IN THE GRAND COURT OF THE CAYMAN ISLANDS FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 247 OF 2019 (NSJ)

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND IN THE MATTER OF BITMAIN TECHNOLOGIES HOLDING COMPANY

BETWEEN:

GREAT SIMPLICITY INVESTMENT CORPORATION

PLAINTIFF

AND

BITMAIN TECHNOLOGIES HOLDING COMPANY

DEFENDANT

IN OPEN COURT

Appearances:	**Mr Alex Potts QC, Mr Jonathon Milne and Mr Spencer Vickers of Conyers on behalf of the Plaintiff**
	Mr Stephen Moverley Smith QC, Mr Marc Kish and Mr William Waldron of Ogier on behalf of the Defendant
Before:	**The Hon. Justice Segal**
Draft judgment Circulated:	**2 October 2020**
Judgment delivered:	**5 October 2020**

JUDGMENT ON JOINDER ISSUE, THE PLAINTIFF'S STRIKE-OUT APPLICATION AND THE PLAINTIFF'S PRELIMINARY ISSUES APPLICATION

Introduction

1. On 3 August 2020 I delivered a short ruling (the ***Ruling***) dealing with the applications heard on 28-30 July 2020.

2. I gave directions for the filing of further submissions including further submissions in connection with the issue of whether it is necessary or appropriate for Victory Courage Limited ***(VCL)***, a non-party shareholder in the Defendant who was referred to in paragraph 12 of the Plaintiff's statement of claim, to be joined as a party (the ***VCL Joinder Issue***). I concluded that I should decide whether VCL should be joined as a further defendant before disposing of the Plaintiff's application to strike out the parts of the Defendant's defence and counterclaim that relate to the paragraph 12 claim (the ***Plaintiff's Strike-Out Application***) and the Plaintiff's application for a direction that there be a trial of certain preliminary issues or a split trial (the ***Plaintiff's Preliminary Issues Application***). The Plaintiff and the Defendant have now filed their further submissions and this judgment deals with the VCL Joinder Issue, the Plaintiff's Strike-Out Application and the Plaintiff's Preliminary Issues Application.

3. For the reasons given below, I have decided that:

   (a) it is open to a shareholder who wishes to prevent his company from treating as valid, and from acting on, resolutions which were purportedly but not validly passed at a shareholders' meeting (or a meeting which was not properly convened) to apply for relief, by way of a declaration, against the company without the need, in order for the action to be properly constituted, to join any shareholder.

   (b). a plaintiff shareholder may but is not required to join another shareholder. The plaintiff has a choice although the Court of its own motion can require joinder. I have concluded that joinder *on the Court's motion* is not appropriate or required in the present circumstances. The Plaintiff's decision as to how best to prosecute its claim, what facts and evidence to rely on and who needs to be joined as a party is in this case one with which the Court should not interfere of its own motion, when the Plaintiff has formed a view as to what is needed and neither the Defendant nor VCL have sought to challenge the Plaintiff's approach and applied to have VCL joined.

(c). the Plaintiff's Strike-Out Application should be dismissed.

(d). the Plaintiff's Preliminary Issues Application should also be dismissed.

4. The parties now need to make progress towards a trial of all the issues raised in the Plaintiff's claim and suitable directions are required to facilitate this. These directions should, in outline, cover the following matters (on the assumption that discovery has now been properly given and inspection taken place):

(a). the Plaintiff should have a period (I suggest 14 days) within which to file an amended statement of claim.

(b). if the Plaintiff chooses to do so, the Defendant should have a similar period in which to file an amended defence and counterclaim.

(c). if the Defendant chooses to amend its defence and counterclaim, the Plaintiff should have a period in which to file an amended reply to the amended defence and counterclaim.

(d). the parties should exchange witness statements within a period (again I suggest 14 days) after the date of the order made in respect of the applications dealt with in this judgment or if further amended pleadings are filed, after the date on which the last of such amended pleadings is filed.

(e). within a period thereafter (I suggest 21 days) the parties should attend on the listing officer with a view to fixing a date for the trial of the action and shall file with the Court draft directions for the conduct of the trial (either in agreed form or as proposed by each party) and if the directions are not agreed the parties should indicate whether they seek a hearing to settle the directions or whether they wish the Court to settle the directions on the papers.

(f). there should be a PTR no less than six weeks before the start of the trial.

(g). liberty to apply.

5. I request counsel to file with the Court before 14 October 2020 draft directions consistent with this outline, either in agreed form or as proposed by each party and I shall then settle the directions on the papers. I would also request that counsel file at the same time their submissions as to the appropriate costs order to be made in respect of the matters dealt with in this judgment.

The background

6. The Defendant is currently the only other party to the Plaintiff's proceedings. The relief sought in the statement of claim is a declaration that (i) the extraordinary general meeting of the ordinary shareholders of the Defendant purportedly held on 13 November 2019 (the ***EGM***) was invalid (invalidly convened) and that the resolutions purportedly passed thereat were also invalid and of no effect; (ii) the extraordinary general meeting of the Class B shareholders purportedly held immediately thereafter (the ***Class B Meeting***) was also invalid as were the resolutions purportedly thereat (the ***Class B Resolutions***) and (iii) the extraordinary general meeting held on 9 December 2019 (the ***December EGM***) was validly convened and that resolutions were validly passed thereat for the removal as directors of Mr. Wu Jihan (***Mr Wu***) and two others.

7. The Defendant has two classes of ordinary shares - Class A and Class B ordinary shares. Prior to the events in dispute, a Class B ordinary share entitled the holder to ten votes per share (save with respect to certain reserved matters). A Class A ordinary share entitled the holder to one vote per share. The Plaintiff and VCL are the holders of the Class B shares. Mr. Zhan Ketuan (***Mr Zhan***) owns the Plaintiff while Mr. Wu owns VCL. The Plaintiff holds 3,988,768,187 Class B Shares, and VCL holds 2,243,331,244 Class B Shares.

8. The Plaintiff relies on two main grounds. First, that the EGM and the Class B Meeting were not properly convened so that no business could validly be conducted thereat (the ***Invalidly Convened Point***). Secondly, that VCL's vote at the Class B Meeting was invalid because it voted for an improper purpose by failing to vote in the collective interests of the Class B shareholders (the ***Validity of the Class B Resolutions Point***). Paragraph 12 of the statement of claim sets out the basis for and facts relied on to establish the second ground, with respect only to the Class B Meeting and the Class B Resolutions. The Plaintiff then asserts that it follows from the fact that no resolutions were validly passed at the EGM and the Class B Meeting that the resolutions

proposed at December EGM (which it says was properly convened) were passed and the appointment and replacement of directors approved thereby were made.

The Validity of the Class B Resolutions Point – the pleadings

9. Paragraph 12 of the statement of claim states as follows:

> *"Further or alternatively, the resolution passed at the Class B Meeting to reduce the voting rights of the Class B ordinary shares from 10 votes per share to one vote per share was invalid:*
>
> *(a). In voting at the Class B Meeting, Victory Courage Limited was under a duty to vote in the interests of the Class as a whole, that is in the collective interests of itself and the Plaintiff, the only other Class B shareholder.*
>
> *(b). It was manifestly not in the collective interests of the Class B shareholders to reduce the votes per share from ten (10) votes to one (1).*
>
> *(c). The only reason to reduce the votes per share of the Class B ordinary shares was to deprive the Plaintiff of majority control of the Company."*

10. The Defendant filed a request for further particulars of the statement of claim on 31 March 2020 including the following request with respect to paragraph 12:

> *"4 Under paragraph 12(a) "In voting at the Class B Meeting, Victory Courage Limited was under a duty to vote in the interests of the Class as a whole…" (a) Please specify the basis on which it is alleged Victory Courage Limited is under such a duty. (b) Please specify the basis on which the allegations made in relation to the duties owed by Victory Courage Limited give rise to a case to answer vis the Company.*
>
> *5 Under paragraph 12(b) "It was manifestly not in the collective interests of the Class B shareholders to reduce the votes per share from ten (1) to one (1)." (a) Please specify the basis on which such action is alleged to be "manifestly" not in the collective interests of the Class B shareholders."*

11. In its defence and counterclaim dated 2 April 2020 (the ***Defence***) the Defendant responded to paragraph 12 as follows:

> *"27. Paragraph 12 is neither admitted nor denied. So far as Paragraph 12 seeks to make allegations against third parties, the Company is not in a position to respond to those allegations and the Company cannot speak to the alleged obligations of its Class B Ordinary shareholders and/or their interests. The entirety of paragraph 12 does not disclose any cause of action against the Company and is liable to be struck out.*

> *28. Without prejudice to the foregoing, paragraph 12 is denied so far as it is alleged that the Class B Meeting was invalid. Further, while the Company is not in a position to plead to the obligations of the Company's Class B Ordinary shareholders, and/or what is or is not in the interests of that class as a whole, so far as it is alleged that there was no reason to reduce the voting rights attached to the Company's Class B Ordinary shares, paragraph 12(c) is denied for the reasons set out in section F below."*

12. Section F of the Defence and Counterclaim (***Section F***) explains (at [29]) that the Defendant's board "*considered the resolutions tabled [at both the EGM and the Class B Meeting] to be in the best interests of the [Defendant] for the benefit of its present and future members as a whole*" because the "*weighted voting rights attaching to the Class B Ordinary shares had given rise to an environment in which the [Defendant's] affairs were being conducted in a manner that was highly prejudicial to the [Defendant's] interests and those of the Members as a whole*":

(a). the Defendant alleges that it had been agreed between Mr Wu and Mr Zhan that each would be able to exercise independent authority over the affairs of the Defendant's subsidiaries (the Defendant owns 100% of the shares in a Hong Kong company called Bitmain Technologies Limited which owns all the shares in a PRC company called Beijing Bitmain Technologies, together ***Bitmain***) but that either could veto a decision made by the other (the ***Co-CEO Structure***); that the purpose of issuing the Class B ordinary shares with ten votes per share (the ***WVR Structure***) had been to preserve the collective control of Mr Wu and Mr Zhan (through the Plaintiff and VCL respectively) over the Defendant and maintain the Co-CEO Structure as the Defendant began to issue shares to outside investors; and that in or around 2018, when the Defendant was experiencing financial difficulties, Mr Zhan made a number of serious misjudgements as a director of the Defendant (against the opposition of Mr Wu and in violation of the Co-CEO Structure) that caused significant loss to the Defendant.

