trust and confidence between the members. Its plan, which was evidenced in writing in clear terms, was that it would refuse to approve the payment of dividends out of available retained earnings (surplus profit) in an amount recommended by the Actuary in order to "leverage" the Respondent into either agreeing to give the Appellant a greater share of any dividend to be declared than the Appellant was otherwise entitled to receive under the contractual Dividend Policy to the financial detriment of the Respondent, or that the Respondent would get so fed up with the Appellant's egregious conduct that it would withdraw from the Company due to the breakdown in the relationship, which would be significantly to the Appellant's financial advantage and to the Respondent's detriment."

The statutory framework

34. Section 92 of the Companies Act (2021 Revision) provides that "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".

35. Section 95(3) identifies alternative remedies that may be ordered if a petition on the just and equitable ground is presented by members of the company as contributories. The subsection is set out later in this judgment (paragraph 60).

The just and equitable ground

36. In *Ebrahimi v Westbourne Galleries* [1973] AC 360, Lord Wilberforce said this (in a passage quoted by the judge):

> "The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words 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 disregard 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 association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the

transfer of the members' interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to "quasi-partnerships" or "in substance partnerships" may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words "just and equitable" sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in the company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in" (at 379 A-380 B).

37. It is desirable also to quote two other passages from Lord Wilberforce's speech. Immediately following the passage I have just quoted, he identified the *Westbourne Galleries* case as an expulsion case, and dealt with the application in such cases of the just and equitable clause. He said this:

> "The question is, as always, whether it is equitable to allow one (or two) to make use of his legal rights to the prejudice of his associate(s). The law of companies recognises the right, in many ways, to remove a director from the board.… In all these ways a particular director-member may find himself no longer a director, through removal, or non-re-election: this situation he must normally accept, unless he undertakes the burden of proving fraud or mala fides. The just and equitable provision nevertheless comes to his assistance if he can point to, and prove, some special underlying obligation of his fellow member(s) in good faith, or confidence, that so long as the business continues he shall be entitled to management participation, an obligation so basic that, if broken, the conclusion must be that the association must be dissolved" (at 380 B-E).

The second passage is itself a quotation from the judgment of Smith J in the Australian case *In re Wondoflex Textiles Pty Ltd* [1951] VLR 458, the whole judgment being described by Lord Wilberforce as of value:

> "It is also true, I think, that, generally speaking, a petition for winding up, based upon the partnership analogy, cannot succeed if what is complained of is merely a valid exercise of powers conferred in terms by the articles. … To hold otherwise would enable a member to be relieved from the consequences of a bargain knowingly entered into by him. But this, I think, is subject to an important qualification. Acts which, in law, are a valid exercise of powers conferred by the articles may nevertheless be entirely outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company; and in such cases the fact that what has been done is not in excess of power will not necessarily be an answer to a claim for winding up. Indeed, it may be said that one purpose of [the just and equitable provision] is to enable the court to relieve a party from his bargain in such cases".

38. The jurisdiction has recently been considered by the Privy Council in *Chu v Lau*. At paragraphs 14, 15 and 17 Lord Briggs said this:

> "[14] A just and equitable winding-up may be ordered where the company's members have fallen out in two related but distinct situations, which may or may not overlap. First, a winding-up may be ordered to resolve what may conveniently be labelled a functional deadlock. This is where an inability of members to co-operate in the management of the company's affairs leads to an inability of the company to function at board or shareholder level.…
>
> [15] Secondly, where the company is a corporate quasi-partnership, an irretrievable breakdown in trust and confidence between the participating members may justify a just and equitable winding-up, essentially on the same grounds as would justify the dissolution of a true partnership.…
>
> [17] The important potential distinction between the two types of breakdown case is this. If there is a complete functional deadlock, then a winding-up may be ordered regardless whether the company is a corporate quasi-partnership. But if the company is of that type, then a breakdown of trust and confidence may justify a winding-up even where there may not be a complete functional deadlock. In the former case winding-up is a remedy for paralysis. In the latter it is the response of equity to a state of affairs between individuals who agreed to work together on the basis of mutual trust and confidence where that trust and confidence has completely gone. But of course both may exist together and a complete breakdown in trust and confidence may well be the cause of functional deadlock, in a two-party quasi-partnership like the present".

