[2016] JMCC Comm. 5

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2013 CD 00138

BETWEEN	PAYOUT (JAMAICA) LIMITED	CLAIMANT
AND	VICTORIA MUTUAL BUILDING SOCIETY	DEFENDANT

Mr. Conrad George and Mr. Adam Jones instructed by Hart Muirhead Fatta Attorneys-at-law for the Claimant

Mr. Jerome Spencer instructed by Patterson Mair Hamilton Attorneys-at-law for the Defendant

HEARD: September 17, October 7 and 8, November 3, 2015 and March 30, 2016

Company law - shareholders agreement - alleged breach of shareholders agreement by majority shareholder - meaning of reorganization of share capital in shareholder agreement - whether an increase in the company's authorized share capital amounts to reorganization of shares - whether issue of shares to majority shareholder in debt conversion a breach of the shareholder's agreement - whether agreement otherwise provided for or contemplated the action taken by the majority

EDWARDS, J

Background

[1] The Claimant, a St Lucian Company called Payout (Jamaica) Limited (Payout) and the Defendant, a Jamaican Company called Victoria Mutual Building Society Limited (VMBS) registered under the Building Societies Act, entered into a joint venture agreement whereby they would operate a new foreign exchange remittance service. To form this new remittance service they both agreed to merge their assets into the new entity. VMBS agreed to provide its existing remittance transfer service platform called V-LINK and Payout agreed to provide a motor car, computer equipment, trademarks, domain addresses and its existing online international payment service platform listed as web development. Management of the company would also be done by a Payout representative. Payout had previously operated an online international payment service in Jamaica and the Caribbean.

[2] I do not think it is necessary to this decision to state the value of these contributions except to say that V-Link was touted as being profitable to the tune of US$1.2 million and the highest money value on Payout's asset contributed was US$54, 377.00 for the web development.

[3] Pursuant to this joint venture agreement a private company called VMBS Money Transfer Services Limited (VMTS or the Company) was incorporated in October 2004. Both VMBS and Payout became the only shareholders in this company. The Company was incorporated with an authorized share capital of 1,000 ordinary shares valued at the Jamaican dollar equivalent of US$1 each. The shares were issued and allotted as to Payout-150 shares or 15% and VMBS–850 shares or 85%. This distribution is said to have been based on the value of their respective contributions.

[4] VMTS was financed by a loan from VMBS in the sum of Five Hundred Thousand United States Dollars ($500,000.00 USD) at 10% per annum evidenced by a loan agreement dated December 12, 2004, a debenture agreement and five promissory notes (the loan having been disbursed in five separate tranches of

US$100,000.00 dollars each). VMTS appeared not to have and in fact had no other cash capital. The Company had profitability projections amounting to Four Hundred and Twenty Two Thousand Four Hundred and Twenty Two United States Dollars ($422,422,00 USD) in year one with an upward trend to Eight Million Nine Hundred and One Dollars and Thirty Five Cents rounded upwards in United States Dollars ($ 8, 901,35 USD) in year five.

[5] The parties also entered into a shareholders' agreement which was to govern their joint venture relationship and how they were to exercise their powers regarding the Company. The agreement provided that to the extent that it was in conflict with the Articles of Association it would prevail.

[6] Unfortunately for the shareholders the company made no profits. In fact VMTS experienced losses from the very first year of its operation. According to the Company's financial statements it made a loss every year, (except 2007 where it made a small profit which slightly reduced the annual deficit), up to 2011. Due to its recurrent losses the Company was also unable to service its debt to VMBS. It was only able to continue operating because of the unsecured line of credit and guarantees covering its debts provided by VMBS.

[7] VMTS operated as a subsidiary of VMBS. Its insolvent state is said to have caught the attention of the financial regulatory body the Bank of Jamaica (BOJ). VMBS subsequently called in the loan in 2010 and the Company informed VMBS that it was not in a position to repay the demand loan. It now fell to the Board of Directors of VMTS to consider the options available to this insolvent company and devise a plan to deal with it. Suggestions were made by each shareholder as to how to extinguish the debt, promote the success of the Company or sever the connections between the existing shareholders. Neither side approved the recommendations of the other.

[8] The Company was twice valued, firstly by Ernst and Young, which valued the shares at nil and by Deloitte and Touche which also valued the Company's shares at nil. The Board of Directors of VMTS at a meeting of the Board held on

November 16, 2011 recommended a debt for equity conversion. Payout as the minority shareholder, through its nominee Directors, rejected the valuation of the shares and voted against the debt for equity conversion. VMBS decided to take the bull by the horn and at an Extraordinary General Meeting of the shareholders held December 28, 2011, a resolution was passed to authorize a debt for equity conversion involving the issue of additional shares to VMBS in return for the cancellation of the loan to VMTS.

[9] An Extraordinary General Meeting was again held on March 28, 2012 from which Payout was absent having been absent from the adjourned meeting called March 21, 2012. At this meeting a resolution was passed to increase the share capital and a second resolution was passed to ratify the debt to equity conversion and the issue of shares to VMBS. As a result, the authorized share capital of the company was increased from USD$1,000 by the creation of 883,290 new shares and the recommendation of the board to carry out a debt to equity conversion was approved. Payout had been invited to purchase a pro rata allotment of shares in relation to those that would be issued to VMBS in the amount of 132,343 but it did not take up the offer, claiming the actions of VMBS as majority shareholder was in breach of the shareholders' agreement. The company's authorized share capital was increased and the additional shares were subsequently issued to VMBS in the debt for equity swap. It is this action of the defendant as majority shareholder which brought the parties before court.

[10] This matter is one that rests mainly upon the determination of a sole issue; that is whether the Defendant was in breach of their contractual obligations to the Claimant. The contractual obligation of which I speak is one arising from the shareholders' agreement entered into between the parties, more specifically clause 9.2.1.

The Claim

[11] To understand fully the claimant's case I need to outline the actual nature of the claim. Payout alleged that the action of VMBS in increasing the share capital was

in breach of the shareholders' agreement. In filing this claim it relied on clause 9.2.1 of the shareholders agreement which states:

> *"Unless otherwise agreed by all the shareholders in writing, the shareholders shall exercise their powers in relation to the company to procure that (save as otherwise provided or contemplated in this agreement or the business plan as amended) the company will not and none of the companies in the group will –*
>
> *Issue; allot, redeem, purchase or grant options over any of its shares or other securities or reorganise its share capital in any way."*

[12] Payout alleged that what was done by VMBS was not provided for or contemplated in the agreement or business plan and as it was not agreed in writing by all the shareholders it was in breach of clause 9.2.1. It therefore sought the following orders;

1. A declaration that the provisions of clause 9.2.1 of the shareholders' agreement precluded the increase in share capital of the company from 1000 to 883,290 ordinary shares in the company.

2. An order cancelling the increase in the authorized share capital of the company purportedly effected by resolution of the members of the company on 28th March 2012.

3. An order cancelling the conversion of the US$500,000.00 loan from the defendant to the company from debt to equity on 28th March 2012.

4. An injunction restraining the company from purporting to reorganise its capital through the increase of its capital or otherwise, without the consent of the claimant

5. Further and or other relief

[13] VMBS denied the allegations made by Payout and denied it was entitled to the reliefs claimed. VMBS maintained that the actions taken did not require the consent of Payout and were lawfully authorized. It further contended that the remedies sought were inequitable, insincere and inimical to the best interests of

the company. A defence was filed 4^{th} July 2014. With respect to the existence of the shareholders' agreement, its original stance was to put the claimant to proof and would admit only to an understanding in similar terms to the claim. It also claimed that it acted under an expressed and or implied term of the understanding and or agreement. It denied that it acted in breach of a shareholders' agreement. It admitted only to an increase in the share capital and not to a reorganization of share capital. It relied on the parties understanding under clauses 19.4 and 19.5 and clause 4 of the draft agreement.

[14] In its defence, it pointed to the company's insolvency and the fact that it had traded unprofitably for years under the management of the claimant's representative and that it had to provide guarantees so that the company could continue to operate. It also pointed to the fact that the claimant was notified to purchase the shares pro rata to those that would be issued to it but the claimant failed to act on the invitation. It also denied that there was a reorganization of the share capital.

The Agreement

[15] Before moving to the substantive issues, I wish to make some preliminary remarks about the agreement itself. The shareholders' agreement entered into by the parties was never dated or fully executed. The defendant took this as a point of contention in their statement of case. At first, the defendant in its defence would admit only to an understanding in similar terms to that pleaded by the claimant. It was only at the last hour before the date of trial that they admitted to being bound by the agreement in their Notice of Admission of Facts filed on October 6, 2015.