(b). Section F then set out particulars of these allegations. The Defendant alleges that in or around December 2018, Mr Zhan attempted to seize control of the Defendant without consultation with the board or shareholders by informing Bitmain's staff that Mr Wu had been removed from day to day management of the Defendant. It is alleged that following a meeting between Mr Zhan, Mr Wu and senior management a compromise agreement was reached. It was agreed, it is said, that Mr Zhan and Mr Wu would no longer be involved in the day to day management of the Defendant but would continue to supervise the Defendant's affairs from their position as directors, and a new CEO

would be appointed. Subsequently, it is alleged, Mr Zhan failed to abide by the compromise agreement by side-lining the new CEO and asserting control over day to day management of the Defendant. It is alleged that the mismanagement of the Defendant's board had been a product of the WVR Structure and that maintaining it would not be in the best interests of the Defendant. The board considered that members' interests would be best protected by creating a "*more level voting structure.*" It is said that this was particularly important since the Defendant was and is in the process of transitioning to a publicly listed company.

13. The Plaintiff provided its further and better particulars of the statement of claim on 9 April 2020 (the ***Plaintiff's Further and Better Particulars***). It asserted that the requests were not proper requests as a matter of law but in the interests of assisting the Court it provided responses:

(a). as regards the first request set out in paragraph 4, the Plaintiff stated that members of a class have a duty to vote in the interests of the class as a whole. As regards the second request set out in paragraph 4, the Plaintiff noted that the Defendant was bound by article 10.1 of its articles of association which provides that if there is no valid resolution of a general meeting of the Class B shareholders, the resolution purportedly passed at the EGM to vary the number of votes attributable to the Class B shares was ineffective and, as a matter of law, the Defendant was not permitted to use any provision in its articles or any power for the purpose of influencing the outcome of a general meeting or Class B meeting.

(b). as regards the request set out in paragraph 5, the Plaintiff said that the allegation was already fully pleaded as it was self-evident, but for the avoidance of doubt, the Class B shareholders of which there were only two had ten votes and would obtain no benefit as a class from unilaterally agreeing to the reduction to one vote.

14. In its reply and defence to counterclaim dated 9 April 2020 (the ***Plaintiff's Reply***) the Plaintiff denied the allegations against Mr Zhan and the Plaintiff made in Section F and asserted that since the resolutions proposed at the EGM and Class B Meeting could not have been passed had the Plaintiff attended the meetings, the only reason for the Defendant to hold them was because it believed that the Plaintiff would not attend or would be unable to attend the meetings. It said as follows in response to Section F (underling added):

"*(a)* *The allegations made against Mr. Zhan and/or the Plaintiff are denied. In any event the allegations are irrelevant as purported justification for the Defendant's conduct with respect to the purported EGM and Class B Meeting.*

(b). *The resolutions purportedly proposed by the Defendant at the purported EGM and Class B Meeting respectively could not have been passed (and would not have been passed) had the Plaintiff actually attended the purported meetings. Accordingly, the only reason for the Defendant to hold such purported meetings was because the Defendant believed that the Plaintiff would not attend and/or would not be able to attend, the Defendant having chosen not to give notice to the Plaintiff, or having chosen to give notice in such a manner as to ensure that the Plaintiff would not receive actual notice of the purported meetings and would not be able to attend the purported meetings."*

The two summonses – the Plaintiff's Strike-Out Application and the Plaintiff's Preliminary Issues Application):

15. On 10 June 2020 the Plaintiff issued a summons seeking an order that Section F (and all references to Section F) be struck out under the Court's inherent jurisdiction and/or GCR O.18 on grounds that they:

(a). disclose no reasonable cause of action or defence pursuant to GCR O.18, r.19(1)(a).

(b). are scandalous, frivolous or vexatious pursuant to GCR O.18, r.19(1)(b).

(c). would otherwise prejudice, embarrass or delay the fair trial of the action pursuant to GCR O.18, r.19(1)(c).

(d). are otherwise an abuse of the process of the Court pursuant to GCR O.18, r.19(1)(d).

16. The Plaintiff also issued a separate summons on 10 June 2020 in which it applied (in [3]) for directions that there be a trial of the following preliminary issues under GCR Order 33, rule 4(2):

(a). that the Defendant did not post notices of the EGM or the Class B Meeting to the Plaintiff.

(b). in the alternative, if the notices were dispatched, that proper notice was not given to the Plaintiff in accordance with the relevant provisions in the Defendant's articles or with applicable law.

The parties' submissions on the Joinder Issue

17. In the Ruling I explained that I did not consider it appropriate to decide the Plaintiff's Strike Out Application or the Plaintiff's Preliminary Issues Application before seeing the further written submissions on the VCL Joinder Issue.

18. Two issues arise. First, is there a requirement to join VCL (the ***Proper Constitution Issue***)? Secondly, even if there is not, should the Court of its own motion order VCL to be joined pursuant to GCR O.15, r.6(2)(b) (the ***Discretion Issue***)?

19. GCR O.15, r.6(2)(b) gives the Court power to:

> *"order any of the following persons to be added as a party, namely –*
>
> *(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or*
>
> *(ii). any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter."*

20. The Plaintiff argues that there is no requirement and that it not necessary or appropriate to join VCL at this stage.

21. In relation to the Proper Constitution Issue the Plaintiff argued as follows:

(a). its "*claims … are against the [Defendant]*" and "*Both the substance and form of [its] claims against the Defendant reflect a dispute between the Plaintiff and the [Defendant] … and the current action is properly constituted as such*."

(b). the remedies it seeks are declarations as between the Plaintiff and the Defendant regarding the alleged invalidity of the EGM, the Class B Meeting and the resolutions passed thereat.

(c). since the Defendant is properly a party there is no need for the Plaintiff to apply (or for the Court of its own motion) to join, or to solicit the active participation, of any other shareholders.

(d). paragraph 12 of the statement of claim "*introduces a 'further or alternative' basis for a claim by the Plaintiff for declaratory relief against the Company (not being a claim by the Plaintiff for any remedies against Victory Courage), with respect to the alleged invalidity of the resolutions purportedly passed at the purported*."

(e). my judgment in *Tianrui (International) Holding Company Limited v China Shanshui Cement Group Limited*, unreported, Grand Court, 6 April 2020 (***Tianrui***) supported the Plaintiff's position particularly in its recognition (at [101] to [108]) that a shareholder such as the Plaintiff has a personal right to bring a claim against a company in circumstances where its voting rights as a shareholder have been diluted by improper action on the part of the company, acting through its directors; a shareholder such as the Plaintiff has a personal right to challenge any attempt by the Company to argue that the potential availability of ratification (at shareholder level) can defeat a shareholder's personal claim against the company and in a shareholder's claim against a company, it is not necessary to join the directors as parties. The Plaintiff considered that it is possible and appropriate for the Court to make a declaration as between a Plaintiff shareholder and a defendant company, that would bind those parties *in personam* (but which might or might not bind third parties, or non-parties, such as other shareholders not formally before the Court).

22. In relation to the Discretion Issue and the need for VCL to be joined in order to ensure that all matters in dispute can be effectually and completely determined or whether there exists a question or issue arising out of or relating to or connected with any relief or remedy claimed in the proceedings which it would be just and convenient to determine as between VCL and the Plaintiff, the Plaintiff submitted as follows:

(a). the Plaintiff's claim was perfectly capable of being adjudicated fairly by the Court, as between the Plaintiff and the Defendant, without the joinder and active participation of VCL (bearing in mind the reality that VCL was the BVI holding company for Mr. Wu's interests in the Defendant, and Mr. Wu was actively involved in these proceedings as a purported director of the Defendant, a key protagonist, and a material witness for the Defendant).

(b). for the purpose of GCR Order 15, it was neither '*necessary*' nor '*appropriate*' that VCL be joined in circumstances where (i) no claim is made by the Plaintiff against, and no remedy is sought by the Plaintiff against VCL; (ii) VCL is clearly on notice of these proceedings (at least through the medium of Mr. Wu, one of the Defendant's purported directors) but has not applied to be joined; (iii) it could not be said that VCL "*ought to have been joined as a party*", or that its separate "*presence before the Court [was] necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon*"; (iv) the joinder of VCL at this stage would be inconsistent with the overriding objective, since it would give rise to potential further delays and unnecessary costs, potentially delaying, rather than expediting, the substantive resolution of the issues in dispute between the Plaintiff and the Defendant; and (v) VCL was a witness of fact who did not need to be joined (in many cases such witnesses were not joined even where it was apparent from the pleadings that their evidence was likely to be impeached or challenged at trial, and findings of fact made by the Court).

23. In relation to the Proper Constitution Issue, the Defendant submitted that as presently drafted paragraph 12 does not disclose a cause of action against the Defendant because properly construed it involves an allegation of breach of duty against VCL, the alleged duty being to vote in the best interests of the Class B ordinary shareholders. Accordingly, if VCL was not joined as a party, paragraph 12 would disclose no cause of action against a party and would be liable to be struck out:

(a). it was clear from a plain reading of paragraph 12 that the following was pleaded: (i) the existence of a duty owed by VCL (b) the extent of the duty owed by VCL and (c) the alleged breach of that duty by VCL resulting in the Class B Meeting being said to be invalid. Whilst the remedy sought by the Plaintiff for that breach of that duty was against the Defendant (i.e. a

declaration that the Class B Meeting was invalid), the allegation of breach of duty was made only against VCL.