Lord Briggs also quoted from the English Court of Appeal decision in *In Re Yenidje Tobacco Company Limited* [1916] 2 Ch 426, where Lord Cozens-Hardy MR said this:

> "If ever there was a case of deadlock I think it exists here; but, whether it exists or not, I think the circumstances are such that we ought to apply, if necessary, the analogy of the partnership law and to say that this company is now in a state which could not have been contemplated by the parties when the company was formed and which ought to be terminated as soon as possible".

39. In a separate judgment in *Chu v Lau*, Lady Arden said this (at paragraph [92]):

> "The implication of equitable obligations in a quasi-partnership is the way in which the courts secure that justice is done between quasi-partners who have not taken every contractual protection that they might have done to prevent the misuse of corporate powers".

40. Absent a quasi-partnership, a breakdown of trust and confidence is not in itself enough to justify winding up on the just and equitable ground - although if the breakdown is the consequence of a lack of probity by a shareholder it may on its own suffice for a winding up order whether or not the company is a quasi-partnership or is suffering from functional deadlock: see *Loch v John Blackwood Limited* [1924] AC 783, where the Privy Council stated that "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" (788).

41. It is convenient here to mention *Re Coroin* [2012] EWHC 2343 (Ch) 994, referred to by the judge in paragraph 214(iii) of her judgment (quoted above in paragraph 30(1)). The case, a decision of David Richards J (as he then was), was concerned primarily with a petition brought under section 994 of the Companies Act 2006 alleging unfairly prejudicial conduct. That section is not directly concerned with the just and equitable ground for winding up, and has no direct parallel in the Cayman Islands legislation. In the course of his judgment, however, the judge said this:

> "635. For part of his case, however, Mr McKillen relies also on legitimate expectations of participation in the management of the company. In my judgment, this is not sustainable. The importance of the passage from the speech of Lord Wilberforce in In re Westbourne Galleries Ltd cited by Lord Hoffmann in O'Neill v Phillips is that it indicates the circumstances in which reliance may be placed on equitable considerations (Lord Hoffmann deprecates the use of the expression 'legitimate expectations', regretting that

he introduced it into this area of the law: see p.1102) as giving rise to a possible case of unfair prejudice. It is very important to note that in that passage, having identified that the structure of a company is defined by company law and the articles of association, Lord Wilberforce observed that; "In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small." Equitable considerations, affecting the manner in which legal rights can be exercised, will arise only in those cases where there exist considerations of a personal character between the shareholders which makes it unjust or inequitable to insist on legal rights or to exercise them in particular way. Typically that will be in the case of a company formed by a small number of individuals on the basis of participation by all or some of them in the management of the company.

636. In my judgment, there is no room for equitable considerations of this kind in the present case. The company was formed by a group of highly sophisticated and experienced business people and investors with a view to the purchase of a well-known group of hotels for a price running into many hundreds of millions of pounds and to retaining and managing some of those hotels. There was little prior relationship between many of the investors and some were unknown to each other until a few days before the company was formed. More importantly, articles of association and a shareholders agreement were negotiated and drafted, containing lengthy and complex provisions governing their relations with each other and with the company. I find it hard to imagine a case where it would be more inappropriate to overlay on those arrangements equitable considerations of the sort discussed by Lord Wilberforce and Lord Hoffmann."

42. Thus quasi-partnership is no more than a shorthand name for circumstances in the formation or operation of a company which indicate the existence of an understanding between the parties that the company would operate on a particular basis even if, as a matter of strict contract, that basis could be frustrated by one party or another.

Discussion

Quasi-partnership

43. The critical issue on the appeal is whether or not the judge was right to categorise the Company as a quasi-partnership. In considering that issue, timing is important. A company may not start out as a quasi-partnership but may become one (as the judge recognised in paragraph 22 of her judgment). The converse is also true: a company may start out as a quasi-partnership but cease to be one. It is less clear that the judge recognised this. The relevant time in either case is when the acts complained of occurred.