[16] The Notice of Admission of Facts filed by the Defendant was filed in response to the Notice to Admit filed by the claimant on September 8, 2015. The claimant's in their Notice to Admit stated;

1. *The parties entered into a Shareholders' Agreement.*

2. The Defendant acknowledged the existence of the Shareholders Agreement in correspondence and specifically clause 9.2.1 and its terms.

3. The parties have acted according to the terms of the Shareholders Agreement even though said agreement was never formalized."

[17] The defendant in their Notice of Admission of Facts stated;

"The Claimant and it were parties to a shareholders' agreement."

"It acknowledged the existence of a shareholder's agreement..."

"It acted in accordance with the shareholder's agreement although this agreement was never dated or executed by it."

[18] In any event the position that an unsigned agreement is a valid and enforceable document is supported in law by the English decision of **Reveille Independent LLC** v **Anotech International** (UK) Ltd [2015] EWHC 726. The commercial court ruled that a party to the agreement had accepted the terms of that agreement by its conduct, even though it had not signed it and even though the agreement purported to require the signatures of both parties to take effect. This was in circumstances where the contract had set out particular formal requirements that should have been complied with. The court found that the conduct of the parties had waived those formal requirements.

[19] So for the avoidance of doubt, in the circumstances of this particular case, the court would have been bound to find that VMBS had by its conduct accepted the terms of the agreement. In the letter dated July 30, 2012 from Mr. Trevor Patterson attorney-at-law to VMBS which formed part of the agreed bundle, reference was made to the purported shareholders' agreement and its enforceability was acknowledged. In fact legal advice had been sought by the defendant on the clause in question. The defendant's attorneys advised that there was no breach of the agreement. After considering the actions of the defendant as a whole I take the view that it would have been estopped in those circumstances from denying the existence of the agreement. The shareholders' agreement would have been accepted by the court in any event and was finally accepted as binding by the defendant, albeit at the very last minute.

[20] I will now refer to the relevant sections of the agreement and will cross reference them whenever I deem it necessary or convenient. The most relevant clauses are 9.2 and 9.2.1 which I have already quoted. Other relevant clauses were;

> *9.4 Each shareholder shall use all reasonable and proper means in his power to maintain improve and extend the business of the company and its subsidiaries (if any) and to further the reputation and interest of the company and the company.*
>
> *19.5 Each of the parties undertakes with each of the others to do all things reasonably within his power, which are necessary or desirable to give effect to the spirit and intent of this agreement and the articles.*
>
> *19.8 This agreement sets forth the entire and complete and exclusive agreement and understanding between the parties hereto relating to the subject matter hereof.*
>
> *19.10 This agreement constitutes the entire agreement between the parties with respect to the matters dealt with herein.*
>
> *13.1 If during the continuance of this agreement, there shall be any conflict between the provisions of this agreement and the provisions of the Articles then, during such period, the provisions of this agreement shall prevail."*
>
> *Clause 4 Before any shares (whether forming part of the original capital or any increase of capital of the Company) are issued to any person, each class of such new shares shall first be offered to the holders for the time being of the corresponding class of shares pro rata to the number of shares of that class held by each of them to which each shareholder is entitled and limiting a time (not being less than 21 days) after which, if not accepted, will be deemed to have been declined. In so far as the same are taken up pursuant to such offer, the Directors may dispose of the same in such manner as they think most beneficial to the Company.*

Issues on the Claim

[21] As said previously the sole question is whether the defendant is in breach of its contractual obligations to the claimant. The answer to that question can only be answered by the determination of three broader issues raised from the claim and the defence filed. These are as follows:

1. Was the increase in the authorized share capital of the Company a reorganization of its share capital amounting to a breach of the shareholder's agreement?

2. Was the issue of shares to VMBS without the consent of Payout a breach of the shareholder's agreement?

3. Was the action undertaken by the Defendant contemplated by the expressed or implied terms of the understanding and/ or agreement?

The Claimant's arguments

[22] The major issue for the court to decide is whether the defendant is in breach of the shareholders' agreement. It has early been agreed that there was indeed a shareholders' agreement entered into by both parties. There is no longer any dispute as to that fact. There is also no dispute as to the provisions of clause 9.2/ 9.2.1. What is in fact in dispute, as submitted by counsel for the claimant, is the question of interpretation of the said clause.

[23] Counsel argued that the only instrument which governed the obligations of the parties to each other was the shareholders' agreement and the Articles of Association. Counsel pointed to clause 13.1 of the shareholders agreement which I have already stated in its entirety and which basically meant , as counsel for the claimant put it, that clause 9.2/9.2.1 trumps the Articles of Association."

[24] Counsel submitted that clause 9.2/9.2.1 plainly dealt with the reorganization of the share capital of the company. According to counsel any provision in the Articles of Association that deals with the reorganization of the share capital of the company was superseded by clause 9.2/9.2.1 to extent that it was inconsistent with it, and was therefore irrelevant. Counsel submitted that the defendant could not rely on clause 4 to justify the authorization of new shares as it governed the issuing of shares only after such shares had been authorized. Counsel argued that clause 4 did not deal with the authorization of new shares and was therefore irrelevant. He further argued that what was relevant to these proceedings was the manner in which the increase in share capital was procured. He submitted that any such increase was governed by clause 9.2/9.2.1 and was unaffected by clause 4.

[25] Counsel asked the court to be guided by the principles set out in **Marley v Rawlings and anor.** [2014] UK SC 2 when interpreting the agreement. In that case Lord Neuberger in his judgment at para. 19 said:

> "*When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words.*
>
> *(a) In the light of*
>
> *(i) The natural and ordinary meaning of those words,*
>
> *(ii) Any overall purpose of the document*
>
> *(iii) Any other provisions of the document*
>
> *(iv) The facts known or assured by the parties at the time that the document was executed and*
>
> *(v) Common sense, but*
>
> *(b) Ignoring subjective evidence of any party's intentions*

[26] Counsel submitted that the ordinary meaning of clause 9.2/9.2.1 is that the parties were prohibited from issuing, allotting, redeeming, purchasing or granting options over any of its shares or other securities and are further prohibited from reorganizing the share capital in any way unless all the shareholders agree to do so in writing, except in such a manner that is set out elsewhere in the agreement or business plain.

[27] Counsel also noted that applying the **Marley** approach the overall purpose of the agreement was to (a) govern the relationship between the shareholders, (b) establish how the company was to be run, (c) regulate sales of the shares in the company, (d) provide a measure of protection for the minority shareholder. He pointed out that this was clearly supported by the recitals in the agreement in particular recital (d) and (e). Counsel submitted that the correct interpretation of 9.2.1 was that it was intended to protect the rights and interest of the minority.

[28] Counsel submitted further that, in so far as the defendant was attempting to rely on clause 9.4 and 19.5 and clause 4 of the agreement there was a distinction between the authorization of shares and the issue of shares. Counsel cited the case of **Commissioner of Inland Revenue v Blott** [1921] 2 AC 171 where Lord Dunedin LJ stated:

> *"There are certain ways in which the authorized capital may be increased, but assuming the company has not taken advantage of what it can do in this way it can only issue shares to the extent which it still has shares authorized but not issued."*

[29] Counsel also submitted that 9.4 did not advance or assist the defendant's case and was not relevant to these proceedings. Counsel submitted that in any event the claimant used all reasonable and proper means in its power to maintain, improve and extend the business of the company and to further the reputation and interest of the company and the group.

[30] Counsel highlighted the means used by the claimant including negotiations with and alternative offers made to the defendant and agreeing to mediation. All this was disregarded by the defendant who passed resolutions in direct breach of the agreement and who by letter dated January 10, 2012 purported to offer shares which had not been properly authorized and in fact were not yet in existence.

[31] Counsel argued that 9.2/9.2.1 superseded 9.4 as a general rule of construction and that 9.4 is a general provision of general effect whereas 9.2.1 is of specific effect. Counsel also argued that 19.5 of the agreement was also irrelevant to the issue before the court. Counsel noted that the parties entered into an agreement and that there was no further understanding. Counsel pointed out that no such understanding had been pleaded and there was no evidence of one before the court. Counsel argued that 9.4 (which is a good faith clause) did not assist the defendant as it was the defendant which had acted in bad faith.

[32] Counsel further argued that the facts known to the parties at the time they were entering the agreement were that the –

(a) Partnership was in order to operate a foreign exchange remittance company

(b) That the defendant would be in majority shareholder and the claimant a minority shareholder

(c) The defendant would put up the initial capital necessary for this operation of the business of the company

(d) All shareholders would have to agree in writing to any reorganization of the share capital of the company.

Counsel submitted that the correct interpretation of the agreement was that the facts known by the parties point to the fact that the claimant as minority shareholder would require protection of its interest.

