In The Supreme Court of Bermuda

CIVIL JURISDICTION

COMMERCIAL COURT

2024: No. 70

IN THE MATTER OF CASSATT INSURANCE COMPANY, LTD

AND IN THE MATTER OF THE COMPANIES ACT 1981

RULING

Date of Hearing: **14 October 2024**
Date of Ruling: **4 November 2024**

Appearances: **John Wasty, Appleby (Bermuda) Limited, for Cassatt Insurance Company, Ltd.**

Kyle Masters, Carey Olsen Bermuda Limited, for the Petitioners

RULING of Mussenden CJ

Introduction

1. The Petitioners in this matter are Jefferson Health Northeast System and Abington Memorial Hospital. The Amended Petition seeks an oppression remedy pursuant to section 111 (the "**s.111 Remedy**") of the Companies Act 1981 (the "**Act**") on behalf of the Petitioners in their capacity as shareholders of Cassatt Insurance Company, Ltd. (the "**Company**"). The

oppressive conduct complained of in the Amended Petition explicitly includes the wrongful removal of the Petitioners as registered shareholders of the Company.

2. This matter comes before me on directions for the hearing of the Amended Petition, as well as the Company's Summons issued 5 October 2024 seeking to strike out the Amended Petition on the grounds that the Petitioners do not have standing under section 111 to seek an oppression remedy (the "**Strike-Out Summons**"/"**Strike-Out Application**"). The present hearing is for directions as the Company and the Petitioners have not been able to agree directions.

3. The Company's position on directions (the "**Company's Directions**") is that the Strike-Out Summons should be determined before any trial of the facts on which the s.111 Remedy relies.

4. The Petitioners' position on directions (the "**Petitioners' Directions**") is as follows:
   a. The Court should first determine both the issue of: (i) whether the affairs of the Company are being conducted in a manner oppressive or prejudicial to the interest of the Petitioners; and (ii) whether the Petitioners have standing to bring the Amended Petition ("**First Hearing**"); and
   b. The Court should then determine any further issues related to the Petitioners' oppression remedy pursuant to section 111 of the Act.

5. The Petitioners' proposal also includes procedural directions for the First Hearing which allow for the discovery and inspection of documents related to the issues to be determined as part of the First Hearing, the filing of affidavit evidence and the cross-examination of deponents, the filing of expert evidence and the cross-examination of experts, and the filing of skeleton arguments and a two-and-a-half-day trial for the First Hearing.

Background

6. The Company is an exempted company limited by shares under the Act. Its business is the reinsurance of and provision of excess insurance over policies of medical professional

liability and comprehensive general liability written by Cassatt Risk Retention Group, Inc ("**Cassatt RRG**") and administered by Cassatt RRG Holding Company, Inc ("**RRG Holding**"). The Court was referred to the Company's bye-laws (the "**Bye-Laws**") and its consolidated and amended shareholders' agreement dated 16 November 2011 ("**CASA**" and, together with the Bye-Laws, the "**Constitutional Documents**").

7. The Company's shareholders are comprised of each Cassatt RRG policyholder, from time to time ("**Institutional Shareholders**"). The Company's membership is restricted to entities who meet certain qualification requirements. To be eligible to acquire or continue to own shares in the Company, pursuant to Article II.A CASA and Bye-Law 3.2 an Institutional Shareholder must, *inter alia*:

   a. participate in each program (i) written by Cassatt RRG and the Company and (ii) administered by RRG Holding (the "**Insurance Program**"); and
   b. participate in and comply with the claims and risk management procedures (the "**Cassatt Procedures**") adopted by the Company's Board (the "**Board**").

   (together, the "**Eligibility Requirements**").

8. An Institutional Shareholder's failure to qualify under or to continue to meet the Eligibility Requirements, constitutes possible grounds for a forced withdrawal upon a vote of a majority of the Board pursuant to Article II.B and I.E CASA ("**Forced Withdrawal**"). Pursuant to Bye-Law 5.2, "*[s]ubject to complying with Bermuda law and the Shareholders' Agreement*," an Institutional Shareholder's shares shall be purchased by the Company "*upon the cancellation or termination of the Institutional Shareholder's participation in the Insurance Program*."