44. After considering the relevant authorities, including *Westbourne Galleries* and *Chu v Lau*, and a passage from French on Applications to Wind Up Companies, the judge said this (paragraph 41 of her judgment):

> "The question for the Court is whether this Company was established or its business conducted on the basis of mutual trust and confidence between founding members or whether the relationship between the Members is a purely commercial one in which the parties' contractual arrangements set out and define the scope of the parties' rights and obligations within the Company…".

This was a perfectly proper way of framing the issue for her to decide, but it fails to recognise expressly that the dichotomy she identifies may change over time.

45. In my judgment, the judge was entitled to find that the relationship between the founding members, including Augusta and Valley, amounted in the early years of the Company's life to a quasi-partnership - that is to say, that the relations between the original members, including Augusta and Valley, were governed not merely by the Company's constitutional documents but by implicit obligations of good faith. Until 2008/9, the Company operated on a combination of basic constitutional documents (the memorandum and articles of association), certain regulatory requirements resulting from the Company's status as an insurance company, and understandings derived from Mr Cain's email of 13 February 2004 and the meeting which preceded it. There was ample material on which the judge could find that the founding members embarked on the enterprise in the hope or expectation that it could be made to work through the goodwill of the persons representing the participants, notwithstanding the immaturity of the company's constitutional documents and despite a considerable lack of certainty as to the strict legal position. Viewed in that light, the factors relied on by the judge – the fact that the principals were known to each other, that the founding members would have an equal voice in the management of the concern regardless of their capital contributions, the fact that they regarded each other as "partners" – indicated a substantial element of trust and confidence that an essentially informal arrangement could be made to work. It is in just such a situation that equity may feel the need to step in if the trust and confidence breaks down. Whilst I would not myself regard this as coming close to a "paradigm case" – the typical example of such a case being the position where former partners incorporate their business, as in *Westbourne Galleries* – I agree with the judge that the initial relationship between the founding members can correctly be categorised as a quasi-partnership.

46. In my view, however, that position did not continue. At paragraph 214(iii) the judge pointed out that "at the time the Company was established, the entirety of their agreement was not … "fully negotiated and drafted" in "lengthy and complex" contractual documents". Whilst that was true at the outset, it did not remain so after 2008/9. At that point, the founding members decided to record the basis of their participation in a number of documents. The context of those documents was the impending arrival of a new member; and the inevitable inference is that the existing members recognised that the informal arrangements which had previously governed their participation could not safely continue, even if the new member or subsequent members agreed to subscribe to the underlying ethos adopted by the founding members.

47. The key document is the Participation Agreement. It was expressly to prevail in the case of conflict with the articles. It contained an arbitration clause and an entire agreement clause. In relation to the arbitration clause, it is important to note that the Participation Agreement was an agreement not only between the founding members but between them and the Company. It provided for the declaration of dividends to be the province of the Board. If the failure to pay dividends was causing damage to the company, as the materials available to the judge suggested was the case, there would on the face of it have been a failure by the directors to exercise their powers in the best interests of the Company. In principle (and assuming that Virginia law, which would govern an arbitration, is to similar effect to Cayman law) the arbitration provision could have been operated – as indeed Valley sought to do – in order to obtain, or seek to obtain, an award compelling the Company to declare dividends so as to mitigate the damage to the Company. Such dividends would have been allocated in accordance with the Dividend Policy. Whether such an arbitration would have succeeded is an open question; but the immediate point is that the arbitration clause was on the face of it capable of providing some remedy to the impasse over dividends, and the wider point that the arbitration clause was designed to provide an effective remedy in case of dispute over the rights and obligations of the members. The position is different from that in *Yenidje*, where the disputes were so frequent that the arbitration provision served no useful purpose and was not an obstacle to winding up. And whatever the fate in the Privy Council (where judgment is pending) of this court's decision in *Re China CVS (Cayman Islands) Holding Corporation* 2020 (2) CILR 201, nothing in that decision would have prevented arbitration of the dividend dispute in advance of presentation of the petition. As to the entire agreement clause, it is of course designed to exclude additional contractual obligations such as collateral contracts, implied terms and the like; and in theory it might, like the rest of the contractual provisions governing the relations of the members, be subject to equitable intervention. But it is nevertheless a powerful indication that the members thought and intended that the rules governing the relationship between themselves, and between them and the Company, were exclusively contained in the Participation Agreement and related documents. The judge failed to consider its effect.