(b). the need to join third parties as proper defendants to proceedings affecting their rights was acknowledged by this Court in *Tianrui* at [52]. As the Court noted in *Tianrui* (at [52]), where a plaintiff seeks a declaration that a corporate transaction is void (in that case bond and share issuances) without joining affected third parties, then it would be necessary for the declaration to be framed to reflect the fact that the cause of action and claim relied upon were brought only against the company, for example by limiting the declaration to the validity of the procedure by which the meeting was convened. The Plaintiff in this case does not seek such a limited declaration. Instead it seeks a broad declaration that the Class B Meeting is invalid and the resolution passed thereat is invalid, unenforceable, and void. It seeks such a declaration on the basis of, among other things, a breach of duty by VC.

24. In relation to the Discretion Issue:

(a). the Defendant noted that it was common ground that the Court had a discretion of its own motion to order the joinder of VCL if it considered that course appropriate. The Defendant considered that the decision whether to order that VCL be joined was one for the Court and did not in its written submissions argue for any particular order.

(b). the Defendant did say that if the Court considered that VCL should be joined to the proceedings, the following consequential directions would be appropriate:

(i). leave be given for the Plaintiff to serve the proceedings out of the jurisdiction on VCL.

(ii). upon VCL filing its defence, the Plaintiff be given a reasonable period of time to amend its statement of claim (so far as it relates to the allegations against the Company) in light of VCL's defence, the Defendant be given leave to amend its defence and counterclaim, and

the Plaintiff be given leave to amend its reply and defence to counterclaim.

(iii). upon the close of pleadings, a further directions hearing be fixed for the Court to give appropriate directions for discovery (including by VCL, if necessary), the exchange of witness statements, and dates for trial and, if thought appropriate, a pre-trial review.

(c). proceeding in this manner will enable the Court to consider what further directions are appropriate with the benefit of the parties having fully regularised their pleadings in light of the joinder of VCL. The Court can then assess, with the benefit of knowing VCL's position, what directions should be made as regards the exchange of witness statements and the setting down for trial.

The Joinder Issue: the Proper Constitution Issue - discussion

25. In my view, having considered the further submissions of both parties, the Plaintiff is right on this issue.

26. It is open to a shareholder who wishes to prevent his company from treating as valid, and from acting on, resolutions which were purportedly but not validly passed at a shareholders' meeting (or a meeting which was not properly convened) to apply for relief, by way of a declaration, against the company. The shareholders acting through resolutions passed at a general meeting are decision makers for the company. The general meeting is an organ of the company. By assenting to a resolution, shareholders give the consent which is necessary to make the act covered by the relevant resolution the act of the company. As May LJ said in *Multinational Gas and Petrochemical Co v Multinational Gas and Petrochemical Services* [1983] 3 WLR 492 at 519-520 (underlining added):

> *"..... so long as the company is solvent the shareholders are in substance the company. The most commonly cited passage as to the position of the shareholders is in the decision of the Privy Council in North-West Transportation Co. Ltd. v. Beatty (1887) 12 App. Cas. 589 delivered by Sir Richard Baggallay who said, at p. 593:*
>
> > *"The general principles applicable to cases of this kind are well established. Unless some provision to the contrary is to be found in the charter or other instrument by which the company is incorporated, the resolution of a*

> *majority of the shareholders, duly convened, upon any question with which the company is legally competent to deal, is binding upon the minority, and consequently upon the company, and every shareholder has a perfect right to vote upon any such question, although he may have a personal interest in the subject matter opposed to, or different form, the general or particular interests of the company.""*

27. When there is a challenge to such corporate decision making the company is properly a party and defendant to such proceedings. A shareholder who challenges the validity of a resolution purportedly passed at a general meeting is asserting that no valid decision has been made by the shareholders and the company is not bound to (and indeed must not) give effect to the purported resolution. Where the shareholder issues proceedings for a declaration to that effect against the company he has standing because his (personal) rights as a shareholder are being infringed where the company acts or threatens to act on the basis of an invalid resolution (see the discussion on standing in *Zamir & Woolf*, The Declaratory Judgment 4th ed., 2011 chapter 5). The shareholder has a right under the articles to have the requirements for proper shareholder voting respected and to enforce the corporate governance arrangements established by the corporate constitution. If the company acts on and gives effect to the invalid resolution it is in breach of the articles and the shareholder has a cause of action against the company (the claim is based on section 25 of the Companies Law). But even before the company has so acted, the shareholder may seek a declaration (or injunctive relief) where the company threatens to give effect to the invalid resolution. To the extent that the articles constitute a statutory contract to which the company is a party (and the other shareholders are parties) the shareholder's claim is based on a breach or threatened breach of contract by the company.

28. In a case where the challenge is to an amendment to the articles and is based on the allegedly improper exercise of the voting power by another shareholder, the claim is based either on a breach of an implied term (see for example *Chivers, Shaw, Bryan and Staynings,* The Law of Majority Shareholder Power, 2nd ed., 2017, at [1.24]) or the requirements imposed by equity for regulating the exercise of majority voting rights (see generally Lord Sales' 2019 Lehane Memorial Lecture, *The Interface between Contract and Equity*). While the law is not settled on the question of whether any claim based on a breach of the articles lies against the shareholder who has exercised his voting rights improperly (although there may be a claim for example in tort based on the overall conduct of the shareholder including and as evidenced by the exercise of his voting rights), it is unnecessary for me to form a view on the point. In the present case, the Plaintiff is not seeking any relief against VCL.

29. However, paragraph 12(a) of the statement of claim avers that VCL "*was under a duty*" to vote in the interests of the Class B shareholders as a whole (the reference to VCL being under a duty is repeated in the Plaintiff's further and better particulars of the statement of claim) and the Defendant submits, as I have noted, that properly construed this involves an allegation of (and asserts a cause of action against VCL based on) a breach of duty by VCL. In consequence, if VCL is not joined as a party, paragraph 12 would disclose no cause of action against a party and would therefore be liable to be struck out.

30. I do not accept this argument. The reference to VCL being under a duty is capable of being understood as a reference to the need for a vote to be in the interests of the class in order for it to constitute a valid vote. This is a condition to validity. The power to vote was subject to implied limitations, which it is alleged were not met in the present case. There is no indication in the statement of claim (as clarified by the further and better particulars of the statement of claim) that the Plaintiff is alleging an actionable duty owed by VCL to other Class B shareholders or the Defendant (breach of which would give rise to a pecuniary or other liability, even assuming such a claim to be legally permissible). This view is confirmed by the Plaintiff's supplemental written submissions where (albeit only in a footnote, namely footnote 3) the Plaintiff states that its argument that paragraph 12 permissibly introduces a "*further or alternative basis for a claim by the Plaintiff for declaratory relief*" only against the Defendant "*relies on*" a number of authorities including *British American Nickel Corporation v M.J. O'Brien Limited* [1927] AC 369, *In re Holders Investment Trust Ltd* [1971] 1 WLR 583 and *Allen v Gold Reefs of West Africa* [1900] 1 Ch. 656. In that footnote, there is a quotation from the judgment of Viscount Haldane in *British American Nickel* which adopts the usual formulation of the applicable principle which refers to a resolution being invalid where the shareholder had been motivated by personal rather than class interests and does not refer to the shareholder being under any duty to anyone. It seems to me therefore that at this stage paragraph 12 of the statement of claim should be understood as making a claim that the Class B Resolutions were not validly passed because they could not have been in the collective interests of the Class B shareholders and/or that VCL acted for an improper purpose. The reference to VCL being under a duty is somewhat inelegant but not determinative.

The Joinder Issue: the Discretion Issue - discussion

31. I have also concluded that the Plaintiff is correct to say that the Court should not require joinder of VCL.

32. A plaintiff shareholder may but is not required to join another shareholder. The plaintiff has a choice although the Court of its own motion can require joinder. As the 1999 White Book notes (at 15/6/7) prima facie, the plaintiff is entitled to choose the person against whom to proceed and to leave out any person against whom he does not desire to proceed. However, a person who is not a party may be added as a defendant against the wishes of the plaintiff either on the application of the defendant or by the Court of its own motion. The Defendant in these proceedings, as I have explained, has not applied to have VCL joined. So the question is whether the Court should require VCL to be joined of its own motion. This is a jurisdiction which the 1999 White Book describes as "*entirely discretionary*" but exercised "*in rare cases*" (see 15/6/8).

33. GCR O.15, r.6 (2) (b) states that the Court may order any of the following to be added as a party:

> *"(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or*
>
> *(ii). any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter."*

34. A number of principles apply to the application of GCR O.15, r.6 (2) (b):

(a). a plaintiff who conceives that he has a cause of action against a defendant is entitled to pursue his remedy against that defendant alone and cannot be compelled to proceed against other persons whom he has no desire to sue.

(b). the jurisdiction is guided by the preference for completeness of adjudication (see the 1999 White Book 15/6/8 and 15/6/10). The object of the rule is to prevent multiplicity of actions and to enable the Court to determine disputes between all parties to them in one action (and to prevent the same or substantially the same question being tried twice with possibly different results).

(c). the third party must have an interest which is directly related to or connected with the subject matter of the action. The interest must be a legal and not just a commercial interest (see *Re I. G. Farbenindustrie A.G.* [1944] Ch. 41 (at 43-44) per Lord Greene MR).