[33] Counsel noted that the court had to consider three (3) questions. The first was whether the authorization of new share capital was a reorganization of the share capital of the company and according to counsel the answer to that first question must be yes. The second question was whether all the shareholders agreed to this reorganization in writing and according to counsel the answer to the second question was an undoubted no. The third question was whether the business plan provided for or contemplated a reorganization of the share capital of the company, again according to counsel the answer was no.

[34] Counsel argued that an increase in the authorized share capital was a reorganization of the share capital of the company. Counsel noted that where the authorization purported to increase share capital from $1000 to $883,290.00 and the issuing of an additional 749,947 shares to VMBS to cancel the debt owed amounted to a reorganization.

[35] Counsel also argued that the fact of reorganization was recognized by the defendant's witnesses based on their definition of reorganization. Counsel also relied on the definition of reorganization in *Halsbury's Laws of England Volume* 6 [2001] p 931. Counsel also relied on the definition in the Transfer Tax Act schedule 1, paragraph 4. Counsel further relied on the case of **Dunstan (Inspector of Taxes) v Young, Austin and Young Ltd** [1989] STL 69. Counsel argued that there was clearly no written agreement by the minority for such reorganization. He also noted that the business plan did not provide or contemplate such reorganization.

The Defendant's arguments

[36] Counsel for the defendant denied that the claimant was entitled to any relief. He contended that what was done on March 28, 2012 did not require the consent of Payout and was lawfully authorized. Counsel also argued that the remedies being sought by the claimant was inequitable, insincere and inimical to the best interests of the company. The claimant's quick response to that point was to indicate that the remedies sought were not equitable but arose from a breach of contract and that the remedies were common law remedies.

[37] Counsel for the defendant pointed out that the authorized share capital or nominal capital was different from the company's issued share capital. Counsel cited *Palmers Company Law* 22nd edition at page 263 where it states that:

> *"The nominal capital in its original or altered form sets the limit of capital available for issue. The nominal capital is, strictly speaking, not "capital" at all; it represents only an authority by the shareholders to the directors to create new capital by the issue of shares (hence the term "authorized capital"); the issued capital on the other hand has actually been taken up by the shareholders who have agreed to give consideration in cash or kind for the shares issued to them unless those shares are fully paid bonus shares; the issued capital is thus a reality and not merely an authority."*

[38] Counsel submitted that reorganization of a company's share capital was not defined by Companies Act 2004. He however, agreed that the Transfer Tax Act does provide some guidance. That Act states that reorganization of a company's

share capital includes the allotment of shares in a company to a person in proportion to their existing holding of shares in that company. He noted that the allotment of shares is a contract for the issue of shares. Based on that he submitted that the increase in the authorized share capital by the resolution effected March 28, 2012 could not be considered a reorganization of the company's share capital. This he said was because no sum was raised by the issue of shares nor was a contractual obligation created for anyone to pay for shares in the company. He noted that all that took place was that the company was given additional capacity to issue additional shares. Therefore, according to counsel for defendant no consent in writing was required and there was no breach of 9.2/9.2.1.

[39] Counsel further contended that the shareholders agreement made no provision for the increase in the authorized share capital of the company and therefore, the Articles of Association was applicable. Counsel contended that by virtue of the Articles of Association, the share capital could be increased by an ordinary resolution passed at the general meeting of the company. He pointed to article 43 which stated that the company may "by ordinary resolution increase its share capital by the creation of new shares, such increase to be of such aggregate amount and to be divided into shares of such respective amounts as the resolution shall prescribe."

[40] Counsel for the defendant contended that the resolution passed on March 28, 2012 at the Extraordinary General Meeting was in keeping with article 43 and required no consent. Counsel also relied on the dissenting dicta of Lord Dunedin in **Commissioner of Inland Revenue v Blott** at page 203. He submitted that an increase in authorized share capital offers no value to the shareholder until he is issued with a share certificate in the company.

[41] Furthermore, Counsel pointed out that the agreement specifically stated at clause 19.7 that it did not constitute a partnership between the parties so counsel for the claimant was plainly wrong in referring to the joint venture as a

partnership. Counsel noted that increasing the authorized share capital is not the same as increasing the share capital. An increase in the authorized share capital only gives a company the capacity to increase its share capital. The share capital is only increased when new shares are issued for money or monies worth.

[42] He agreed that whilst the witness Mr. Richard Powell did say that a change in the loan capital and debt equity would amount to reorganization, counsel argued that he did not however, say reorganization of share capital. In response to the definition cited by counsel for the claimant in Halsbury's Laws of England, counsel for defendant countered that the issue of new shares to shareholders otherwise than in proportion to their existing beneficial holdings is not a reorganization of a company's share capital or if they no longer hold shares in the same proportions as existed previously, as in this case, there is no reorganization of a company's share capital. Counsel noted that the definition cited by the claimant only illustrated that reorganization of share capital may be achieved in multiple ways.

[43] Counsel for the claimant on the other hand argued that the defendant's submission and authority on the authorized share capital was inconsistent with its pleadings and that the court should not consider them. Counsel argued that in any event 9.2.1 refers to all share capital. Counsel further submitted that 9.2.1 dealt specifically with the issuing and allotment of shares and argued that it would be contrary to common sense that the agreement precluded the reorganization of share capital while leaving the question of the increase in the authorized capital of the company to a simple majority per the Articles of Association.

The evidence

[44] Evidence was given in this matter by Payout's representative Mr. Patsalos and by VMBS representatives Mr. Powell and Mr. Lewis. This is a case which turns almost entirely on the interpretation of the agreement so that the issue of credibility in this case was hardly a live one. Both sides appeared to me to

believe sincerely in their case and there was very little room within the four walls of the agreement for lies or prevarication. To the extent that the evidence of the witnesses took the case any further, I accepted that all were being as honest and as sincere as their human failings allowed. Mr. Lewis and Mr. Powell are both employees and to my mind have no personal interest to serve. Mr. Patsalos does have an interest to serve but I do believe that he is sincere in his belief in the claimant's case and I have not discerned any wish in him at any time to deceive the court.

[45] To better understand the predicament facing both party, it is necessary to consider both the scheme devised by the majority and the reason for it. The reason for this scheme begun with the loan. On December 12, 2004 VMBS granted a loan to VMTS in the sum of US$500,000.00 at an interest rate of 10% per annum. Interest was to be computed and paid quarterly on March 31, June 30, September 30 and December 31 in each year. VMBS, as a result of the loan, also secured a debenture over the borrower's assets. The borrower also executed five (5) promissory notes in sum of US$100,000.00 each at interest rate of 10% per annum to be paid quarterly; March 31, June 30, September 30 and December 31 in each year. This was in accordance with the schedule of draw down for sums advanced December 21, 2004 US$100,000.00; February 1, 2005 US$100,000.00; June 6, 2005 US$100,000.00 and August 16, 2005 US$100,000.00.

[46] VMTS was never able to keep up with the repayments on this loan because it was a loss making venture from the start. After several years of losses the parties began discussions on how to stem the tide. As noted previously, neither side could agree on the way forward. Then the correspondence begun. I will highlight a few I consider pertinent to the issue.

[47] On April 8, 2009 Mr. Patsalos of Payout wrote to Mr. Lewis of VMBS. In that letter the claimant rejected the offer to purchase shares for US$100.00 and made a counter offer to; **(1)** recapitalize the company and continue as a VMBS/Payout

partnership, growing the company and **(2)** have VMBS buy Payout shares for US$350,000.00.

[48] On June 17, 2009 Mr. Lewis wrote to Payout. In that letter Mr. Lewis outlined several issues as follows:

(1) That the Bank of Jamaica (BOJ) as the regulatory body had raised questions regarding the viability of VMTS;

(2) That VMBS had indicated in two (2) meetings held October 2008 and March 2009 that it could no longer continue to subsidize the operations of VMTS;

(3) That its proposal made March 2007 that VMTS raise additional capital from both shareholders was rejected by Payout who did not wish to purchase additional shares in cash;

(4) That its proposal March 2008 for VMBS to purchase the equity owed by payout in VMTS for US$1.00 in return for which payout would be released from having their 15% liabilities of VMTS and VMBS would assume all liabilities was rejected;

(5) That the proposal by Payout for the recapitalization of VMTS by either **(a)** VMBS writing off the entire loan or **(b)** converting the loan to non-voting preference shares was rejected by VMBS as a transfer of value from VMBS to Payout;

(6) That as a counter-offer to the offer to purchase Payouts 15% for US$350,000.00, VMBS proposed that Payout purchase VMBS 85% interest for US$2,330,000.00. This was rejected by Payout;

(7) That VMBS proposed a competent independent 3rd party be engaged to value VMTS shares and VMBS would purchase Payout's share in VMTS at that accepted value. This was rejected by Payout;

(8) That VMTS was trading with negative equity and was not paying any interest on the loan;

(9) That the BOJ had suggested the present capital structure of the company was unacceptable to it as the regulatory agency;

(10) VMBS made a final offer to purchase VMTS shares at US$1.00 or such price to be determined by valuation;

[49] On September 21, 2010 VMBS made a demand for repayment of the loan with a threat to consider conversion of the loan to equity if the demand was not met by the specified date of September 29, 2010. On October 6, 2010 the Chairman of the Board of VMTS wrote to VMBS to indicate the company was not in a financial position to repay the loan and requesting a meeting to consider the options. On the March 23, 2011 VMBS undertook to provide financial support to VMTS to satisfy its obligations as they became due for next 12 months.