48. Once the Participation Agreement was in place, it defined comprehensively the obligations of the members and the Company and provided a remedy for any failure to meet those obligations. As Mr Potts said, from this point on, whatever the position might have been when the Company was established in 2004, the members were engaging in a high degree of corporate formality. Thereafter, it seems to me that there was no scope for the superimposition of equitable considerations. No doubt the remaining members, including by the end only Augusta and Valley, regarded themselves informally as "partners", and no doubt also they expected their relations to operate on the basis of trust and confidence. But many parties to contracts enter into them on the basis that they trust the counterparty and have confidence in that counterparty's ability and willingness to perform its contractual obligations; and if they do not, the remedy lies in contract, not in equity. To take the typical example, of a participant excluded from management, it will ordinarily be the case – as Lord Wilberforce pointed out in *Westbourne Galleries* – that the articles will contain provisions which are capable of having the effect of excluding a participant from management; but in the typical case it will not have been contemplated that the provisions of the articles would be used to that effect. As Mr Levy rightly pointed out, to that extent the contractual terms may not prevail; but that does not mean that they are irrelevant. To take again the typical example: if a shareholders' agreement provided expressly that no party had a right to participate in the management of the company save as provided by the articles, it seems to me that it would be impossible to contend that there was some overriding equitable obligation that meant that if a participant were excluded under the articles the excluded party was entitled to have the company wound up on the just and equitable ground. That is in essence the position here. Once the Participation Agreement was in place, it was that document (together with the other constitutional documents) which defined the parties' relationship. It left no room for any super-added obligation. It was not permissible to revert to the basis on which the Company was initially established and ignore the subsequent formalisation of the parties' relationship.

49. Thus, by the time of presentation of the petition, matters had changed from the initial position. I note again what Lady Arden said at paragraph [92] of *Chu v Lau*: "The implication of equitable obligations in a quasi-partnership is the way in which the courts secure that justice is done between quasi-partners who have not taken every contractual protection that they might have done to prevent the misuse of corporate powers". In this case, the members set about putting in place a sophisticated contractual regime with contractual protections. They did so in the light of the projected introduction of a new member or members of the Company who had not formed part of the group of participants that had steered the Company through its early life and in whom in consequence the same trust and confidence could not necessarily be reposed. As well as extensively defining their rights and obligations, they provided a mechanism for dispute resolution in the arbitration provision, and made clear by the entire agreement clause that the

Participation Agreement contained a complete code. Any remedies lie in contract: there is no scope for equitable intervention.

50. In my judgment, therefore, the judge was wrong to hold that the Company was still a quasi-partnership at any point after 2009, and in consequence was wrong to hold that there was any basis for a just and equitable winding up.

51. In light of that conclusion, I can deal more briefly with the other issues raised on the appeal.

Irretrievable breakdown of trust and confidence.

52. The judge's view is based primarily on Augusta's conduct, which caused Valley to lose trust and confidence in Augusta, and on Valley's reaction to that conduct, which caused Augusta to lose trust and confidence in Valley. On the face of it, these are questions of fact, and on conventional principles this court should be slow to interfere. There are, however, several concerning features of the judge's analysis of this topic.

53. First, the judge took the view that in withholding consent to the payment of dividends Augusta was acting in bad faith. She expressed this view most clearly in paragraph 216 of her judgment, dealing with "legitimate expectation", which I have quoted above in paragraph 30(3); but she also referred to Augusta not acting in good faith (paragraph 188) and its stance as unprincipled (paragraph 190). This view was self-evidently influential in the judge's conclusions; but the problem is that allegations of bad faith were not made in the petition and were not put to Augusta's witnesses in cross-examination. Augusta complained in its submissions to the judge about indications – such as the use of the term blackmail – that Valley was seeking to advance a case of misconduct without pleading or cross-examining to it; and in his closing reply submissions to the judge Mr Levy made clear that he was not alleging bad faith, saying: "We are not looking for bad faith, we don't need to plead that, we don't need to find it". In those circumstances, the judge should not have based her judgment on this aspect on findings of bad faith that were not part of Valley's case and which Augusta had in consequence had no proper opportunity to dispute.