35. The authorities show that in some cases shareholders challenging the validity of shareholder resolutions have only joined the company while in others they have joined both the company and other shareholders. But even in cases where the challenge has been based on the motives and purpose of other shareholders when voting, proceedings have been brought without such shareholders being joined. In such cases the plaintiff needs to form a view, if only the company is joined, as to how it will prove its case and consider the evidence that needs to be adduced in order to do so. Testimony may not be needed from the shareholders whose vote has been challenged (because the plaintiff relies on the effect of the resolutions and inferences as to the purpose of those voting for them) but even if it is, they can (obviously) give evidence without being made a party to the proceedings (as witnesses of fact, as the plaintiff points out). The following cases are illustrative of these points:

(a). *Rights & Issues Investment Trust v Stylo Shoes* [1965] Ch. 250 is an example of a case in which shareholders challenged resolutions without joining other shareholders. The plaintiff was an ordinary shareholder in the defendant company. The defendant company's issued capital consisted of 400,000 management shares and 3,600,000 ordinary shares. Each management share carried eight votes, so that the management shares carried approximately forty-seven per cent of the total voting power. The defendant company had been negotiating for the acquisition of the capital of the B company. It was proposed, for the intended acquisition of the capital of the B company, to issue the unissued ordinary shares of the defendant company to the B company or its shareholders and to create 4,800,000 new shares. To give effect to this proposal two meetings were convened; one was a separate meeting of the ordinary shareholders of the defendant company to pass a special resolution approving an increase of the voting rights carried by the management share from eight votes per share to sixteen votes per share, and the other meeting was of the shareholders of the defendant company. The effect of the increase in the voting rights attached to a management share would be that the management shareholders would, although they took up no new shares, retain approximately the same voting strength as before. At both meetings management shareholders did not vote in respect of any shares held by them. At the separate meeting of the ordinary shareholders ninety-two per cent of the votes cast were in favour of

altering the voting rights attached to the management shares. At the meeting of all shareholders 96.5 per cent of the votes cast were in favour of the increase of capital; eighty-nine per cent of the votes cast were in favour of increasing the voting rights of management shares. A motion was filed by those holders of ordinary shares who had voted against the resolutions in order to restrain the company from acting on those resolutions on the ground that they were oppressive. The proceedings were brought against the company and the directors of the company seeking injunctive relief. No shareholders were joined. The plaintiff argued that that transaction represented a discrimination or oppression against the holders of the ordinary shares, other than those who also held management shares, and that the resolutions were oppressive on the holders of the ordinary shares. The holders of the management shares were said to be getting additional voting power in return for nothing. The defendants argued that there was no discrimination or oppression since what had happened was that the holders of the ordinary shares, exclusive of those held by those holding management shares, acting bona fide and in the interests of the company as a whole, considered it desirable that the existing basis of control should be maintained and they had voted in favour of an alteration of the company's articles accordingly. In the short judgment of Pennycuick J held that there was no reason why the company should not have validly passed the resolution, provided it was passed by a majority with no personal interest in the matter. In his short judgment there is no reference to any evidence given by any shareholder (the case involved an application for an injunction and the directors were presumably joined to ensure that they were separately bound by the court's order and furthermore the shareholders said to benefit by the passing of the resolution did themselves not vote so there was no challenge to any vote cast them and their motives for voting).

(b). *Citco Banking Corp NV v Pusser's Ltd and another* [2007] 2 BCLC 483 (***Citco***) is an example of a case where only some of the shareholders were joined. In this case the validity of a shareholder resolution in relation to a BVI company was challenged. The two main shareholders were the chairman, who owned or controlled just under 28% of the shares, and Citco which held 13% of the shares. The remainder of the shares were widely spread among other shareholders. Citco found that when it sought to recover a loan made to the company, the company was in serious need of more working capital. The chairman arranged a private placement of shares and a substantial line of credit from another bank, both of which were said to be conditional on his taking control of the company and personally guaranteeing repayment of advances made by that bank. The chairman proposed that the company issue 200,000 class B shares, each carrying

50 votes, and that 200,000 of his class A shares be converted into class B shares. The proposal was carried at an extraordinary general meeting by special resolutions which amended the articles of association and authorised the issue of the class B shares. The votes cast were 1,125,665 votes for (the chairman held or controlled approximately 390,000 shares) and 183,000 against (all of which were cast by Citco). Citco issued proceedings against the company and the chairman seeking a declaration that the special resolutions passed at the extraordinary general meeting were invalid because they were passed in the interests of the chairman, to give him indisputable control, and not bona fide in the interests of the company. The Privy Council upheld the BVI Court of Appeal and found that the resolutions were validly passed. Although the BVI Companies Act did not contain any qualification of the power of a 75% majority to amend the articles of association, the courts had always treated such a power as being subject to implied limitations. The proper test was whether, in the opinion of the shareholders, the alteration of the articles was for the benefit of the company and whether there were grounds on which reasonable men could come to the same decision. Since reasonable shareholders could have accepted in good faith the reasons put forward by the chairman as to why the amendment of the articles was in the interests of the company even though the amendment had the effect of vesting of voting control in him, and since there was no dispute as to whether the chairman had acted bona fide the appellant's challenge to the special resolutions failed. Nor was the chairman barred from voting simply because the special resolutions were advantageous to him. Neither Citco nor the chairman gave evidence. Lord Hoffmann (at page 493) when commenting on the decision below, noted that (underlining added):

> *"The Court of Appeal, reversing the judge, said that where he went wrong in principle was 'when he attempted to step into the commercial arena'. Their Lordships take this to mean that the judge fell into the same error as Peterson J in Dafen Tinplate Co Ltd v Lianelly Steel Co (1907) Ltd [1920] 2 Ch 124, namely that he took it upon himself to decide whether the amendment was for the benefit of the company. The Court of Appeal said that he should instead have applied the test laid down in Shuttleworth's case, namely, whether reasonable shareholders could have considered that the amendment was for the benefit of the company. The Court of Appeal considered that it would have been reasonable for shareholders to have accepted in good faith the arguments put forward by Mr Tobias as to why the amendment would be in the interests of the company. <u>The only shareholder who gave evidence at the trial was Mr de Vos, [the company's New York attorney] who said that he had thought the amendments were in the best interests of the company as a whole. It was not necessary for Mr Tobias and the company to prove to the judge that the arguments were justified by the facts.</u>*

(c). in *Clemens v Clemens* [1976] 2 All ER 268, a shareholder disputed the validity of resolutions passed at an extraordinary general meeting of the company and brought proceedings against both the company and the other shareholder. The plaintiff held 45 per cent, and her aunt 55 per cent, of the issued share capital of a family company. The capital of the company consisted of 200 preference shares, of which the plaintiff and the aunt each held 100, and 1,800 ordinary shares of £1 each fully paid, of which the plaintiff held 800 and the aunt 1,000. Under the articles of association members of the company had a right of pre-emption if another member wished to transfer his shares. The aunt was a director of the company but the plaintiff was not. There were four other directors. The directors proposed to increase the company's share capital from £2,000 to £3,650 by the creation of a further 1650 ordinary shares all of which were to carry voting rights. The directors other than the aunt would receive 200 shares each, and the balance of 850 shares would be placed in trust for long service employees of the company. The plaintiff's solicitor wrote a letter to the aunt pointing out that the scheme would reduce the plaintiff's shareholding to under 25 per cent and stating that the plaintiff was opposed to it. The aunt replied that she was fully aware of the implications of the changes in the company's structure but intended to support the scheme. The plaintiff's solicitor attended the meeting as her proxy and proposed an adjournment. The aunt voted against the adjournment, and the three resolutions were then passed. The plaintiff brought an action against the company and the aunt, seeking a declaration that the resolutions were oppressive of the plaintiff and an order setting them aside. But neither the plaintiff nor the aunt gave any evidence. On behalf of the plaintiff two witnesses were called, her solicitor, and an independent chartered accountant. The defendants called no witnesses. Foster J held that the onus of proving that the resolutions ought not to be implemented lay squarely on the plaintiff but the fact that the defendants elected to give no evidence did not entitle the court when drawing inferences to take the worst view so far as the defendants were concerned.

(d). *Quin & Axtens v Salmon* [1909] 1 Ch. 311 CA (affirmed [1909] ACC 442 HL) is an example of a case in which an aggrieved shareholder commenced a representative action on behalf of all shareholders against the company and the shareholders who constituted the majority that passed the challenged extraordinary general meeting. The company’s shares were held almost entirely by two people. Of the 50,007 shares Mr. Axtens held 27,240 and Mr. Salmon 22,085. Of the balance, 250 were held by a director, 250 by Mr Salmon’s brother, and the remaining shares were distributed amongst various small holders. Mr. Axtens and Mr. Salmon were also both managing

directors. One of the company's articles provided that board resolutions relating to certain actions would not be valid or binding unless advance notice had been given to Mr Axtens and Mr Salmon, and neither of them had dissented in writing before or at the relevant board meeting. The majority of the board desired to take and passed resolutions approving the taking of action covered by the article (to acquire a lease of certain premises and to demise certain vacant premises belonging to the company) but Mr Salmon dissented from each of these resolutions in accordance with the articles. At an extraordinary general meeting of the company resolutions to the same effect were passed by a simple majority of the shareholders by reason of Mr Axtens' shareholding. Mr Salmon, suing on behalf of himself and all other shareholders of the company except the defendants, commenced an action against the company and Mr Axtens and the other director shareholder for an injunction to restrain the defendants from acting upon any of the resolutions passed at the adjourned extraordinary general meeting. The English Court of Appeal, overturning Warrington J, held that the shareholder resolutions were inconsistent with the articles and were an attempt to alter the terms of the articles (and the statutory contract between the parties) by a simple resolution instead of by a special resolution. In the circumstances, there was no issue as to the motivation of the majority shareholders and therefore no need to lead evidence on this issue.

36. In paragraph 12 of the statement of claim the Plaintiff asserts, as I have noted, that VCL was under a duty to vote in the interests of the Class B shareholders and that a reduction of the voting rights of such shareholders from ten votes to one vote was "*manifestly*" not in their collective interests. The assertion appears to be that such a reduction could never (in principle) be in the interests of the Class B shareholders. It followed that the reduction was against their interests and that VCL in voting in favour of the Class B Resolutions must be taken to have been acting to benefit itself in another capacity (and to prejudice the Plaintiff by depriving it of majority control). While the Plaintiff alleges that the Defendant had engaged in deliberate wrongdoing (to prevent the Plaintiff being able to vote at the EGM and the Class B Meeting - see paragraph 11(f) of the statement of claim), there is no similar averment with respect to VCL. It remains to be seen how the Plaintiff proposes to make good its claim, both as regards the propositions of law and as to the evidence on which it relies. At this stage in the proceedings, it remains to be seen whether the Plaintiff intends to put in evidence as to VCL's state of mind and motives (to challenge its good faith) or to rely only on the effect of the Class B resolutions and the context to support inferences and arguments concerning VCL's motives and opinions

and whether there were grounds which could have caused reasonable shareholders to support and pass the Class B Resolutions.