[50] According to the Minutes of the Meetings of the Board of Directors of VMTS dated November 16, 2011 at which Mr. Patsalos and Mr. Peter Williams of Payout were both present by phone, it was indicated that against the background of the call on the loan and the indication by the lender that it was prepared to accept a debt for equity conversion in settlement, the directors had commissioned a valuation by Ernst and Young. Mr. Patsalos objected to the report indicating it was costly and served no useful purpose. Mr. Patsalos and Mr. Williams voted against acceptance of the report.

[51] At that same meeting a resolution was passed as follows:

> *"RESOLVED that the Board of Directors recommends to the shareholders the conversion of the parent society's demand loan to equity based on the Ernst and Young valuation report for the debt to be converted on a dollar to dollar basis, with one dollar of debt used to obtain one dollar of ordinary shares, with the society owning 850 of the existing shares plus 60.7 million newly issued shares.*

Mr. Patsalos and Mr. Williams voted against the resolution. It was proposed that a shareholders meeting be convened to discuss the minority shareholder's interests and proposals.

[52] According to the Minutes of the Extraordinary General Meeting of the Shareholders of VMBS Money Transfer Services Ltd. held December 28, 2011 at which the minority shareholder was present the background to resolution 1 was read out by chairman. Resolution 1 was for the total liabilities of Jamaican $65,132,897.00 to be converted to equity on a dollar to dollar basis and that

VMBS be issued additional shares in the company resulting in an increase in share capital of 65,132,89.00 ordinary shares in favour of VMBS in full satisfaction of the debt.

[53] Mr. Peter Williams of the claimant indicated that it would result in the increase in equity and the dilution of the shares of the minority shareholder. He suggested that –

(a) The Company be recapitalized injecting new equity to repay the debt

(b) The minority shareholders sells its shares to the majority shareholder at an agreed price.

[54] Mr. Patsalos indicated a willingness to pay 15% of the US$500,000.00 but not the 10% interest which he wanted reduced but this was rejected by the defendant. Mr. Patsalos asked to move a resolution offering to sell minority shares to the majority shareholder. VMBS rejected the request to reduce the interest from 10% has it had provided a guarantee from year to year and it felt that 10% was a reasonable rate. Mr. Patsalos abstained from voting on the resolution. The vote was held to carry by the chairman. Mr. Patsalos raised the issue of clause 9.2.1 which he felt would prevent the vote passing. Mr Patsalos said resolution 1 breached the shareholder's agreement and was therefore not binding. Mr. Patsalos' counter resolution was put to the vote and was not passed. The minority shareholder then presented a third resolution in the form of an offer of sale of its shares to the majority for US$150,000.00. There was no vote on resolution 3.

[55] On 10th January 2012 VMTS under the signature of the company secretary notified the claimant of the intention to summon another Extraordinary General Meeting to consider a resolution to increase its share capital by 882,290 additional ordinary shares of which 749,947 ordinary shares would be issued by the board to VMBS to liquidate the loan indebtedness of US$749,947.00.

Interest accruing since December 19, 2011 would be written off if the transaction was completed by February 17, 2012.

[56] It also notified the claimant that before the additional shares were issued to VMBS, Payout would be offered the opportunity to subscribe for ordinary shares pro rata to its existing shareholding, to avoid dilution of its shareholding in the company. The notice also purported, pursuant to clause 4 of the shareholder agreement, to grant the claimant the right so subscribe for an additional 132,343 ordinary shares in the company at US$1.00 per share being the pro rata allotment due to it of the 882,290 new shares proposed to be issued. The claimant was given 21 days to accept the offer failing which it would be deemed to have been declined. It would cost payout US$132,343.00 to purchases the shares.

[57] According to the Minutes of Extraordinary General Meeting of the Shareholders held on March 21, 2012 the minority shareholder was absent. There was no quorum and by virtue of articles 56 and 57 of the Articles of Association of VMTS the meeting adjourned to the same day, time and place the following week. Accordingly the minutes of the Extraordinary General Meeting of the Shareholder of VMTS held on March 28, 2012 reflect that the Minority Shareholder was again absent but operating under Article 57 the members present were deemed to be a quorum. The meeting considered the resolution to increase the share capital of the company. The resolution was:

> *"That the capital of the company be increased from US$1000.00 to US$883,290.00 ordinary shares, by the creation of 882,290 ordinary shares, such new ordinary shares to rank pari passu in all respects with the existing ordinary shares of the company."*

The majority, shareholder voted in favour of the resolution.

[58] A second resolution was passed ratifying the debt to equity conversion by the issue of shares to VMBS:

> *"That the decision of the board to approve the conversion of a loan of US$500,000.00 made by Victoria Mutual Building Society (VMBS) together with interest up to December 19, 2011 of US$249,947.00 be and is hereby ratified, confirmed and approved."*

[59] On May 17, 2012 Mr. Patsalos wrote to Mr. Powell indicating that it was his view that the shares had not been validly issued since there was no Director's resolution increasing the capital and converting the loan to equity. He claimed that the shareholders could not authorize the issue of shares. In a subsequent mail on June 1, 2012, Mr. Patsalos again pointed out to Keri-Gaye Brown attorney-at-law and Corporate Secretary for VMBS that in his view the new shares remained only authorized but unissued as issuing them would require a subsequent meeting and resolution by the board and until then the authorized shares remain under the control of the board.

[60] At the trial evidence was given by Mr. Patsalos on behalf of the claimant. He stands by his interpretation of the meaning of clause 9.2/9.2.1. He is also familiar with the business plan and nothing in it, he states, qualified 9.2.1. He became a Director of VMTS in 2007 after the agreement was already in place. His evidence was that he disagreed with the valuation report from Ernst and Young for the simple reason that it did not take into account branding or marketability. He said VMTS had a good automation system which came from Payout.

[61] As for the US$500,000.00 loan at 10% interest, he gave evidence that in 2004 rates were high but by 2008 with the worldwide economic crisis rates had fallen but VMBS board representative on VMTS would not negotiate a reduced interest rate. He said the loan was made on a faulty premise, that V-Link was profitable. He said that the claimant made several suggestions to solve the problems including lowering the offer to sell to US$150,000.00 or to eliminate the debt by offering a 15% capitalization of the loan excluding interest. He noted the question of interest remained a sticky point. He also suggested the interest be rolled over until the company became profitable in which case it would then pay the interest. This would mean Payout would inject 15% of the capital

US$75,000.00 and the VMBS would inject 85%. He said Payout also offered to sell its shares to 3rd parties.

[62] Under cross-examination he was shown the financials for VMTS from 2005. He agreed the company had been operating at a loss with a rising account deficit annually. He agreed the company was losing money from the beginning. He claimed that the only thing VMBS brought to the table was a loss making company and the loan. He noted that VMBS believed the existing remittance company V-Link that they brought to the table was making money but it was not.

[63] He admitted that he had been told that BOJ had concerns about the company. He agreed that the claimant had also objected to a valuation done by Deloitte and Touche which valued the shares at nil. He noted that the valuation done was a waste of money. He also disputed the Ernst and Young valuation which also valued the shares at nil.

[64] He said Payout did not agree to any reorganization of the capital. He said clause 4 was the procedure for issuing new shares and could only be read as the procedure to be followed after the authorization was given under clause 9.2.1 or generally where authorization was given to issue shares. He agreed the word increase was not in clause 9.2.1 but stated his belief that it covered an increase.

[65] He said that he understood the difference between authorized and issued share capital. He noted that shares are issued once they are authorized, that is, once they are authorized they may be issued. He said that if the authorized share capital was increased but the additional shares were not issued, none of the shareholders would suffer dilution.

[66] He agreed he was present on December 28, 2011 when the resolution was read out. He agreed that Mr. Williams expressed a concern with dilution. He agreed clause 4 provided protection against dilution. He said that once the authorized share capital was increased it was possible that the additional shares would be

issued. He agreed that the protection offered by clause 4 was to offer existing shareholders the new shares on a pro rata basis.