54. Secondly, there is the judge's approach to functional deadlock. One of the established grounds on which a just and equitable winding up petition may be based is the existence of functional deadlock – that is to say, the existence of a state of affairs in which disagreements between the members of the company make carrying out its operations impossible. In the present case, the petition did not claim that such a state of affairs existed; but Augusta contended that the absence of any deadlock was relevant when considering whether or not it was just and equitable to wind

up the Company. The judge considered the issue between paragraphs 243 and 246 of her judgment, but declined to decide it. She said this:

> "In the circumstances where I have found that there is an irretrievable breakdown of mutual trust and confidence, I do not think it necessary to embark upon any enquiry as to whether at the time of the trial there existed a functional deadlock at the Board and Shareholder level" [at 244].

In taking this view, she founded herself on the decision of the Privy Council in *Chu v Lau*. At paragraphs [14] and [15], Lord Briggs said this:

> "A just and equitable winding-up may be ordered where the company's members have fallen out in two related but distinct situations, which may or may not overlap. First, a winding-up may be ordered to resolve what may conveniently be labelled a functional deadlock. This is where an inability of members to co-operate in the management of the company's affairs leads to an inability of the company to function at board or shareholder level.… Secondly, where the company is a corporate quasi-partnership, an irretrievable breakdown in trust and confidence between the participating members may justify a just and equitable winding-up, essentially on the same grounds as would justify the dissolution of a true partnership".

At paragraph [17] he added this:

> "The important potential distinction between the two types of breakdown case is this. If there is a complete functional deadlock, then a winding-up may be ordered regardless whether the company is a corporate quasi-partnership. But if the company is of that type, then a breakdown of trust and confidence may justify winding-up even where there may not be a complete functional deadlock. In the former case winding-up is a remedy for paralysis. In the latter it is the response of equity to a state of affairs between individuals who agreed to work together on the basis of mutual trust and confidence where that trust and confidence has completely gone. But of course both may exist together, and a complete breakdown in trust and confidence may well be the cause of functional deadlock, in a two-party quasi-partnership like the present".

These statements do indeed make it clear that a breakdown of trust and confidence in a quasi-partnership, and functional deadlock, are separate and distinct routes to a just and equitable winding up. In the present case, the petition was based on the former ground, not the latter, so that the judge did not need to consider functional deadlock as a possible justification for a

winding-up. However, what Augusta was suggesting was that the question of functional deadlock – or, in the present case, an absence of such a deadlock – was relevant to the question of whether the judge could realistically find that there had been a sufficient loss of trust and confidence to justify the winding up of the Company. The argument was that, since in all respects save the disagreement over payment of dividends, Augusta and Valley were able without difficulty to carry on the Company's business in all its aspects, the totality of the facts suggested that there had not in fact been a failure of trust and confidence sufficient to justify winding-up. It is reasonably clear what the judge would have decided had she considered this point: she was adamant that there had been a sufficient loss of mutual trust and confidence, and rested her conclusion on functional deadlock on Augusta's own evidence - see paragraph 246 of her judgment, quoted in paragraph 30(4) above. But a proper assessment of the effect of intractable disagreement over dividends (and related issues) required consideration of the parties' relations in the other areas of the Company's business, and the judge did not give it that consideration.