9. The Company's obligations to an Institutional Shareholder who is no longer participating in the Insurance Program, including following a Forced Withdrawal, are set out in Article I.C CASA.

10. The Company asserts that the Petitioners are former shareholders of the Company which failed to comply with the Cassatt Procedures, and after a letter dated 31 October 2023 to

them requiring them to cease and desist their continuing non-compliance, they did not cure their non-compliance. Thus, on 25 January 2024, the Board resolved to effect a Forced Withdrawal of the Petitioners and the Company provided such notice to the Petitioners on 29 January 2024, with the effect that the Petitioners ceased to be shareholders as of that date.

11. In the weeks leading up to the cease and desist letter, the Company asserts that the Petitioners attempted to appoint two directors to the Board and an alternate pursuant to the Bye-Laws, such Institutional Directors being members of Senior Management (defined as the President, Chief Executive Officer, Chief Operation Officer, General Counsel or similar position, or Chief Financial Officer of the Institutional Shareholder of any of its subsidiaries). Bye-Law 44 provided that any amendment to the Bye-Laws must be approved by the Board and also was subject to approval of a shareholder super majority, which was defined to mean the affirmative vote of 80% of the issued and outstanding shares of the Company.

12. On 14 February 2023 and 13 July 2023, the Petitioners' respective Institutional Directors resigned their offices. The Petitioners were entitled to appoint new Institutional Directors and an Alternate Director upon appropriate notice to the Secretary of the Company. In the weeks preceding the anticipated date of the Company's 2023 annual general meeting on 23 October 2023 ("**AGM**"), representatives of the Company and the Petitioners discussed the Petitioners' appointment of new Institutional Directors and an Alternate Director, which the Company asserts was done with the intention of formalizing the appointments of the proposed appointees (the "**Proposed Appointees**") at the AGM with a meeting of the Board to immediately follow the AGM.

13. On 8 September 2023, the Company's CEO informed the Petitioners that the Proposed Appointees did not meet the definition of Senior Management (which the Petitioners deny). However, the Company was amenable to a compromise of the appointment of the two Institutional Directors provided the Alternate Director was an individual who held the position of President, CFO, COO or General/Legal Counsel of an Institutional Shareholder. The parties were not able to reach a compromise.

14. On 20 October 2023, the Company's CEO informed the Proposed Appointees that the AGM was being cancelled and that the Board would continue to meet to address outstanding matters including whether they qualified to be Institutional Directors, as the Company took the position that they did not meet the requirements for directors since, in effect, they were not Senior Management. The Company also asserts the Board concluded that the Bye-Laws could not be construed to permit the appointment of the Proposed Appointees. On 23 October 2023, the Deputy General Counsel of Thomas Jefferson University responded on behalf of the Petitioners acknowledging that the Bye-Laws would need to be amended in order for the Proposed Appointees to be qualified to serve, suggesting changing the word "subsidiary" to "affiliate'. On 31 October 2023, counsel for the Company informed the Petitioners that the Board had declined to amend the Bye-Laws as suggested.

The Amended Petition

15. The Amended Petition asserts that, in September 2023, the Petitioners gave notice that they were appointing the Proposed Appointees as their Directors. The Company's position is that there was no such notice.

16. The Amended Petition asserts that the Proposed Appointees are "*all Senior Management*" of Jefferson Health, the Petitioners' parent company ("**Jefferson**"), and that since Jefferson is the corporate parent of the Petitioners, Jefferson's executives qualify as the Petitioners' Senior Management. The Company denies those assertions.

17. The Petitioners allege that: (i) the proposed Appointees were appointed to the Board; (ii) the Proposed Appointees have been improperly excluded from the Board's business since their appointment; and (iii) the exclusion is part of a scheme to disadvantage the Petitioners. The Company denies the allegations noting that the Petitioners could have at any time before the Forced Withdrawal appointed qualified persons to the Board but failed to do so.