[67] He declared that clause 4 was not subject to clause 9.2.1 and disagreed that the words "save as otherwise provided or contemplated" would cover clause 4. He said once properly authorized the Board must operate under clause 4. He said under 9.2.1 the shareholder can agree to the issue of new shares.

[68] He noted that they did not buy the 123,343 shares because they were not legally available. They were of the view that the situation ought to remain until the court adjudicated as an offer could not be made for shares from someone not legally authorized to sell it. He also pointed out that the increase effected by the company was not lawful as there was no Board meeting to approve the issuing of the shares. He said in his view the whole process was not done properly. He declared that the debt to equity conversion was in breach of the shareholder's agreement.

[69] He agreed however, that the conversion was beneficial to the company but argued that there were other ways to achieve the same things. He denied it benefited both shareholders as he claimed the minority shareholder has been diluted to less than 1/10%.

[70] He agreed 9.4 imposed an obligation on both shareholders. He agreed 19.5 was a good faith clause imposing obligations on both parties. He agreed those clauses are to be read with 9.2.1. In re-examination he told court the offer to buy additional shares was rejected as an illegal offer as it was in breach of 9.2.1 and not bona fide.

[71] Mr. Powell gave evidence on behalf of the defendant. He gave evidence that it was his understanding that the equity was divided based on contributions in kind. VMBS had V-Link and Payout had equipment. In addition he said, VMBS agreed to provide a loan as working capital. Mr. Powell gave evidence that the discussions with Payout dragged over several years and that they rejected every

proposal put on the table. He said Payout did not want to put up any cash for equity. He stated that the first time that offer was made to recapitalize to cover the loan principal only was at the Extraordinary General Meeting. To sell its shares for $150,000.00 he said was the second proposal made by Payout at the Extraordinary General Meeting. It was put as a resolution and was not an offer to VMBS. He said VMBS posture had always been to have the claimant keep its 15% holding. He said that the problem was that they did not want to subscribe to principal and interest. He said they had the opportunity to subscribe to the debt equity swap but did not take it up.

[72] On the question of reorganization he gave evidence that his understanding of the definition of reorganization was to configure and allocate resources depending on what you wish to achieve. He said that if there is already an arrangement, to reorganize means to change the arrangements.

[73] He said the first Extraordinary General Meeting approved the debt equity conversion, the second Extraordinary General Meeting increased the share capital after opportunity was given to minority to subscribe pro rata. He also said the second resolution ratified what was done. He denied that the notice was in breach of clause 4.

[74] He told the court that if one were to make a notional allocation of the deficit to shareholders, $55,000,000.00 of negative net worth would go to VMBS and $10,000,000.00 to Payout. He said that was the situation from the beginning as it was a loss making entity from the beginning. He said VMBS had been issuing guarantees which covered the minority interest in order to maintain and protect all shareholders.

[75] He also pointed out that BOJ had raised the matter of VMTS insolvency at exit interviews after their annual inspections. He said the BOJ's concerns were covered by the issuing of the debtors guarantees. He said there was only two options open to the company, the first was to recapitalize and the second was to wind up the company. He told the court that if the company had been wound up

the minority shareholder would have received nothing as the shares were valued at nil.

[76] He said that by passing resolution 2 on December 2011 to effect the debt equity swap the defendant did not breach the agreement. He said it was the issue of the shares which would have resulted in the breach. He denied that the notice sent in January was ineffective. On March 28 meeting he said was the meeting at which shareholders passed the resolution to increase the share capital. The resolution he said was not in breach of 9.2.1. He could not recall if there was a board meeting to issue shares. Under cross examination he agreed that the decision to increase the share capital could be a reorganization.

[77] Mr. Lewis also gave evidence for the defendant. He is Senior Vice President of VMBS. He too gave his definition of reorganization which he said was to bring together and make some kind of system or item or formal arrangement. That something that was there, something else was done to it. He denied that the debt for equity swap which resulted in a change in the amount of shares allocated to a shareholder was a reorganization of capital. He refused to say change and reorganize are the same things. He agreed that normally directors could issue shares without a shareholder agreement. He agreed that under clause 4 the shares have to be firstly authorized then they must be issued pro rata in accordance with the clause 4.

Was the increase in the authorized share capital of the Company a reorganization of its share capital amounting to a breach of the shareholder's agreement?

[78] I will now consider whether the increase in the share capital was a reorganization of the company's share capital. The defendant asserted that the share capital of the Company had not been reorganized but rather increased. The question that faces this Court is whether an increase in the authorised share capital can be considered as a reorganization of share capital. The first place the court must start to find the answer is in the provisions of the agreement itself. But before I do so I will consider in a general way the nature of such agreements. Generally a

shareholders' agreement operates as a binding contract between the parties to it. Usually its provisions deal with duties, rights and obligations of members of a company. It may be oral or in writing. It is usually made at the start of a new company, though it can be made at any time during life of a company. These agreements are governed by the common law and the terms, once agreed to, can only be altered or varied if all the parties agree (or if otherwise provided for).

[79] I turn now to the actual provisions of this shareholders' agreement. I have already quoted the provisions of clause 9.2/9.2.1 on which the claimant relies. It makes no provisions for what will happen if one side wants or thinks it necessary in the interest of the company to do what the provision prohibits without agreement. The provisions which the defendant relies on I have also already mentioned. Suffice it to say that no provision is made in the agreement for one party to breach it if it feels the other is not acting in the best interest of the company by not agreeing to whatever steps the other side proposed.

[80] The agreement is a comprehensive document. It is undated and unsigned. It was made between Payout (Jamaica) Ltd., VMBS and VMBS Money Transfer Services Ltd. The preamble gives an indication of the purpose of the agreement at (D). It states:

> *(D) the parties have agreed to enter into this agreement for the purpose of regulating their relationship with each other and certain aspects of the affairs of and their dealings with the company.*

The share equity was recognized by clause 3 of the agreement to be 85% to 15% respectively. Clause 4 provided for protection of the minority from dilution of shares by granting pre-emptive rights.

[81] The claimant relies on the increase in the authorized share capital being a reorganization of share capital and therefore being a breach of clause 9.2.1. It is important to note that the clause does not expressly refer to the increase in the authorized share capital as a prohibited action. It does, however, prohibit the reorganization of share capital in any way. This begs the question whether the increase in authorized share capital was a kind of reorganization of share capital. I will begin the analysis where counsel begun, that is, with the definition of reorganization.

[82] In *Halsbury's Laws of England* Volume 6 (2011) paragraph 931 it states:

> *"Reorganization" means a reorganization or reduction of a company's share capital"*

The first thing to note from that definition is that a reduction of share capital simpliciter is a reorganization of share capital but an increase in share capital is not listed as a reorganization of share capital by itself. The paragraph goes on to state:

> *"The term 'reorganization of a company's' share capital' is not a term of art, but the essential feature is the continued identity of the shareholders holding their shares in the same proportions.* ***An increase of share capital can be a reorganization provided that the new shares are acquired by existing shareholders because they are existing shareholders and in proportion to their existing beneficial holdings."*** *(emphasis added)*

Based on this definition where reliance is on an increase in share capital to contribute to a reorganization it must therefore, involve an element of acquisition of new holdings. In other words there must follow a subsequent transaction involving the same shareholders.

[83] Section 4 of the Transfer Tax Act also refers to reorganization of share capital. It states:

> *4.-(1) This paragraph shall apply in relation to any reorganization or reduction of a company's share capital; and for the purposes of this paragraph-*
>
> *(a) Reference to reorganization of a company's share capital include-*
>
> *(i) Any case where persons are, whether for payment or not, allotted shares in or debentures of the company in respect of and in proportion to (or as nearly as may be in proportion to) their holdings of shares in the company or of any class of shares in the company; and*

(ii) Any case where there are more than one class of share and the rights attached to shares of any class are altered; and

(b) "original shares" means shares held before and concerned in the reorganization or reduction of capital, and new holding means, in relation to any original shares, the shares in and debentures of the company which, as a result of the reorganization or reduction of capital, represent the original shares (including such, if any, of the original shares as remain).

[84] To better understand the difference in the submissions made by both sides, it may be appropriate at this juncture to define what a company's authorised share capital is. Authorised share capital is a statement of the maximum share capital the company can have. It is also a statement of the class of shares of which the share capital amount may be made up. It states the nominal value of the class of shares and the maximum number of those shares that the company can have. The authorised share capital and the issued share capital may not necessarily be one and the same. For example in this case the authorised share capital was US$1000.00 divided into 1000 shares of a class of ordinary shares with a nominal value of US $1.00 per share. Both parties in this case agreed to take up all 1000 shares which were subsequently issued and allotted so the issued shares were 1000. The company therefore had an authorized share capital of US$1000.00 and an issued share capital of US$1000.00. However, if the parties had agreed to take up only 500 ordinary shares, it would be a different picture. What we would now have is an authorized share capital of US$1000.00 and issued share capital of $US 500.00.