55. The third area of concern relates to Ms Mannix's Confidential Debrief. This document was pivotal in the judge's assessment of Ms Mannix's evidence and her findings that Augusta was pursuing a policy designed to drive Valley out of the Company and leave Augusta, as the sole surviving member, in possession of the retained earnings. The purpose of the Confidential Debrief was expressly to assist Ms Mannix in identifying possible arguments to justify a division of the departed members' retained earnings otherwise than in accordance with the allocation defined by the Dividend Policy. The underlying basis for a departure from the Dividend Policy allocation was that the departed members' retained earnings had not been contributed to by the capital introduced by Augusta or Valley, and were uninfluenced by their loss records. This was an argument which had been presaged by Mr Cain in December 2016: see paragraph 22 above. I find it difficult to understand why the judge took so much against what I consider to be a perfectly respectable argument, and why she regarded it as providing a firm foundation for her findings of bad faith and lack of principle. However, in this respect at least, I acknowledge that her assessment of Augusta's motives is likely to have been influenced by the oral evidence that she heard; and, despite my concerns on this aspect, I would not have thought it appropriate for this Court to interfere with the judge's assessment.

56. In the end, however, the question is whether an underlying basis of trust and confidence has ceased to exist, not (unless it is primarily the fault of the petitioner) whose fault it is that it no longer exists. Whether or not I would myself have taken the same view, I consider that the judge was entitled to her conclusion that the failure to agree on distribution of dividends over the lengthy period she identified was enough to indicate an inability to cooperate on a fundamental aspect of the Company's affairs, namely the operation of the only mechanism by which profits could be released to the members, regardless of the cause of or motives behind that inability and regardless of the fact that the parties were able to operate on a transactional basis in relation to

other aspects of the Company's business. Accordingly, had the issue been live, I would have rejected this ground of appeal.

Legitimate expectation

57. As David Richards J points out in *Re Coroin*, the introduction of the concept of legitimate expectation into this area of the law was made by Lord Hoffmann, who subsequently regretted it. The danger is, of course, that the expression has become associated with judicial review, and has overtones which have no place in the just and equitable ground for winding up. What the expression does do, however, is indicate a position where the underlying basis of a relationship may not be reflected in the contractual documents. As I have already said, that will typically be the case where a member is excluded from management notwithstanding a fundamental understanding that he would participate in it. Here, the judge felt able to conclude that – notwithstanding the clear terms of the Participation Agreement and Dividend Policy – it was a fundamental basis of the association of the members and the Company that profits would be distributed in accordance with the Dividend Policy. Given the premise of a quasi-partnership (which I have, of course, rejected), she would in my view have been entitled to that view; and I would have rejected this ground of appeal also.

Alternative remedies

58. The judge introduced the question of alternative remedies in the following terms (paragraph 247 of the judgment):

> "The final issue for resolution is, if the Court finds that a case for winding-up the Company on the just and equitable ground has been established, to what extent (if any) do one or more alternative remedies exist which make it unreasonable for Valley Health to continue to seek a winding-up?";

and at paragraph 255 she expressed her conclusion thus:

> "The fact that there is an available remedy does not preclude the making of a winding up order unless the petitioner is acting unreasonably in not pursuing that remedy. Valley Health cannot be said to be acting unreasonably in failing to pursue that remedy. On a winding up… each member would receive their contractual share of the surplus assets. Any remedy proposed by Augusta which offered less than that would be properly rejected by Valley Health".

59. In my judgment, the judge's approach to this point was flawed. As is evident from the paragraphs I have quoted, it places the focus on the reasonableness or otherwise of Valley pursuing a winding-up order rather than some alternative remedy. It seems to me likely that this formulation was influenced by the judge's reading of *Chu v Lau*, which she had cited when considering the existence of a quasi-partnership. That case was an appeal to the Privy Council from the Court of Appeal of the Eastern Caribbean Supreme Court on appeal from the British Virgin Islands High Court. The relevant BVI legislation is contained in the Insolvency Act 2003, which by section 167(3) provides as follows:

> "(3) Where an application to appoint a liquidator is made by a member…, If the Court is of the opinion that
>
> a. the applicant is entitled to relief either by the appointment of a liquidator or by some other means; and
> b. in the absence of any other remedy it would be just and equitable to appoint a liquidator, it shall appoint a liquidator unless it is also of the opinion that some other remedy is available to the applicant and that he is acting unreasonably in seeking to have a liquidator appointed instead of pursuing that other remedy".