18. The Amended Petition also alleges that, on 22 February 2024, the management of the Company refused to renew the Petitioners' involvement in the Insurance Program for the 2024/25 policy year, which was in response to the Petitioners' written notification of intent

to renew their participation in it. The Amended Petition alleges that the non-renewal was justified by the management on the same wrongful basis as, and in conjunction with, the attempt to remove the Petitioners as Institutional Shareholders, a position that the Amended Petition alleges was inconsistent with and constitutes another breach of the CASA. As a result of the non-renewal, the Petitioners allege that they were forced to go to market to obtain new third party coverage to replace the coverage wrongfully denied by management of the Company.

19. The Amended Petition asserts that the Forced Withdrawal was unjustified and effected in furtherance of the scheme to disadvantage the Petitioners. The Company denies these allegations noting that the Petitioners' non-compliance with the Cassatt Procedures is a wholly separate issue to the lack of qualification of the Proposed Appointees and casting both issues as part of a wider scheme was nonsense.

The law governing standing to seek an oppression remedy

20. Section 111(1) of the Act permits "*members*" of a company to seek an oppression remedy:

> ***Alternative remedy to winding up in cases of oppressive or prejudicial conduct***
> *Any member of a company who complains that the affairs of the company are being conducted or have been conducted in a manner oppressive or prejudicial to the interests of some part of the members, including himself, or where a report has been made to the Minister under section 110, the Registrar on behalf of the Minister, may make an application to the Court by petition for an order under this section.*

21. In *Re Full Apex (Holdings) Ltd* [2012] Bda LR 9 (SC) Kawaley J (as he then was) held as follows:

> *15. The 3rd Petitioner has no standing to petition as he had no shares registered in his name as required by section 111(1) of the Act as read with section 19 (2). He is not, for these purposes, a "member". His claim is accordingly struck-out.*

22. In *Re Contingent and Future Technologies Ltd* [2024] BCC 223 (Ch), where the Court dismissed an application to strike out an oppression petition filed by shareholders whose shares were involuntarily appropriated by the Company as part of the oppressive conduct complained of, Greenwood JICC stated as follows:

58. In the context of the present case, Nilon Ltd serves to demonstrate that case management powers, however sensibly deployed, cannot properly be used to circumvent or avoid a jurisdictional limitation.

…

115. In those circumstances, I do not accept that it would be just to strike out the Petition, and effectively compel [the petitioner] to commence fresh proceedings in which to establish, if he can, his membership, before commencing fresh proceedings under section 994. In my view, in substance, that step would be inconsistent with the approach taken by Briggs J in Starlight Developers, and in any event, is not justified by reference to the court's duty to manage cases in accordance with the overriding objective. As in Starlight Developers, if the Petition were now to be struck out in its entirety, with costs payable to the Applicants, but [the petitioner] were subsequently to show that he was at all times entitled to membership and was only removed from the register due to the fault of the Respondents, there is a risk that the order would (to adopt the words of Briggs J) "work a real injustice". [The petitioner] would be compelled to spend time and money reproducing steps already taken, and the costs paid to the Applicants would almost certainly be irrecoverable.

23. In *Re Motion Picture Capital Ltd* [2021] EWHC 2504 (Ch), where the Court refused to strike out an oppression petition due to lack of standing, which only became an issue because the petitioner's shares were forcibly transferred after the oppression petition had been filed, Kyriakides DJICC stated as follows:

55. There is no obvious purpose or benefit to the Company having possession of the Shares through its nominees. The only obvious benefit on the face of things as they currently stand is to the Respondent Shareholders, who, in view of the preliminary issue sought, clearly believed that their actions would give them a good chance of having the Petition dismissed on the grounds of standing and thereby avoid having the Court determine the allegations of wrongdoing against them. In this respect, it is also relevant that the step of transferring the Shares was taken nearly two years after the default complained of, shortly before a case management conference in this Petition and then only after the Respondent Shareholders had exhausted all other avenues which might either have got rid of the Petition at an early stage or, at the very least, have deprived Mr. Clarence of standing to pursue it.

…

58. In light of the above and the wide discretion that the Court has under CA section 996 when deciding the issue of remedy, including its ability to take into account matters which post-date the presentation of the Petition, I do not think that it is plain and obvious that a court would refuse to make an order for the purchase of the Shares at trial. In my judgment, if the above matters are established, there is a real prospect that the court, in the exercise of its discretion under section 996 and in order to enable a purchase order

to be made, would make such other orders as might be necessary to restore the position to what it was prior to the Shares being transferred.