[85] So the authorized share capital is the maximum the company can raise under its constitution and can be misleading in the sense that it often does not reflect the actual share capital which represents that which was issued and subscribed for.

[86] The Claimant has placed reliance on the case of **Dunstan v Young** for his proposition that an increase in share capital amounted to reorganization. It was held in that case that an increase in the share capital of the company can be a reorganization of that share capital even if it did not come within the precise definition of the section of the relevant Tax Act **provided that the new shares were issued to existing shareholders because they were existing shareholders in proportion to their existing holdings.** (my emphasis)

[87] It is clear therefore that, contrary to counsel for the claimant's submission, the case does not decide that an increase in the company's authorized share capital simpliciter could be a reorganization of share capital. It is the transaction following any such increase which is crucial. That transaction must be of such a kind that the allotment or issue of shares to existing members depends entirely on the existing holdings. There must therefore be an issue from those newly authorized shares and that issue must be determined by the existing shareholding of the members.

[88] Counsel for the defendant in his submissions said that the act of increasing the authorized share capital did not amount to a reorganization of share capital and placed reliance on the Transfer Tax Act, having observed that the Companies Act, 2004 contained no comparable section on a definition for reorganization. As previously noted the Transfer Tax Act stated that a reorganization of a company's share capital includes the allotment of shares in a company to persons in proportion to their existing holding of shares in that company. The Companies Act however does define "share" as a share in the share capital of a company and includes stock except where a distinction between stock and shares is expressed or implied. "Share capital" is said to include (a) the total issue price (including consideration other than cash) of all classes of shares.

[89] In *Halsbury's Laws of England* the definition does not refer to an increase in the company share capital but to a reduction of share capital because in company law a reduction of share capital is always treated differently than an increase in the share capital. Paragraph 931 continues by pointing out that the term "reorganization" specifically includes any case where either –

> *Persons are, whether for payment or not, allotted shares in or debentures of the company in respect of and in proportion to their*

holding of shares in the company or of any class of shares in the company, or

There is more than one class of share and the rights attached to shares of any class are altered.

[90] I agree with counsel for the defendant that the shareholder's agreement makes no provisions for the increase in the authorized share capital of the Company. It is also not referenced in the prohibitions in clause 9.2.1. Counsel for the claimant asked the court to accept that clause 9.2.1 also covered an increase in share capital by implication otherwise it would make no sense. Under clauses 19,8 and 19.10 the agreement is confined to its four corners, Those clauses state that:

> *19.8 This agreement sets forth the entire and complete and exclusive agreement and understanding between the parties hereto relating to the subject matter hereof.*
>
> *19.10 This agreement constitutes the entire agreement between the parties with respect to the matters dealt with herein.*

[91] Therefore counsel for the claimant's argument that the increase in share capital is to be implied in the prohibitions under clause 9.2.1 cannot be sustained. It is also not necessary to the agreement to imply such a prohibition into clause 9.2.1. (see the reasoning given in paragraphs 155-165 of this judgment) Since the agreement does not cover the increase in the company's share capital, one must look to the Articles of Association.

[92] The Articles of Association states that the company's authorized share capital can be increased by an ordinary resolution passed at the general meeting of the Company. Article 43 states that:

> *"The Company may by ordinary resolution increase its share capital by the creation of new shares, such increase to be of such aggregate amount and to be divided into shares of such respective amounts as the resolution shall prescribe".*

[93] The Company Act 2004 s. 65 permits a company to increase its authorised share capital by shareholders passing an ordinary resolution so to do. So although the company, which is a separate legal entity, has the statutory and constitutional power to increase its share capital, this act is carried out by the shareholders in general meeting by the passing of resolutions. This is a matter of internal management decided by the majority of shareholders. Once the action is taken in accordance with statute and the articles it cannot be interfered with.

[94] Although Article 43 of the Articles of Association empowers shareholders to increase the authorized share capital of the company the Articles must be read subject to the shareholders agreement. Shareholders inter se for the time being may agree to bind themselves to act in a particular manner but this shareholder agreement makes no reference to how the shareholders intended to exercise their voting powers with respect to an increase in share capital and to that extent it does not trump the Articles of Association.

[95] **Dunstan v Young** was a case decided under the English Finance Act 1965 more specifically paragraph 4 of schedule 7 to that Act. Paragraph 4 of schedule 7 to the Finance Act provided that it:

> *"...shall apply in relation to any reorganization or reduction of a company's share capital; and*
>
> *(a) references to a reorganization of a company's share capital include*
>
> *(i) any case where persons are, whether for payment or not, allotted shares in or debentures of the company in respect of and in proportion to (or as nearly as may be in proportion to) their holdings of shares in the company or of any class of shares in the company;*
>
> *(ii) any case where there are more than one class of share and the rights attached to shares are altered."*

[96] The appellant in **Dunstan v Young** was a taxpayer company which wanted to write off the sale of its shares as a loss for corporate tax assessment purposes. If its transaction was deemed to be a reorganization it would avoid the computation of capital gains chargeable to corporation tax by avoiding the provisions of section 22(4) of the 1965 Act in relation to assets acquired otherwise than by way of a bargain made at arm's length.

[97] The taxpayer company had acquired shares in another company which operated at a loss and incurred considerable debts with the taxpayer company. It was decided to sell the loss making company but before this could be done its debt had to be eliminated. The tax payer company devised a scheme where it would increase the share capital of the loss making company by creating new shares ranking par passu with the existing shares. The taxpayer company then bought those new shares for cash at par. The cash it paid for the new shares was then used to pay off the debt due to it and the loss making company was then sold for cash. The taxpayer then claimed a loss on the sale for tax assessment purposes. It claimed that although section 22(4) of the Act would normally apply to the transaction, the issue of the new shares and the resulting increase in share capital was a reorganization of the loss making company's share capital and was therefore covered by paragraph 4, the effect of which was to side step section 22(4) for tax purposes. The Court of Appeal agreed. It held that although the transaction did not fall squarely within the specifics terms of sub-paragraph (a)(i) it fell within the natural meaning of the phrase "a reorganization of a company's share capital."

[98] .The case **of Dunstan v Young** illustrates that "an increase of share capital could be reorganization, provided that the new shares were acquired by existing shareholders, because they were existing shareholders, and in proportion to their existing beneficial holding". The case involved a debt capitalization and the amount of new shares issued had arguably been determined by the debt and not by the existing holdings. The Court of Appeal pointed out two (2) things;

(a) *The section provided no definition of reorganization of a company's share capital and*

(b) That the term reorganization was not a term of art either in fiscal or company law. The court therefore, held that it not being a term of art, "it derives colour from its context."

[99] So unlike counsel's contention that an increase in the authorized share capital of the company was a reorganization, it is clear that it is the transaction (that is the

issuing of the shares) which results in the increase in the actual share capital which is crucial to a finding that there was a reorganization. So an increase in share capital could be a reorganization of that capital, provided that the new shares were acquired by existing shareholders because they were existing shareholders and in proportion to their existing beneficial holdings. In **Dunstan v Young** the issue and allotment of the shares came from newly created shares, which was why it did not fall squarely in the definition of the Act but all the new shares were acquired by the existing share holder who already owned all but one of the existing shares. It was therefore, arguable whether the new shares were acquired in proportion to its existing holding or whether it was definitely referable to the amount of debt.

[100] The court in **Dunstan v Young** also referred to context and in that case the context was the avoidance of corporate taxation. In the current context it is the regulation of the shareholders relationship in the exercise of their powers within a company in which they were the only two shareholders, one of whom was a majority shareholder. In governing their relationship they decided that their powers in the company would be exercised so as to prohibit certain activities in certain circumstances. One thing they determined that their powers would not be exercised to interfere with was the company's right to raise capital by the issue of shares. In my view if they had intended such a serious prohibition they would have expressly stated it so.

[101] The validity of shareholders agreements and the fact that its provisions may take precedence over the company articles has been upheld by the courts. In **Euro Brokers Holding Ltd. v Monecor (London) Ltd.** [2003] EWCA Civ. 105 the Court of Appeal approved the validity of shareholders agreements and the validity of any variation to the agreement made by the parties.

[102] In **Russell** v **Northern Bank Development Corporation Ltd. and ors** [1992] 2 ALL ER 161, it was held that such agreements were personal agreements outside of the articles between shareholders who executed it inter se, as to how they would exercise their voting rights in relation to the creation and issuing of shares in the company and could not bind future shareholders.