37. VCL clearly has a legal interest which is directly related to or connected with the subject matter of the Plaintiff's action. That interest arises qua shareholder and is the same as that of the Plaintiff. If VCL considers that the Class B Resolutions were properly passed, it will consider that the Defendant is bound thereby and wish to have the corporate constitution observed and enforced. In so far as the Plaintiff puts in issue VCL's *bona fides* and whether its vote was properly cast, there is an issue as between the Plaintiff and VCL which it might be just and convenient to determine as between VCL and the Plaintiff in the proceedings between the Plaintiff and the Defendant. However, I have concluded that joinder *on the Court's motion* is not appropriate or required in the present circumstances. While the Court is required actively to case manage litigation and on occasions it is tempting as a judge to take control of proceedings and conduct them in the manner you consider to be suitable, it seems to me that, on balance, the decision as to how best to prosecute its claim, what facts and evidence to rely on and who needs to be joined as a party is in this case one with which the Court should not interfere of its own motion, when the Plaintiff has formed a view as to what is needed and neither the Defendant not VCL have sought to challenge the Plaintiff's approach and applied to have VCL joined. VCL, if it wished to do so because it considered joinder to be important to protect its interests and position, could have applied to be joined but it has not done so. If it maintains this stance and chooses not to apply to be joined, it will presumably do so on the basis that it is content to leave the defence of the claim to the Defendant (perhaps because of Mr Wu's position and a wish to have the costs of the defence paid by the Defendant). In this type of case, the Court's decision on the Plaintiff's claim will determine whether the Defendant is bound by the resolutions and if the Court grants the declaration sought by the Plaintiff, VCL will, in substance, as shareholder be required to accept that decision. There is therefore no risk of a multiplicity of actions and there would be no need for further proceedings as between the Plaintiff and VCL. *Tianrui* involved a different issue. In that case, I held that the shareholder was entitled to bring a personal claim in its own name to challenge an allegedly improper exercise of the directors' powers and seek a declaration (binding on the company) that the company was not bound by the directors' decisions and actions. But I did not, on the basis of a preliminary review of the issue (which was not fully argued), consider that such a declaration could affect the rights of third parties (who were creditors and contractual counterparties of the company) without such parties being joined to the proceedings. While I can see benefits to be derived from having VCL joined as a party, I do think that the Court should in the current circumstances take the decision on joinder out of the hands of the parties (and VCL). There is no sufficient need or justification to do so.

38. I would note that if VCL is not made a party to the proceedings and if the Plaintiff seeks a finding of impropriety against VCL by the Court it will need to ensure that VCL is given a proper opportunity to defend itself against and rebut such allegations. It is well-established that the Court should not entertain allegations of impropriety against a person who has had no opportunity to defend himself against such allegations, and certainly no adverse findings should be made in those circumstances. A person against whom such a finding has been made is entitled, on appeal, to a determination that such a finding should not have been made. In *Vogon International v SFO* [2004] EWCA Civ 104, in determining the costs of a civil claim brought by Vogon, the trial judge (although he had not been invited to do so and without giving any advance notice to those concerned of his intentions) made a finding that both Vogon, and its director Mr Sear, had conducted themselves in an opportunistic and dishonest manner. The English Court of Appeal strongly criticised the approach of the trial judge, with May LJ holding at §29 that:

> *"It is, I regret to say, elementary common fairness that neither parties to litigation, their counsel, nor judges should make serious imputations or findings in any litigation when the person against whom such imputations or findings are made have not been given a proper opportunity of dealing with the imputations and defending themselves."*

Plaintiff's Strike-Out Application

39. The Plaintiff submitted in summary, that a strike-out of Section F would promote the achievement of the overriding objective and:

(a). in respect of GCR O.18, r.19(1)(a), Section F discloses no reasonable defence to the Plaintiff's claims set out in the originating summons and the statement of claim. Section F makes no reference to (i) the Plaintiff, (ii) the Plaintiff's conduct, or (iii) the Plaintiff's rights as a member of the Defendant to attend, and to receive notice of, extraordinary meetings of the Defendant's shareholders and meetings of Class B shareholders. In the Plaintiff's Reply, the Plaintiff asserts that the allegations made in Section F are *irrelevant* as a justification for the *Defendant's* conduct with respect to the purported EGM and Class B Meeting. Since the resolutions proposed at these meetings could only have been passed if the Plaintiff failed to attend the meetings, so that there would have been no point in convening the meetings unless the Defendant also made arrangements and acted so as to prevent the Plaintiff from attending, the fact that the meetings were convened, together with the defects in the notice process (if any notice was given), show that the Defendant's purpose was to procure the passing of

resolutions without the Plaintiff having an opportunity to vote. The Plaintiff's argument appears to be that this purpose is improper whatever mismanagement and misconduct Mr Zhan may have been guilty of – so that even if the allegations set out in Section F are proved, they cannot justify the Defendant's decision to convene the meetings and the manner in which the meetings were convened.

(b). in respect of GCR O.18, r.19(1)(b), Section F makes irrelevant and unwarranted allegations regarding the conduct of Mr Zhan personally (in particular, his alleged conduct as a director of the Defendant, rather than his role as a representative of the Plaintiff in the Plaintiff's capacity as a shareholder of the Defendant). Mr Zhan is not a party to these proceedings (whether in his capacity as a director or otherwise) and the allegations made against him are irrelevant to the Plaintiff's rights or claims as a shareholder of the Defendant, and cannot properly be adjudicated by the Court in the circumstances.

(c). in respect of GCR O.18, r.19(1)(c), the inclusion of Section F (if allowed to stand) substantially expands the potential pool of documents which would need to be disclosed by the Defendant in the course of the Defendant's discovery, as well as the likely scope of the evidence and the parties needing to be served and joined to the litigation, and which has already delayed the fair trial of the action. The Plaintiff referred, by way of analogy, to *Christoforou v Christoforou & Anor* [2020] EWHC 1196 (Ch) (15 May 2020), per HHJ Eyre at paragraph 59:

> "*It is an important part of case management to ensure that trials are focused on the key issues between the parties and the court must be mindful that the generation of a host of satellite issues can lead not just to disproportionate expense but can also create the risk of an unjust outcome resulting from a lack of focus*"

(d). in respect of GCR O.18, r.19(1)(d), and for all of the reasons above, the inclusion of Section F is an abuse of the process of the Court. The Defendant is advancing unmeritorious and irrelevant points, without making any effort to serve or join the necessary parties, so as to further delay, disrupt and deflect attention from its own improper conduct.

40. The Defendant's position can be summarised as follows:

(a). the purpose of Section F is to explain why, by reference to Mr. Zhan's conduct, the resolutions proposed at the EGM and the Class B Meeting were in the best interests of the Defendant. It addresses the suggestion made in paragraph 11(g) of the statement of claim that the Defendant was acting improperly.

(b). in addition, in paragraph 12 of the statement of claim, the Plaintiff makes an allegation as to the propriety of the actions of a third party, VCL. The difficulty in responding to that allegation, where VCL has not been joined as a party, is explained in paragraphs 27 and 28 of the Defence. The Defendant is not able to speak as to the subjective view of VCL as to what it considered to be in the best interests of Class B shareholders when it voted at the Class B Meeting. However, to the extent that the Plaintiff is seeking to allege that objectively, it could not have been in the best interests of Class B shareholders to vote in favour of the Class B Resolutions, Section F explains why those resolutions were in the best interests of the Defendant and therefore its shareholders, including the Class B shareholders.

(c). where an application is made to strike out part of a pleading, clearly GCR O.18 r.19(1)(a) (*it discloses no reasonable defence*) has no application. There is no evidence to suggest that Section F is in any way scandalous, frivolous or vexatious. Equally, it does not prejudice, embarrass or delay the fair trial of the action, nor is it an abuse of the process of the Court. The provisions of GCR O.18 r.19(1)(b) to (d) accordingly have no application.

41. As I have noted, the Defendant's response to the Plaintiff's case in paragraph 12 is set out in paragraphs 27 and 28 of the Defence. The Defendant says that in so far as paragraph 12 seeks to make allegations against third parties, namely VCL, the Defendant "*is not in a position to respond to those allegations*" and cannot "*speak to the alleged obligations of its Class B Ordinary shareholders and/or their interests*." The Defendant asserts that paragraph 12 does not disclose any cause of action against the Defendant and is liable to be struck out. Without prejudice to this position, paragraph 12 is denied in so far as it is alleged that the Class B Meeting was invalid. The Defendant says that while it "*is not in a position to plead to the obligations of the Company's Class B Ordinary shareholders, and/or what is or is not in the interests of that class as a whole, so far as it is alleged that there was no reason to reduce the voting rights attached to the Company's Class B Ordinary shares, paragraph 12(c) [which states that the only reason to reduce the votes per share of the Class B ordinary shares was to deprive the Plaintiff of majority control of the Company] is denied for the reasons set out in*

section F below." So Section F is intended to provide the Defendant's (acting by the Defendant's board's) response to the Plaintiff's claim, made with respect to VCL's reasons for voting at the Class B Meeting, that there was no reason why the reduction in the voting rights of the Class B shareholders could be in the interests of the Class B shareholders (the Defendant says that the reduction *was* necessary in order to restore proper governance and avoid further mismanagement by changing the WVR Structure and therefore in the interests of the Defendant and all its shareholders). As paragraphs 29 and 31 of the Defence state, the Defendant's board "*considered the resolutions tabled [at both the EGM and the Class B Meeting] to be in the best interests of the [Defendant] for the benefit of its present and future members as a whole*" because there was a need, arising out of Mr Zhan's alleged mismanagement and misconduct, to change the WVR Structure.

42. As I have held, I do not agree that paragraph 12 of the statement of claim discloses no cause of action against the Defendant. It properly asserts that the Class B Resolutions were not validly passed and (implicitly and in combination with the prayer for relief in the statement of claim) that giving effect to the purported resolutions would be a breach of the Defendant's corporate constitution.