24. In *Chiang at al v Kistefos Investments A.S.* [2002] Bda LR 50 (CA), where the Court of Appeal upheld the dismissal of an application to strike out an oppression petition, Astwood P stated at page 10 as follows:

The judge said in his conclusion at p.16 of his judgment:

> *"1) I have heard the submissions of counsel over a period of some five and a half days. I have considered the Petition in detail and the Affidavits and 22 files of documents which accompany them. I have effectively been called upon to carry out a minute and protracted examination of the documents and alleged facts of the case in order to see if the Plaintiff has a real cause of action. This I am not prepared to do. I am not prepared to usurp the position of the trial judge who must have the benefit of the oral evidence tested by cross-examination in order to decide the issues between the parties.*
>
> *2) I have come to the conclusion that the Petition discloses a prima facie allegation of complaint that the affairs of the Pacific are being conducted in a manner prejudicial to the interests of some part of the members including Kistefos.*"

We agree with the judge's approach to the strike out application. He will come to his final conclusion when he has heard the evidence tested in cross-examination as to whether the conduct complained of amounts to conduct which is oppressive and/or unfairly prejudicial to the interests of some part of the members of the company including Kistefos.

We concluded that the judge had not erred and that the petition should be allowed to proceed to trial. In our view, sufficient facts are pleaded in the petition to indicate to the Company and Chiang what the allegations are which are asserted against them. In our opinion if these allegations are established, the judge could infer that the conduct complained of has been proved.

25. In *UTB LLC v Sheffield United Ltd* [2019] EWHC 2744 (Ch), where the Court found that the wrongful transfer of a registered shareholder's shares can be retroactively invalidated as part of granting an oppression remedy, Fancourt J stated as follows:

20 In my judgment that case says nothing about the question of whether someone who was a shareholder, and who ceased to be a shareholder only by reason of the order of a court that was subsequently overturned on appeal, was entitled to complain about unfairly prejudicial conduct during the time after the court order and the order on appeal. Under section 994(1), the question is, first, whether a petitioner is a shareholder at the date on which the application by petition is made. [The petitioner] would be if, by order of the Court of Appeal, UTB had to re-transfer its shares in [the company]. It would then once again be the owner of the shares whose value had been affected by any unfairly prejudicial conduct affecting [the company]'s members, or some part of its members

including [the petitioner]. [The petitioner] would have locus standi and would have suffered loss to the extent that its shares had been reduced in value. That is quite different from a case in which a putative petitioner had never been a member of the company in issue.

The law governing rectification

26. Section 67 of the Act provides as follows:

Power of Court to rectify register
67. (1) If-
(a) the name of any person is, without sufficient cause, entered in or omitted from the register of members of a company; or
(b) default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member,
the person aggrieved, or any member of the company, may apply to the Court for rectification of the register.

(2) Where an application is made under this section, the Court may either refuse the application or may order rectification of the register and payment by the company of any damages sustained by any party aggrieved.

(3) On an application under this section the Court may decide any question relating to the title of any person who is a party to the application to have his name entered in or omitted from the register, whether the question arises between members or alleged members, or between members or alleged members on the one hand and the company on the other hand, and generally may decide any question necessary or expedient to be decided for rectification of the register.

27. In *Thomas and Swan v Fort Knox Bermuda Ltd and Others* [2014] Bda LR 14 (SC), Hellman J found that the Court has the power to rectify a company's register of members pursuant to section 67(3) of the Act. He stated:

102. Section 67(3) of the 1981 Act is headed 'Power of Court to rectify register'. It provides that, on an application under the section, the Court 'generally may decide any question necessary or expedient to be decided for rectification of the register'. ...

28. In *Nilon Ltd v Royal Westminster Investments SA* [2015] BCC 521 (UKPC), Lord Collins in the Privy Council held as follows:

51. In the view of the Board, proceedings for rectification can only be brought where the applicant has a right to registration by virtue of a valid transfer of legal title, and not merely a prospective claim against the company dependant on the conversion of an equitable right to a legal title by an order for specific performance of a contract. It follows

that Re Hoicrest Ltd was wrong as a matter of principle, however sensible it might have been as a matter of case management.