[103] However, the company is a separate legal entity so shareholders cannot agree to bind the company neither can they agree to fetter the power of the company to increase capital given to it by the statute or its article. In **Commissioner of Inland Revenue v Blott** the court was considering whether the issue of bonus shares amounted to capital or income for tax purposes. The House of Lords recognized that the position of an incorporated company was one in which it could do nothing which it was not authorized to do either by statute or by its Memorandum or Articles of Association. It also recognised that although a company was a separate legal entity it could be controlled by the shareholders by the passing of resolutions at general meetings.

[104] Section 65 of the Companies Act expressly gives the company the power to increase its share capital. S.65 states inter alia that:

> *65.- (1) A company limited by shares or a company limited by guarantee and having a share capital, if so authorized by its articles, may alter the condition of its articles as follows, that is to say, it may –*
>
> *(a) increase its share capital by new shares of such amount as it thinks expedient;*
>
> *(b) consolidate and divide all or any of its share capital into shares of larger amounts than its existing shares,*
>
> *(c) convert all or any of its paid up shares into stock and reconvert that stock into paid up shares of any denomination;*
>
> *(d) cancel shares which, at the date of passing of the resolution in that behalf, have not been taken or agreed to be taken by any person and diminish the amount of its share capital by the amount of the shares so cancelled*
>
> *(2) The powers conferred by this section must be exercised by the company in general meeting.*

[105] In **Commissioner of Inland Revenue** v **Blott** it was recognized and accepted that a company could not forgo its right to alter its articles relying on the decision in **Southern Foundries (1926) Ltd v Shirlaw** [1940] 2 ALL ER 445 at 468 which accepted the principle enunciated by Lindley MR in **Allen v Gold Reefs** [1900] 1 Ch 656 at 671 that:

> *"...the company is empowered by the statute to alter the regulations contained in its articles from time to time by special resolution in general meeting, and any regulation or articles purporting to deprive the company of this power is invalid on the ground that it is contrary to the statute Walker v London Tramways Co. [1879] 12 Ch D 705)."*

So let us consider what the position would be if counsel was correct and the shareholders' agreement did prohibit the increase in share capital by implication. In doing so I will look at the position the court took in **Russell** where the increase in share capital was expressly prohibited.

[106] In the case of **Russell** the shareholders agreed that their shareholders' agreement would take precedence over the Articles of Association and that no further share capital would be created or issued in the company without the written consent of the parties to the agreement. The board of the company subsequently gave notice to the shareholders of an extraordinary general meeting to consider increasing its share capital pursuant to the Companies Act 1960 (Northern Ireland) and its Articles of Association. A shareholder to the agreement brought an action against the others to prevent them from considering or voting on that resolution as it was in breach of the agreement if done without his written consent. It was held that although a provision in a company's Articles of Association which restricted its statutory power to alter those articles was invalid, an agreement outside the articles between shareholders as to how they would exercise their voting rights on a resolution to alter the articles was not necessarily invalid. The court also held that accordingly, as between the original shareholders it did not constitute an unlawful and invalid fetter on the company's statutory power to increase its share capital but was merely a personal agreement outside the articles between the shareholders who executed it as to how they would exercise their voting rights in relation to the creation or issuing of shares in the company and did not purport to bind future shareholders.

[107] Most notably too the court found that the company's agreement not to increase its share capital without the consent of each of the shareholders was unenforceable as being contrary to Act 131 of the Companies (Northern Ireland) Order 1986 and was a fetter on the power of the company to raise capital because it amounted to an undertaking not to exercise its statutory powers for a period which could last for as long as any one of the parties to the agreement remained a shareholder and after the control of the company had passed to other shareholders and, as such, was as obnoxious as if it had been contained in the articles of association.

[108] The importance of this case is two-fold. Firstly, in the particular agreement in **Russell** it explicitly forbade the creation of new shares without consent of the shareholders. The agreement in Payout does not. Secondly, if the claimant is correct and the increase in the authorized share capital of the company was prohibited by implication as a reorganization of share capital, that provision of the shareholder agreement would be invalid as it purports not only to bind the company but also any future shareholder. This, according to **Russell**, neither the company nor the shareholders can validly do. The agreement in **Russell** was however, enforceable by the shareholders inter se as it did not purport to bind future shareholders.

[109] The position therefore is this; a company by a resolution of the majority in general meeting may increase its share capital by authorizing the issue of new shares according to its Articles and in keeping with its statutory powers. However, the present shareholders may agree amongst themselves not to vote to increase the share capital as long as they remain shareholders. This would be a valid exercise of their powers inter se. What they cannot do is bind the company to this agreement or bind any future shareholders by this agreement. This would be a fetter on the power of the company and be as invalid as if had been a prohibition contained in the Articles of Association itself.

[110] So even if counsel for the claimant was correct and clause 9.2.1 prohibited the increase in authorized share capital, according to the reasoning in **Russell,** which accords with my own views, to the extent that the company is a party to the agreement it could not bind the company and would, in any event, be invalid as it purports to bind future shareholders. In **Russell** the court was able to sever the agreement made by the company from that made by the shareholders inter se and find that the latter still remained valid after severance because it did not bind any future shareholders and was therefore not a fetter. In the case at bar if it prohibited the creation and issue of new shares and was binding on future shareholders it would be impossible to find the clause valid because it does purport to bind future shareholders and it is not possible to sever that intention from the clause itself.

[111] At the time the agreement was entered into VMTS had the statutory power to increase its share capital and the power under its constitution by virtue of Article 43. Clause 9.2.l if it prohibited an increase in the company's share capital (and I do not agree that it did) would be unlawful and invalid as it would effectively be a fetter on the statutory power of the company to increase its share capital and was more than an agreement between shareholders inter se as to their manner of voting.

[112] Clause 13 of the agreement gives it precedence over the Articles in the case of conflict. Again if counsel for the claimant is correct then clause 9.2.1 would be invalid as when read with clauses 14.1 and 19.3 the agreement purports to bind not only the present shareholders inter se, but also the company and any future shareholders. Clause 14.1 states that the company is bound by and it shall comply with the terms and conditions of the agreement in so far as it relates to it and is bound to act in all respects as contemplated by the agreement. Clause

19.3 states that it binds and enures to the benefit of the successors, permitted assigns and personal representatives (as the case might be) of each of the parties.

[113] In **Russell** the court found that the company by being a party to the agreement undertook not to exercise its statutory powers in an agreement which could have lasted for a period binding on future shareholders and was as obnoxious as if it had been contained in the articles of association and was therefore unenforceable as being contrary to statute and its constitution.

[114] In the final analysis with respect to this first issue I hold firstly, that clause 9.2/9.2.1 does not mention explicitly or by implication the increase in share capital, consequently it does not prohibit the mere increase in the authorised share capital of the company. Secondly, even if there is a prohibition on the increase in share capital by implication in clause 9.2.1 that prohibition would be invalid on the basis that it would be a fetter on the statutory power of the company to increase its share capital in perpetuity as it purports to bind not only the company as a party to the agreement but all future shareholders. The increase in the authorised share capital was therefore not a breach of the shareholder's agreement.

[115] In this case at bar, (arguably similarly as in **Dunstan v Young**) any reorganization of the company's share capital would result from the issue of the newly created shares to the existing shareholders and not merely from the mere creation of new shares. The question then is whether consent in writing was required for the issue of the newly created shares which arguably resulted in the reorganization of the share capital or the issue of those newly created shares was otherwise provided for or contemplated by the agreement or business plan. This now takes me to the second issue as to whether written consent was required for the issue of the newly created shares as a reorganization of share capital in any way under clause 9.2.1.

Was the issue of shares to VMBS without the written consent of Payout a breach of the Shareholders agreement?

[116] The shareholder's agreement prohibits the issuing, allotment or reorganization of the company's share capital in any way without consent in writing of the shareholders unless it was otherwise provided for in the agreement itself or in the business plan. Counsel for the claimant argued that the issue and increase of newly created shares to VMBS in consideration of the liquidation of the debt was a reorganization of the share capital which would require written consent.

[117] Counsel for the defendant indicated that the defendant acted under the proviso to clause 9.2.1 and thus utilized clause 4. He agreed that the issue of the new shares to VMBS could be a reorganization of the shares which would have required consent under clause 9.2.1 save for the proviso in the clause that states "save as otherwise provided or contemplated in this agreement or the business plan as amended."

[118] Counsel argued that the issue of additional shares to VMBS was otherwise provided for or contemplated by clause 4 of the shareholders agreement. Counsel submitted that clause 4 (Protection against Dilution) provided for shares to be issued only on a pro rata basis. Counsel also noted that clause 4 did not provide for the form which the consideration for the shares should take and submitted that such consideration may be in money or monies worth. Counsel further submitted that since clause 4 provided for the issue of shares only on a pro rata basis there was no need for consent in writing to an issue of shares if such issue was done on a pro rata basis

[119] Counsel submitted that the actions taken by the shareholders and the company on March 28, 2012 were firstly, to increase the authorized share capital of the company and secondly to issue the newly created shares of the company for a consideration other that cash. Counsel submitted that the actions taken were within the contemplation of clause 4 and written consent under 9.2.1 was avoided.