43. However, I do not accept the Plaintiff's argument that the facts asserted in Section F are irrelevant to the paragraph 12 claim and the averment in paragraph 12(c). That averment, and paragraph 12 in general, put in issue whether VCL acted bona fide and whether reasonable Class B shareholders could have accepted in good faith that a reduction in their rights was in the circumstances in their collective interests. Section F, in my view, sets out the facts which are said to support the conclusion that passing the Class B Resolutions was necessary in order to restore proper governance and avoid further mismanagement of the Defendant's affairs. Section F sets out facts and circumstances that in the view of the Defendant's board show that there were good reasons why the Class B Resolutions were justified in the interests of the Defendant and its shareholders. Section F does make detailed allegations regarding the conduct of Mr Zhan as a director of the Defendant but they are relied on to show why the Class B Resolutions were necessary and in the interests of the Defendant and its shareholders. The Plaintiff's assertion of irrelevance in its Reply seems to me to be unsound and misdirected. The Plaintiff's assertion in its Reply addresses a different issue. It goes to the propriety and validity of the Defendant's decision to convene the meetings. It argues that the need to restore proper governance and avoid further mismanagement of the Defendant's affairs could never be a justification for circumventing and undermining shareholder democracy and decision making. That argument can properly be made to support the proposition that Section F can provide no

defence to the Plaintiff's claim that the Defendant sought to disenfranchise the Plaintiff and prevent it from exercising its rights as a shareholder so that the Defendant cannot rely on the deemed notice provisions in the articles to establish that proper and adequate notice was given of the meetings. But Section F has not been included and is not relied on for that purpose. It is expressed to be a denial of the allegation in paragraph 12(c), which is made in the context of the challenge to VCL's vote, that there was no reason to reduce the voting rights attached to the Company's Class B Ordinary shares other than to prejudice the Plaintiff by depriving it of majority control of the Company.

44. While I express no view as to whether such facts and matters are actually sufficient to prevent the Plaintiff from being entitled to a declaration that VCL's vote should be disallowed and the Class B Resolutions treated as not passed, in my view the facts averred in Section F are a denial of and response to (or part of the denial of and response to) facts relied on by the Plaintiff as part of its challenge to VCL's vote and the Class B Resolutions. I note that the parties have not explored (save very briefly) on this application the test to be applied in deciding whether a shareholder's vote should be disallowed. Nonetheless, in light of what has been said on the point, and based on my understanding of the applicable law, as outlined above, I consider that the facts and matters set out in Section F may establish and are capable of establishing a defence to the paragraph 12 claim by showing that there were reasons why such resolutions were for the benefit of the company and grounds on which reasonable Class B shareholders could come to the same decision (see *Citco* above).

45. I would add this. While the Plaintiff can be said to be responsible in part for the difficulties faced by the Defendant in responding to the paragraph 12 claim, because it has decided not to join VCL despite making allegations regarding its intentions and purposes, there is no reason why the Defendant could not have discussed the paragraph 12 claim with VCL and established the basis on which VCL justified its voting decision. The relevant and related facts could then have been pleaded in the Defence and the Defendant could rely on VCL's evidence at trial and in support of its defence. This would have resulted in the removal of the Defendant's complaints about being unable to respond to allegations relating to third parties and a more direct response to the paragraph 12 claim. Alternatively, the Defendant could have applied to have VCL, or asked VCL to apply to be, joined as a party.

46. I also do not consider that the Plaintiff's other grounds for a strike-out are made out. For the reasons I have given I do not consider that the allegations relating to Mr Zhan are irrelevant. I accept that the Defendant's reliance on facts and matters relating to Mr Zhan's conduct as a

director will expand the range of documents which will need to be disclosed by the Defendant in discovery but since this conduct is said to justify the passing of the Class B Resolutions it is relevant for the purpose of discovery. I do not understand why the Plaintiff asserts that Section F will increase the number of parties to the litigation. It has decided not to join VCL and contends that it is sufficient if VCL is, if required, merely a witness of fact. The same reasoning applies to Mr Zhan and Mr Wu and the other parties mentioned in Section F. The issue for the Court will be whether the Class B Resolutions were properly passed and the Court will need to consider all the evidence as to the reasons why such resolutions were passed.

47. In these circumstances, I do not consider that it is appropriate to strike out Section F and I dismiss the Plaintiff's Strike-Out Application.

The Plaintiff's Preliminary Issues Application

48. The Invalidly Convened Point is dealt with in paragraphs 7 – 11 of the statement of claim, as follows:

> *"7. Article 40.1 of the Articles of Association of the Company provides:*
>
> > *"Notices or other documents or communications may be given to any Member by the Company either personally or by sending it by courier, post, fax or email to him to his registered address, or (if he has no registered address) to the address, if any, supplied by him to the Company for the giving of notices to him. Any notice shall be deemed to be effected:*
> >
> > *(a) If delivered personally or sent by courier, by properly addressing and prepaying a letter containing the notice; and to have been effected, in the case of* a *notice of a meeting, when delivered;*
> >
> > *(b). If sent by post, by properly addressing, prepaying, and posting* a *letter containing the notice (by airmail if available) and to have been effected, in the case of* a *notice of a meeting, at the expiration of three days after it was posted; and*
> >
> > *(c). If sent by fax or email by properly addressing and sending such notice through the appropriate transmitting medium and to have been effected on the day the same is sent."*
>
> *8. The Plaintiff did not receive any notice of either the Class B Meeting or the EGM.*
>
> *9. In the premises, the Class B Meeting and the EGM were not validly convened and the business purportedly conducted thereat was ineffective and the purported resolutions are void and of no effect.*

10. *If and in so far as it may be alleged by the Company that notices of the Class B Meeting and the EGM were sent by post, the Plaintiff puts the Company to strict proof of actual posting of the notices in circumstances where, to date, no such notices have been received at the registered office of the Plaintiff.*

11. *If and in so far as the Company may seek to rely upon the deemed notice provision in Article 40.1(b), without prejudice to the Company being required to prove actual posting, the Plaintiff will contend, inter alia, that:*

    (a). The purpose of Article 40.1 is to provide a means to communicate documents and notices to shareholders effectively.

    (b). The purpose of the choice between the methods of service provided by Article 40.1 is to enable the Company to choose an appropriate means of communication according to the nature of the document or notice being communicated.

    (c). Any such choice must be exercised in accordance with the purpose of the Article which is that shareholders are provided documents and notices in a manner which enables them to duly consider, in a timely fashion, the documents sent and the agenda of the meeting and whether to exercise their rights, and not in a way which prevents them from considering the documents or the agenda or prevents them from exercising their rights.

    (d). At all material times previously, actual notice of meetings has been provided to the Plaintiff by the Company by WeChat, instant messenger, email or telephone contact with Mr. Zhan. This was intentionally not done in the case of the Class B Meeting or the EGM.

    (e). The Company knew or ought to have known that service of the notices of the Class B Meeting and the EGM by post from China to BVI would ensure that actual notice was not received prior to the meetings so that the Plaintiff would not have knowledge of the meetings prior to their having taken place and would be deprived of its rights to attend and vote thereat.

    (f). In circumstances where the Plaintiff was the only other Class B shareholder and held a majority of those shares and would have had voting control of the meetings, the only possible inference to be drawn is that the decision to use post and not to inform Mr. Zhan of the Class B Meeting (or the EGM) was deliberate and intended to ensure that the Plaintiff would not vote thereat.

    (g). The Company's use of the post was for an improper purpose and the Company cannot rely upon the deemed notice provision in Article 40.1(b).”

49. As noted above, the Plaintiff set out in the Plaintiff's Preliminary Issues Application *two* proposed preliminary issues, namely whether the Defendant posted the notices of the EGM or the Class B Meeting to the Plaintiff and, if the notices were dispatched, whether adequate notice was given to the Plaintiff in accordance with the relevant provisions in the Defendant's articles and applicable law. In its skeleton argument filed before the hearing, the Plaintiff expanded and

reformulated the second preliminary issue and added a third. That skeleton argument said as follows:

> *"56. In summary, the Plaintiff respectfully requests that the Court should order a trial of the following preliminary issues:*
>
> *56.1 the Defendant did not post notices of the Alleged EGMs to the Plaintiff; and/or*
>
> *56.2 in the alternative, if, as alleged by the Defendant in paragraph 5(a) of the Defendant's answers to the request for further and better particulars of the Defence and Counterclaim, notices of the Alleged EGMs were dispatched by post "at around 8pm, Beijing time, on 4 November 2019", that:*
>
> *(a). under the Articles of Association of the Defendant, the Defendant has failed to provide the Plaintiff with five clear days' notice of the Alleged EGMs under Article 21.1 due to the notice allegedly being posted at 7 am on 4 November 2019 (Cayman Islands time) and the alleged EGMs being purported to be held at 11:05 am and 11:10 am on 12 November 2019 (Cayman Islands time);*
>
> *(b). under the Articles of Association, the Defendant has failed to prepay postage for airmail in accordance with Article 40.1(b); and/or*
>
> *(c). the alleged decision by the directors of the Defendant to purport to give notice in such a way and/or to purport to hold the alleged EGMs in the middle of the night in Beijing when the Plaintiff could not reasonably have been expected to attend such alleged EGMs was an improper exercise of the board's powers for the improper purpose of diluting the Plaintiff's voting rights."*

50. I say that the skeleton argument added a third preliminary issue because the issue set out in paragraph 56.2(c) relates to and challenges the exercise of the board's power to convene the meetings (it is not clear to me that the issue of the validity of the notices convening the meetings resulting from the directors acting for an improper purpose is raised or sufficiently clearly raised in the statement of claim). However, the issues set out in the Plaintiff's Preliminary Issues Application and in paragraphs 56.1 and 56.2 (a) and (b) of the skeleton argument relate to whether the notices were properly given (the mechanics of posting and serving the notices) and whether if they were given the Plaintiff received adequate notice in accordance with the articles.