The Company's Position

29. Mr. Wasty submitted that the Company's position is that the Amended Petition complains that: (i) the Proposed Appointees were not appointed or were excluded from the Board; and (ii) the Forced Withdrawal was unjustified. They submit that the resolution of the Strike-Out Summons is not dependent on the resolution of either of the complaints.

30. Mr. Wasty submitted that the Strike-Out Summons relies on a straightforward application of the law to uncontested facts: (i) the s.111 Remedy is only available to a member of the Company; (ii) the Petitioners are not members of the Company; and (iii) the Petitioners are not entitled to rectification of the register of members, as they are not qualified to be members of the Company.

31. Mr. Wasty relied on the case of *Re Full Apex (Holdings) Ltd* at [15]. He rejected the reliance placed by the Petitioners on the case of *Re Contingent and Future Technologies Ltd* that *Re Full Apex (Holdings) Ltd* did not apply in the context of rectification, noting that it was a flawed submission. He then relied on the Privy Council case of *Nilon Ltd v Royal Westminster Investments SA* where Lord Collins held that the Board's view was that proceedings for rectification can only be brought where the applicant has a right to registration by virtue of a valid transfer of legal title, and not merely a prospective claim against the company.

32. Mr. Wasty submitted that should the Petitioners argue that the Court disregard the Eligibility Requirements, the Company would rely on *Bratton Seymour Service Co Ltd v Oxborough* [1992] BCC 471 (CA), as applied by the Court of Appeal for Bermuda in *Capital Partners Securities Co Ltd v Sturgeon Central Asia Balanced Fund Ltd* [2018] Bda LR 33 (CA) at [344] as demonstrating the principle that the Court has no jurisdiction to rectify a company's bye-laws.

33. In summary, Mr. Wasty submitted that the Petitioners cannot, given the terms of the Constitutional Documents, establish any right to registration and accordingly are not entitled to rectification. Thus, they are not members of the Company, consequently they are not entitled to the s.111 Remedy.

34. Mr. Wasty submitted that the threshold legal issue of standing should be determined first. He argued that the Company's proposed directions would be consistent with the Overriding Objective because: (a) they would save expense as the resolution of factual issues will require discovery, expert evidence, cross-examination of witnesses and a multi-day trial; (b) ensure the case is dealt with fairly and expeditiously as the factual issues are immaterial to the legal issues relied on in the Strike-Out Summons; and (c) ensure appropriate use of the Court's resources.

35. Mr. Wasty submitted that the Petitioners' approach would be inconsistent with the Overriding Objective because the Petitioners' proposed directions would: (a) increase expenses through discovery, preparation of factual evidence and expert evidence and attendance at a trial; (b) increase delay as trial preparation would take longer than preparation for a hearing on the Strike-Out Summons and a judgment on the factual issues will take longer for the Court to hand down; and (c) consume an inappropriate share of the Court's resources.

The Petitioners' Position

36. Mr. Masters submitted that the Petitioners' position is that it would be wrong to grant the Strike-Out Application which would mean that the Petitioners are prevented from seeking an oppression remedy because the Petitioners were removed from the Company's register of members as part of the very oppression complained of. Mr. Masters submitted that the Strike-Out Application is a defence to the merits of the Petitioners' oppression claim in the guise of a preliminary issue.

37. Mr. Masters submitted that the Bermuda courts have only considered standing pursuant to section 111 where the petitioner has never been a registered shareholder of the company,

advancing that the Bermuda courts have not considered standing in circumstances where the petitioners were registered shareholders but for the forced transfer of their shares as a direct result of the oppressive conduct complained of. Mr. Masters relied on several English authorities as set out below to support the position that the principles are equally applicable to the Petitioners' section 111 claim:

a. *Re Contingent and Future Technologies Ltd* where he argued that the company's application to strike out the oppression petition due to lack of standing was effectively a defence to the merits of the oppression claim, leading the Court to order a split trial, where the issue of standing was to first be determined at the same time as the merits of the oppression claim. He also relied on the same case at [115] to highlight that it would be a "*real injustice*" to strike out the oppression petition in circumstances where the standing issue was only created due to the oppressive conduct complained of.
b. *Re Motion Picture Capital Ltd* in respect of the reason for transferring the shares was to challenge standing and also for the point that the Court found that it had a discretion to retroactively restore the petitioner's shares.
c. *UTB LLC v Sheffield United Ltd* where he argued that the Court confirmed that it had the discretion as part of granting an oppression remedy to invalidate any wrongful transfer of shares by operation of law, such that shares wrongfully transferred can be retroactively restored, thus eliminating any technical issue of standing.

38. In respect of the Court ordering a split trial, Mr. Masters argued that it would create a "*real injustice*" if the Company were allowed to use the Strike-Out Application to block the Petitioners from seeking an oppression remedy due to lack of standing. He relied on *Re Contingent and Future Technologies Ltd* and the Overriding Objective to show that such an approach would be more efficient and cost effective. He argued that the issue of standing and the issue of oppressive conduct cannot be properly separated from each other as there will need to be a determination of the Petitioners' oppression claim. Further, if the Petitioners were wrongfully removed as members due to oppressive conduct, then they remain registered shareholders. Also, it would be unnecessarily costly and time consuming for the

Court to make a preliminary determination on the merits of an oppression claim as part of the Strike-Out Application and then make the determination again when substantively hearing the Amended Petition on its merits.

39. In respect of rectification, Mr. Masters submitted that the matter of rectifying the Company's register of members to reflect that the Petitioners remain registered shareholders is merely a technical issue. He stated that the Court can address the issue either as part of fashioning an oppression remedy pursuant to section 111 (similar to the approach in *Re Motion Picture Capital Ltd*) or by ordering rectification at any time pursuant to section 67(3) of the Act. He relied on *Thomas and Swan v Fort Knox Bermuda Ltd and Others* for the authority that the Court has jurisdiction to order rectification. Mr. Masters submitted that the Petitioners have sought to enforce their rights as shareholders of the Company and the Amended Petition otherwise seeks such further or other relief that the Court may deem fit.

40. Mr. Masters submitted that the present case was not like the situation in *Nilon Ltd v Royal Westminster Investments SA* where the Privy Council held that statutory rectification in the British Virgin Islands can only be granted where the applicant has a right to registration by virtue of a valid transfer of legal title. He argued, that in *Nilon*, the applicant had never been a registered shareholder but had sought rectification based on an outstanding claim that a defendant had orally agreed to transfer shares in the company into the name of the applicant. Thus, the applicant was an equitable shareholder until obtaining an order for specific performance, and the Privy Council held that the applicant could not seek rectification until it obtained an order for specific performance. Mr. Masters argued that, in the present case, the situation is entirely different since the Petitioners have legal title to the shares in the Company, and having always been registered shareholders of the Company, they are merely seeking recognition of that fact.

41. Mr. Masters submitted that the Petitioners were wrongfully removed from the Company's register of members contrary to law due to the oppressive conduct complained of in the Amended Petition, then the Company wrongfully rejected the Petitioners' attempts to remain

within the Insurance Program using the same oppressive conduct as the justification for doing so.

42. Mr. Masters submitted that wrongdoing cannot be used as a shield by the Company to oust the Court's jurisdiction to grant an oppression remedy as the Court has the power to correct that wrongdoing either through a section 111 oppression remedy or pursuant to section 67(3) of the Act.

Analysis

43. In my view, I should order that this matter proceed by way of the Petitioners' Directions for several reasons.

44. First, I am satisfied that I have the discretion to order a split trial to ensure that the litigation is heard in the most efficient and cost-efficient manner. I refer to the case of *First Atlantic Commerce Ltd v Bank of Bermuda Ltd* [2007] Bda LR 4 (SC), where Kawaley J (as he then was) found that the Overriding Objective empowered the Court to adjust the issues to be considered as part of a split trial to ensure the litigation was heard in the most efficient and cost-efficient manner. He stated:

> *12. Having regard to the Overriding Objective in Order 1A of the Rules, the Court is not constrained to resolve this controversy on the basis of the arguments advanced by the parties. This Court is under a positive duty to actively consider how this litigation should be managed with a view to saving time and costs. The parties do not have an unfettered right to have their day in Court; the right to a fair hearing implies a hearing that is fair to both sides and resolves serious issues in an efficient manner.*

45. Second, I am satisfied that the Court has the power pursuant to section 67(3) of the Act to rectify a shareholder register. I rely on the case of *Thomas and Swan v Fort Knox Bermuda Ltd and Others* where Hellman J found at [102] that the Court *"generally may decide any question necessary or expedient to be decided for rectification of the register …"* In my view, in the present case, there are questions for determination in respect of the issue of rectification in this matter.

46. Third, I am not satisfied by the Company's submissions that the Strike-Out Summons relies on a straightforward application of the law to uncontested facts. This is based on the Company's view that: (i) the s.111 Remedy is available only to a member of the Company; (ii) the Petitioners are not members of the Company; and (iii) the Petitioners are not entitled to rectification of the register of members as they are not qualified to be members. In my view, to take that approach would be to gloss over the issues of how the Company arrived at the position to effect a Forced Withdrawal. Although, in *Re Full Apex (Holdings) Ltd,* Kawaley J struck out a section 111 claim as the petitioner in that case had no shares registered in his name, in my view that reasoning does not apply in the present case, because at a deeper level, the facts are contested and the issues of standing and oppressive conduct are overwhelmingly intertwined. In my view, to accept the Company's position to hear the Strike-Out Summons only, in the absence of any of the material facts, has the potential to lead to, as stated in *Re Contingent and Future Technologies Ltd*, a "*real injustice"*.

47. Fourth, in my view, there is merit in the arguments of the Petitioners that the issue of standing and the issue of oppressive conduct cannot be properly separated from each other as there will need to be a determination of the Petitioners' oppression claim in considering standing. In my view, as argued by Mr. Masters, it would be wrong, on hearing the Strike-Out Summons with no evidence of relevant background facts, to grant the application such that the Petitioners are prevented from seeking an oppression remedy because they were removed from the Company's register as part of the oppression complained of. At this stage, I accept the cases relied on by the Petitioners. Further, I accept that the present case is different from the case of *Nilon Ltd v Royal Westminster Investments SA* , in that here the Petitioners' claims are not merely a prospective claim, but the claims are based on the assertion that they have legal title to the shares in the Company and they have always been registered shareholders of the Company.

48. Fifth, I accept the English line of cases relied on by Mr. Masters, namely *Re Contingent and Future Technologies Ltd, Re Motion Picture Capital Ltd* and *UTB LLC v Sheffield United Ltd* , as examples of where there were reasons to order a split trial to determine standing and

the oppression remedy. In the present case, both the issues of compliance with the Cassatt Procedures and the participation in the Insurance Program are hotly contested and impact on standing. In my view, the principles in those English cases are applicable to the present case and the determination of standing. I also rely on the reasoning of Hargun CJ in *Re The P Trusts (Ruling on Rescission)* [2022] Bda LR 128 (SC) and *Chiang et al v Kistefos Investments A.S.* where the Bermuda Court of Appeal upheld the dismissal of an application to strike out an oppression petition. Similar to that case, in my view there needs to be a full trial with oral evidence tested by cross-examination to make a determination of the issue of standing and the claim of oppression.

49. Sixth, I have considered the Overriding Objective in this case and the principles of case management. In my view, applying the principles in *Re Contingent and Future Technologies Ltd,* it will be more efficient and cost-effective for a split trial. I agree with Mr. Masters that it would be unnecessarily costly and time-consuming for the Court to make a preliminary determination on the merits of the oppression claim as part of the Strike-Out Application, and then make that determination again when hearing the matter substantively on the merits.

Conclusion

50. For the reasons set out above, I order that this matter proceed based on the Petitioners' Directions and the Schedule 1 Proposed Form of Order submitted by the Petitioners.

51. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Petitioners against the Company on a standard basis, to be taxed by the Registrar if not agreed.

Dated 4 November 2024

HON. MR. LARRY MUSSENDEN
CHIEF JUSTICE