60. The legislation in the Cayman Islands is not, however, to the same effect. As the judge had recognised much earlier in her judgment (paragraph 19), the question of alternative remedies is dealt with by section 95(3) of the Act. That subsection provides as follows:

> "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 the purchase by the company itself a reduction of the company's capital accordingly".

In *Camulos Partners Offshore Limited v Kathrein and company* 2010 (1) CILR 303, this court held that the availability to a petitioner of an effective alternative remedy would be a ground for restraining a petition on the just and equitable ground; but it also pointed out that "the gateway to an order under s. 95(3) of the [Act] is that the court is satisfied that (but for that order) it would be

"just and equitable" to wind up the company". Subsequent decisions of this court have reiterated these points: see, for example, *Re China CVS*. It follows that, once the judge had determined in the present case that the petitioner had established a prima facie case for winding up, she should have gone on – either then or, as Augusta claims to have asked her to do, at a subsequent hearing – to consider whether any of the statutory remedies was a more appropriate method of dealing with the situation. One obvious possibility would have been an order under section 95(3)(b) "requiring the company… to do an act which the petitioner has complained it has omitted to do", namely an order requiring payment of the outstanding dividends in accordance with the Dividend Policy. She did not consider this or any other of the statutory remedies. It is reasonably clear from the terms of her judgment that, had she considered the alternative remedies, she would have decided that none of them was apt to meet the situation because of the breakdown of trust and confidence; but it is at least possible that, had she had regard to the evidence that the Company was not functionally deadlocked, and indeed was operating perfectly adequately on a day-to-day basis, she would have taken a different view. In my view these failures – to consider the statutory alternative remedies or whether or not there was functional deadlock – mean that her judgment could not have been supported even if she had been right that a case for a just and equitable winding up otherwise existed.

Policy considerations

61. Although it seems to me that the fact that the Company was a large company with a fluctuating membership of representatives of the (themselves substantial) corporate participants, regulated as an insurer, and utilising SSC and several other service providers, might have given the judge pause, she was right to hold that none of these matters was an obstacle to a finding of quasi-partnership or a just and equitable winding up. The key is the nature of the underlying relationship of the participants, and that is independent of the size of the enterprise, the corporate nature of the participants and the existence of regulatory oversight – although such factors are of course relevant to an assessment of the relationship. In this case, most of the factors were present in the early years of the Company's life, but were not enough to outweigh the evidence of an enterprise started and for a time continued on the basis of trust and confidence supplementing immature constitutional documents. This ground of appeal fails.

Procedural irregularity

62. As I have indicated, the first ground of appeal complained of procedural irregularities. In his oral submissions to us, Mr Potts sensibly left this ground until last, no doubt recognising that none of the complaints would, even if justified, be determinative of the appeal. It is sufficient for me to say that, apart from the questions of the findings of bad faith and the judge's approach to

alternative remedies, which I have dealt with above, there is in my view nothing in the complaints.

Disposition

63. For the reasons I have given, I would allow this appeal. The question – much discussed in the course of the appeal hearing – is what should be done. The Company should not have been wound up; but it has been in liquidation since the judge's order, and the joint official liquidators have been administering its affairs since then. Augusta did not seek a stay of the winding up order, a fact of which Mr Levy made much. Both Augusta and Valley have set up their own separate captive insurance companies. If the Company is restored to life, it will serve no useful purpose. The Participation Agreement applies the Dividend Policy automatically to distribution of surplus in a winding up; but if there is no winding up the dispute over dividends will on the face of it remain unresolved. There is no question of the availability of alternative remedies under section 95(3): since there was on proper analysis no case for a just and equitable winding up, the gateway to alternative relief is not open (see *Camulos*, cited in paragraph 60 above). Nor is there anything to remit to the Grand Court, since the Petition has failed and there is accordingly no proceeding on foot. In the circumstances, it seems to me that – unsatisfactory though it plainly is – the only order that we can make is an order allowing the appeal, discharging the joint official liquidators, and dismissing the Petition. I would make that order, and leave questions of costs for further submission.

The Rt. Hon. Sir Alan Moses, Justice of Appeal

64. I agree.

The Rt. Hon. Sir John Goldring, President

65. I also agree.