51. During the hearing it became clear that the preliminary issues as formulated were insufficiently precise and I invited the Plaintiff to clarify its position and provide, before the start of the second day of the hearing, a further draft of the preliminary issues which it wished the Court to consider. The Plaintiff provided a supplemental note setting out the proposed preliminary issues

which it said were consistent with (but more detailed than) the wording already proposed in the Plaintiff's Preliminary Issues Application, its skeleton argument, and in oral submissions. These were as follows (the ***Latest Draft of the Issues***):

> *"Taking into account the true interpretation of the Defendant's Articles of Association (including Article 1.2, Article 1.11, Article 3.1, Article 6.11, Article 10.1, Article 20.1, Article 21.1 and Article 40.1 and 40.1(b)) and Cayman Islands law:*
>
> *2,1. Did the Defendant post Notices of the Alleged EGMs and/or the Alleged Class Meetings (as purportedly held at 12:05 am and 12:10 am (Beijing time) on 13 November 2019) to all Members of the Company entitled to receive such Notices (including the Plaintiff) at the same time and in the same manner, and if so, by whom, when and where did it do so, and how did it do so (taking into account the Defendant's allegations that the Defendant, or the Defendant's agent Ms. Li Yanchi, placed such Notices in a China Post post box located in Qinghe, Haidian District, Beijing, China at around 8 pm (Beijing time) on 4 November 2019, as alleged by the Defendant at paragraph 14(b) of the Defence and Counterclaim and paragraph 5(a) of the Defendant's answers to the request for further and better particulars of the Defence and Counterclaim)?*
>
> *2.2 Did the Defendant properly address, prepay and post a letter containing such Notices to the Plaintiff (by airmail), and if so, by whom, when and where did it do so and how did it do so?*
>
> *2.3 Were such Notices received by the Plaintiff in advance of the Alleged EGMs and/or the Alleged Class Meetings (in circumstances where the Plaintiff alleges that it did not receive such Notices at paragraph 8 of the Statement of Claim and the Defendant does not admit or deny this allegation, but puts the Plaintiff to strict proof by paragraph 16 of its Defence and Counterclaim)?*
>
> *2.4 If the Notices were sent by post by the Defendant to the Plaintiff, but not received by the Plaintiff in advance of the Alleged EGMs and/or the Alleged Class Meetings, were such Notices nonetheless deemed to be effected by the Defendant to the Plaintiff "at the expiration of three days" after they were posted under Article 40.1 (as the Defendant alleges at paragraph 17 of the Defence and Counterclaim, but as the Plaintiff denies by paragraph 11 of the Statement of Claim, paragraphs 1, 5 and 6 of the Reply and Defence to Counterclaim, and 3.1 and 4.1 of the Further and Better Particulars of the Statement of Claim), and can such a deeming provision be rebutted or disapplied by proof of any of the following facts or circumstances:*
>
> *(i). The Defendant did not apply sufficient postage stamps to enable airmail delivery from China to the British Virgin Islands; and/or*
>
> *(ii). The Defendant (whether acting by its directors or officers or otherwise) knew, or ought to have known, that delivery by postal channels from China to the British Virgin Islands would ensure that actual notice of the Alleged EGMs and/or the Alleged Class Meetings was not received by the Plaintiff (or by the directors of the Plaintiff resident in China) prior to the Alleged EGMs and/or the Alleged Class Meetings so that the Plaintiff would be deprived of its rights to receive notice of, attend at, and vote at such meetings; and/or*

(iii). *The Defendant (whether acting by its directors or officers or otherwise) deliberately fixed the time and/or place for the Alleged EGMs and/or Alleged Class Meetings at a time when it knew, or ought to have known, that the Plaintiff would be unable to attend and vote at such meetings; and/or*

(iv). *The Defendant (whether acting by its directors or officers or otherwise) deliberately chose to effect delivery by post in the manner that it allegedly did and/or to fix the time and/or place for the Alleged EGMs and/or Alleged Class Meetings for an improper purpose (i.e. for the improper purpose of influencing the outcome of a general meeting, and/or for the improper purpose of diluting the Plaintiff's voting rights and/or for the improper purpose of eliminating the rights of shareholders to requisition general meetings).*

2.5 *In the event that such Notices were found by the Court to be deemed to be effected "at the expiration of three days" after they were posted under Article 40.1 (notwithstanding the Plaintiff's case as to the circumstances in which any deeming provision may be rebutted), did the Defendant provide the Plaintiff with five clear days' (deemed) notice of the Alleged EGMs and/or the Alleged Class Meetings under Article 21.1, if the Notices were allegedly put into a China Post post box at about 8 pm (Beijing time), being 7 am (Cayman Islands time), on 4 November 2019, and if the Alleged EGMs and/or the Alleged Class Meetings were purportedly held at 12:05 am and 12:10 am (Beijing time) on 13 November 2019, being 11:05 am and 11:10 am on 12 November 2019 (Cayman Islands time)?*

2.6 *In the event that the Defendant did not give notice of the Alleged EGMs and/or the Alleged Meetings to the Plaintiff and/or in the event that the Defendant deliberately chose to effect delivery by post in the manner that it allegedly did and/or to fix the time and/or place for the Alleged EGMs and/or Alleged Class Meetings for an improper purpose (i.e. for the improper purpose of influencing the outcome of a general meeting, and/or for the improper purpose of diluting the Plaintiff's voting rights and/or for the improper purpose of eliminating the rights of shareholders to requisition general meetings), were the Alleged EGMs and/or the Alleged Class Meetings validly or invalidly held and/or were the resolutions purportedly passed legally valid, binding and in full force and effect, or legally invalid, unenforceable, and void ab initio?*"

52. The Plaintiff:

(a). relied on the following statement by Smellie C.J. in *In re T Trust* [2002] CILR N-1 of the matters to be taken into account by the Court when deciding whether to direct the trial of preliminary issues:

> *"In deciding whether to direct the trial of a preliminary issue, the court should have regard to the following matters: (a) whether the determination of the issue will dispose of the case or at least an important aspect of it so as to narrow the triable issues—if the respondent can avoid the consequences of trying the issue simply by amending his pleadings, there will be no value in trying it; (b) whether the costs and time involved in preparations for trial or the trial itself will be significantly reduced; (c) where the issue is one of construction, to what extent it can be determined or*

agreed on readily ascertainable facts; (d) the degree of risk that the determination of the preliminary issue (or the process of appeal against directions for its trial) will increase costs or delay the trial; and (e) whether, taking into account all other relevant considerations, e.g. the stage which preparations for trial have reached and the parties' relative resources, it would be just to order the trial of the issue (Steele v. Steele, [2001] All E.R. (D) 227, applied). The more expeditiously and economically preliminary issues can be resolved, the better for the interests of all concerned (Tilling v. Whiteman, [1980] A.C. 1, dicta of Lord Wilberforce applied)"

(b). submitted that the prompt determination of the preliminary issues it had formulated would dispose of the case (or at least an important aspect of the case so as to narrow the balance of the triable issues). Whether or not the Defendant provided notice to the Plaintiff and whether the Defendant can rely on the provisions in the articles as to deemed notice was a fundamental feature of the dispute between the parties. But even if these issues relating to notice could not properly be dealt with as preliminary issues they should be dealt with at a first trial and there should be split trials of these and then subsequently the other issues.

(c). submitted that the determination of these preliminary issues would also significantly reduce the costs and time involved in preparations for trial or the trial itself and reduce the costs of trial. If the Court determined after a hearing of a preliminary issue, that the Defendant cannot rely upon the deeming provisions of the articles (e.g. due to short notice and/or a failure to pay correct postage), it would follow that declarations can be made that the Class B Meeting and the EGM were invalid. It is difficult to see how a trial of the remaining consequential declarations as set out in the statement of claim would require any more than a very short hearing.

(d). submitted that the preliminary issues were heavily informed by the Court's construction and application of the articles, and should be capable of being determined on readily ascertainable or agreed facts.

53. The Defendant's position can be summarised as follows:

(a). the Plaintiff had provided no explanation as to why, having demanded full discovery on all issues, and the Defendant having expended very considerable time, effort and expense in preparing to give that discovery, it was now inviting the Court to direct that there should be a trial of preliminary issues. Directing a trial of preliminary issues at this stage would just result in an unjustifiable and damaging diversion of resources and unnecessary expense and delay. Instead the Court should proceed to give directions for the trial of the whole action.

(b). there were dangers in ordering a trial of preliminary issues. As Lord Scarman observed in *Tilling v Whiteman* [1980] AC 1 *"preliminary points of law are too often treacherous shortcuts. Their price can be, as here, delay, anxiety and expense"*. Adopting the approach suggested by David Steele J in *McLoughlin v Grovers* [2002] QB 1312 at [66] (which was consistent with the principles summarised by this Court in *Wahr-Hansen Anders Jahres Rederi A/S and Bridge Trust Company Limited v Compass Trust company* [2004-05 CILR Note 49]), the trial of a preliminary issue should only be ordered (i) if the issue identified is potentially decisive; (ii) the question raised is a question of law; (iii) it can be decided on the basis of agreed or assumed facts; (iv) it is triable without significant delay. None of these criteria was met in the present case.

(c). as to (i), the proposed preliminary issues did not deal with the wholly independent allegations made in relation to the December EGM, nor did they deal with the allegations of impropriety made against VCL in relation to the Class B Meeting. If the preliminary issues were determined against the Plaintiff, the Defendant would still have hanging over it the remainder of the action, which would have been delayed by many months if not years by the preliminary issue trial.

(d). as to (ii), the proposed preliminary issues *prima facie* address, at least in part, disputed issues of fact. The issue relating to whether the notices were posted and the manner in which they were posted self-evidently did. The issue relating to whether any notices given would be deemed by the articles to have been effected *"at the expiration of three days*" appeared to bring into contention the alleged knowledge of the Defendant and its intention in effecting notice by post, both areas of factual dispute.

(e). as to (iii), there was no suggestion that it could be satisfied. The issue relating to whether the notices were posted and the manner in which they were posted self-evidently could not be decided on the basis of assumed facts. Although the Plaintiff had couched the issue relating to whether any notices given would be deemed by the articles to have been effected *"at the expiration of three days*" in terms of "*construction*" of the articles, it appears by reference to the statement of claim that its case did not rest on the construction of the articles but the operation of the relevant provisions of the articles in the factual circumstances of the case. The crux of the Plaintiff's case in relation to this issue seemed to be that: (i) the Defendant knew or ought to have known that service of the notices by post would ensure that actual notice

of the meetings would not be received by the Plaintiff before the meetings took place, (ii) the decision to dispatch the notices by post was deliberate and intended to ensure that the Plaintiff would not attend and vote at the meetings, and (iii) therefore, the use of post was for an improper purpose and the Defendant could not rely on the deemed notice provision in Article 40.1(b) in those circumstances. If all these issues of fact were assumed in favour of the Defendant, then the Plaintiff had no claim. If these issues of fact were assumed against the Defendant, the determination of issue on the basis of those assumed facts would not assist in the early resolution of the dispute. It would still be necessary to have a trial to establish whether, in fact, the Defendant had the requisite knowledge/intention.

(f). as to (iv), given the stage which the proceedings have reached, it was doubtful that the proposed preliminary issues would save any significant time or expense in any event.

54. In my view, it would not be appropriate to direct the trial of a preliminary issues sought by the Plaintiff or to order a split trial for the following reasons:

(a). the Plaintiff is, in substance, seeking to split the trial so that the Invalidly Convened Point will be tried first followed, if required, by a subsequent trial of the Validity of the Class B Resolutions Point and the question of whether the December EGM was validly convened and the resolutions for the removal of Mr Wu and two others as directors were valid and effective.

(b). the Invalidly Convened Point, as reflected in the Latest Draft of the Issues, covers a number of issues. Some involve questions of fact concerning the steps taken or not taken with respect to the giving of notice of the meetings. Some involve questions of fact concerning the actions of the Defendant and the Defendant's knowledge (actual or imputed) when and purpose in acting as it did. Some involve the proper construction of the articles and the application of the articles as construed to the facts as found by the Court.

(c). the following issues in particular arise:

(i). did the Defendant despatch notices to the Plaintiff?

(ii). if so, how and when were such notices despatched?

(iii). did the Plaintiff actually receive such notices and if so when?

(iv). if the notices were despatched, were they, before considering the improper purpose issue referred to in (viii) below, deemed to have been effected three days after posting in accordance with article 40.1(b)?

(v). if the notices were despatched and were deemed to have been effected three days after posting, was adequate notice of the meetings given to the Plaintiff in accordance with the articles (article 21.1 requires five clear-days' notice)?

(vi). did the Defendant (acting by its directors or other authorised officer) know or should it have known that despatch and delivery of the notices in the manner it used would result in the Plaintiff not receiving actual notice of the meetings in time to attend or vote thereat?

(vii). did the Defendant (acting by its directors or other authorised officer) intend to prevent, and adopt the method of despatch that it used for the purpose of preventing and so as to prevent, the Plaintiff from attending or being able to vote at the meeting?

(viii). if the notices were despatched, were not actually received at least five clear days before the meetings, were deemed to have been effected three days after posting and the date on which they were deemed effected was at least five clear days before the meetings, and if the answers to (vi) and (vii) are yes, is the Defendant prevented from relying on article 40.1(b) and/or were the notices invalidly given since the directors had exercised their power to convene the meetings for an improper purpose?

(d). the Latest Draft of the Issues omits one of the questions covered in the Plaintiff's skeleton argument, namely the challenge to the directors' decision to convene and how to convene the meetings (whether the directors' decision to convene and give notice in

the manner they adopted was an improper exercise of the board's powers for the improper purpose of diluting the Plaintiff's voting rights).

(e). the Invalidly Convened Point and the Latest Draft of the Issues involve factual disputes not only in relation to the mechanics of giving notice (what was sent, when, by whom, to whom, by what method and when was whatever was sent received) but also, in order to cover the position if it is found that proper notice was given and deemed to have been received in time, in relation to the Defendant's knowledge and state of mind. They also, as I have noted, involve questions of construction and of law regarding when the deemed notice provisions can be relied on.

(f). I note the criteria identified by Smellie C.J. in *In re T Trust* and the significance to be given to the requirements of the overriding objective. I also note the guidance of David Steele J in *McLoughlin v Grovers* and the neat summary contained in the 1999 White Book (at 33/4/10) of the circumstances in which it is appropriate to direct a split and separate trial:

> *"An order for the separate trial of separate issues is a departure from the beneficial object of the law that all disputes should be tried together and therefore should only be made in exceptional circumstances or on special grounds…… [the] rules provide the machinery for avoiding the trial of unnecessary issues or questions, by isolating particular issues or questions for separate trial and thus eliminating or reducing delay and expense in the preparation and the trial of issues or questions which may ultimately never arise for trial or which otherwise warrant being separately tried…. [an order for the separate trial of a preliminary issue] may have the beneficial effect of expediting the hearing of the substantial issue in the action, eliminating the need for the discovery of documents and evidence on other issues and producing a substantial savings of costs."*

(g). it seems to me that the Plaintiff is right to say that the Invalidly Convened Point could dispose of the case or at least an important aspect of it so as to narrow the triable issues. If the Invalidly Convened Point is decided in favour of the Plaintiff, it will dispose of a decisive or potentially decisive issue in the case. It will have been decided that the EGM and the Class B Meeting were not validly convened and that the resolutions purportedly passed thereat were of no effect. There would then be no need to deal with the Validity of the Class B Resolutions Point (which only arises if the meetings were validly convened and held). It may be that the Defendant would then need to accept that the resolutions purportedly passed at the December EGM were valid and the purported replacement of board members made thereat was also effective, although it

may be that further issues would need to be resolved with respect to the December EGM.

(h). but even though this is a point of significant weight, it is insufficient to justify ordering a separate trial. The Defendant seems to me to be clearly right that this is not a case in which there could be a schedule of agreed or assumed facts. The critical facts are in dispute – both with respect to notice mechanics and the Defendant's knowledge and state of mind. There needs to be a trial with cross examination to deal with these issues. While in my view the Court has jurisdiction to direct a separate trial to deal with both factual as well as legal issues (the guidance given by David Steele J in *McLoughlin v Grovers* was that the questions to be decided where the court gives such a direction should *usually* be questions of law) it will rarely be appropriate to do so. The inability to have the proposed separate trial decided on the basis of a schedule of agreed or assumed facts weighs against granting the Plaintiff's application.

(i). in view of the issues which the Plaintiff wishes to have dealt with at the separate trial, it will be necessary for the parties to adduce and for the Court to consider evidence concerning the knowledge, intentions and purpose of the Defendant (and its directors) in relation to the convening of the meetings. I accept that the Invalidly Convened Point focuses on facts relating to (and evidence of) whether the Defendant's intention or purpose was to disenfranchise the Plaintiff and prevent it from exercising its rights as a shareholder and that these are distinct from the facts relied on by the Defendant in Section F, which relate, as I have noted, to whether the passing of the resolutions themselves can reasonably be justified. Therefore, it is likely that a trial of the Invalidly Convened Point will avoid the need for evidence relating to all or most of the wide range of matters covered by Section F. But I am not convinced that it will be possible or permissible to draw a clear and sharp line between the facts relevant to the Invalidly Convened Point and the Validity of the Class B Resolutions Point. At this stage, it seems to me not to be clear, and unrealistic to expect, that the facts in dispute and evidence adduced at the trial of the Invalidly Convened Point will be wholly distinct from and not touch on the matters covered in Section F. The circumstances in which the meetings came to be convened and the purpose and intentions of the Defendant when taking the steps it did to convene them appear to be closely connected with and overlap with the reasons for wishing to pass the Class B Resolutions. They form part of one action plan and set of actions. The dispute between Mr Zhan and Mr Wu is likely to form the important backdrop to the whole proceedings. So while the range of facts

that is directly relevant to the Invalidly Convened Point are more limited, at least some of the matters referred to in Section F are likely to be relied on at least as relevant background.

(j). as a result, a trial of the Invalidly Convened Point could well cover a significant part of the territory to be covered at a trial of all the issues in dispute. There is a serious risk that the witnesses at the trial of the Invalidly Convened Point would be the same as those (or there would be an overlap between those witnesses and those) who would be called at a trial of the Validity of the Class B Resolutions Point and of the issues relating to the December EGM resolutions (while it is possible that VCL would not need to give evidence at the trial of the Invalidly Convened Point, it might wish and be permitted to do so and then might have to give evidence in both trials). Accordingly, if the Plaintiff is unsuccessful at the trial of the Invalidly Convened Point, the same (or at least some of the) witnesses would need to give evidence again at the trial of the Validity of the Class B Resolutions Point (and with respect to the December EGM). While the discovery required for the trial of the Invalidly Convened Point may well be less than that required for the trial of all issues, full discovery has by now already been given and the extent of discovery is still likely to be significant, so that the cost savings with respect to discovery will not necessarily be substantial.

(k). furthermore, because the Invalidly Convened Point and the Validity of the Class B Resolutions Point (and the issues relating to the December EGM) arise out of one set of connected events and for a single purpose (or at least closely connected purposes), the Court is likely to be assisted in having one trial of all the claims made and issues arising, with all the relevant witnesses giving their evidence at a single hearing.

(l). the number and complexity of issues covered by the Latest Draft of the Issues, and the need for there to be evidence as to the Defendant's knowledge, purpose and intentions, make it likely that the trial of the Invalidly Convened Point will not necessarily be significantly shorter than a trial of all the issues raised in the Plaintiff's statement of claim. It will in any event be a substantial trial, and not be a short or contained trial of a limited number of issues by reference to agreed or assumed facts.

(m). in my view, in these circumstances, taking into account the various competing factors, it is, on balance, not appropriate to order a separate trial of the Invalidly Convened Point and the issues relating thereto as formulated by the Plaintiff. This is not one of

the exceptional cases which justifies a departure from (to use the phrase from the 1999 White Book) "*the beneficial object of the law that all disputes should be tried together.*" The Plaintiff's Preliminary Issues Application is therefore dismissed.

Mr Justice Segal

Judge of the Grand Court, Cayman Islands