[120] Counsel submitted that the actions of the defendant were permitted by the agreement and were done in the best interest of the company and the shareholders and that there could be no good reason to reverse the gains made by the company for the benefit of shareholders and that any concern with dilution by Payout was addressed by the offer of shares pro rata which would restore its 15% stake in the company. Counsel noted that 9.2.1 provided protection to minority shareholder but was subject to what was otherwise provided in the agreement itself including clause 4.

Findings

[121] The issue of shares to VMBS without the consent of Payout was not a breach of clause 9.2.1 because of the proviso to that clause of the shareholders agreement. I think it is useful to reproduce the clause once more. It states:

> *"Unless otherwise agreed by all the Shareholders in writing, the Shareholders shall exercise their powers in relation to the Company to procure that (save as otherwise provided or contemplated in this Agreement or the Business Plan as amended) the company will not and none of the Companies in the group will: –*
>
> *Issue, allot, redeem, purchase or grant options over any of its shares or other securities or reorganize its share capital in any way."*

I agree that taken in context the effect of 9.2.1 was to provide a measure of protection for the minority shareholder. It was clear however, that the protection was not absolute, hence the proviso. It is this proviso that the defendant claims to have utilized.

[122] Clause 4 provides for pr-emption rights. It gives the power to issue shares only in the manner provided in the clause. This provision covers new shares as well as existing shares. The fact that the clause refers to new shares indicates a recognition and acceptance that there is an unrestricted power in the company to create new shares for issue. However, if new shares are created they should be issued and allotted according to the clause 4 procedure. But also if existing shares are to be issued or allotted they too should be issued according to the

clause 4 procedure. Take for instance my earlier example of the 1000 authorised share where only 500 have been subscribed for. If A had subscribed for 250 and B had subscribed for 250, then the remaining 500 existing unsubscribed share could only be allotted by virtue of the procedure in clause 4. If in following the procedure in clause 4, A was given the right to subscribe to 250 of the existing shares and B to 250 of the existing shares, it would amount to a reorganization of the share capital by virtue of the definition in the Tax Act and Halsbury's Laws of England, but the action would still be allowed by virtue of clause 4.

[123] Let's take the example to its logical conclusion. If a was VMBS and B was Payout the issue of the 500 existing shares would not be a breach of the shareholders agreement, even though its effect would result in a reorganization of the share capital because it was provided for in clause 4. So what would be the case if all 1000 original shares were taken up by A and B as to 500 each and the company created 1000 new shares by resolution? If 500 new shares were issued to A as VMBS and 500 to B as Payout the effect would be a reorganization of the share capital by the issue of new shares in proportion to their existing holdings but the issue of the new shares if done in the manner prescribed by clause 4 would not be a breach of the agreement as it would fall into the category of "as otherwise provided for". If clause 4 did not exist, what was done could not have been done without the written consent of the shareholders because it would not have been otherwise provided for. There was no need for the shareholders to consent to authorize the creation of new shares when that was not prohibited in the first place and the company was already authorized by virtue of Article 43.

[124] So I agree the issue of new shares under clause 4 could only be done after they were authorized but not by virtue of shareholder consent but by virtue of the shareholder resolution in general meeting by virtue of article 43.

[125] Clause 4 effectively provides for pre-emption rights. As I said in the case of **Northover v Northover** [2014] JMCC Comm. 14 that:

"Pre-emption rights are rights of first refusal given to the shareholders of a company to subscribe for any new shares that the company issues in proportion to their existing shareholdings. This allows the balance of control between the respective shareholders to be maintained. The right also prevents the diminution in value of existing shares, which will happen if new shares are issued, especially if issued at a price below their true value.

Pre-emption rights may be expressly provided for in the company's Articles of Association and in the Companies Act. Breach of pre-emption rights provisions however, do not invalidate the new issue but those for whom the right exist are entitled to be compensated under a separate compensation claim. It is also equally doubtful whether pre-emption rights apply to shares given for non cash consideration or to bonus shares. Since pre-emption rights or subscription rights are rights given to existing share holders to purchase new issues of the company shares before it is offered elsewhere, the result is that existing shareholders can maintain proportional ownership of the company, if so desired. So, if a corporation offers pre-emptive rights to shares from its authorized, but unissued shares it will offer rights to existing shareholders so that they can maintain their proportionate ownership of the corporation. Authorized share capital includes issued shares and unissued shares. If a corporation wants to raise more money, it will frequently do so by issuing more shares from the authorized share capital which was so far unissued. If it does issue more shares, those are new shares to which pre-emption rights accrue to allow existing shareholders to maintain their proportionate ownership of the company and to prevent dilution of voting rights and dividends rights of the original shareholders.

Authorized share capital only means a company can only issue shares up to that authorized limit. To issue more shares beyond the authorized limit it will have to amend its articles to create new shares and increase the authorized limit. Pre-emption rights may or may not accrue to those new shares created depending on the company's constitution and or the Companies Act. A company's balance sheet can only reflect its issued capital."

[126] Therefore, in a context where share dilution is the concern of the minority shareholder, it was contemplated and provided by the agreement that other than a rights issue which could be dealt with under clause 4 procedure or under a clause 12.4 transfer of shares-pre-emption rights procedure, a written consensus as to how shares were to be dealt with was necessary.

[127] In **Russell**, the shareholder had complained about the anticipatory breach in the agreement which expressly forbade the increase and issue of share capital because of fears that he would thereafter be faced with a rights issue and would not have the funds to take up the offer. In this case before me, there is no bar to the company increasing its share capital and those newly created shares could only be issued and allotted by virtue of the pre-emption rights provisions in clause 4. It offers the measure of protection to the minority to maintain its proportionate share in the company at 15% and it is entirely a matter for it whether it takes up the offer or not.

[128] Therefore there was no breach of the shareholder agreement and the issue of shares by virtue of clause 4 did not require the written consent of the shareholders. If the board is authorised to issue and allot shares the power will be exercised by the board deciding to exercise that authority or power usually by board resolution. If shares are issued or allotted without authority it is not invalid for that reason but the affected shareholder will have a personal claim for compensation.

[129] As to the issue raised by the claimant that the shares were not validly issued by the board as no board resolution was passed to issue the shares I can only advert to the evidence. The evidence is that a resolution was passed by the Board to convert the company's debt to equity by the issue of new shares and this was ratified by a majority of the shareholders. For my part I do not think it was necessary for the board to pass another resolution to ratify the shareholders ratification. All that was required, in my view was for the Board through the chairman or the company secretary to order that the shares be issued. Even if I am wrong the actions can still be ratified by a majority of the board or even if there is no ratification the issue would still remain valid in law as any irregularity with the allotment would not affect the validity of the issue.

[130] With respect to the notice to the claimant to subscribe for the new shares it is clear from the evidence that the notice sent was premature. That notice was sent on January 10, 2012 but ought to have been sent out to the claimant after the increase was ratified on March 28, 2012 and not before. The shareholders meeting on December 28, 2011 would only have considered the debt to equity conversion by the issue of shares to VMBS and not the resolution to increase the share capital which was only done on March 28, 2012. That state of affairs was confirmed by Mr. Powell's evidence in his witness statement at paragraph 19. In light of that and in light of the evidence that the shares are still available, the only remedy is for the board to issue an appropriately timed provisional allotment notice to the claimant in accordance with clause 4

Was there a further understanding and/or agreement expressed or implied between the parties?

[131] In light of my findings above it may not be strictly necessary to go on to the third issue. However, since it formed part of the pleadings and submissions were made on the point, I will provide a few comments which are intended to put the matter to rest. Counsel for the claimant pointed out that although the defendant had raised the question of an implied obligation and implied conditions in clause 9.2.1, it had not pleaded the existence of such an obligation or condition. Furthermore, counsel submitted that there was no evidence of an implied obligation or implied condition that would "trump" clause 9.2/9.2.1.

[132] On the other hand counsel for the defendant submitted that it would be inequitable to grant the claimant the relief it sought. Counsel noted that the remedies sought including rectification of the share register of the company and the injunction, are equitable remedies and by nature discretionary. He argued that the court should not exercise its discretion in favour of the claimant having regard to its conduct since March 1, 2007. Counsel submitted that the claimant showed no regard for clauses 9.4 and 19.5 of the shareholders agreement.

[133] Clause 9.4 states:

> *Each shareholder shall use all reasonable and proper means in his power to maintain, improve and extend the business of the company and its subsidiaries (if any) and to further the reputation and interest of the company and the Group.*

[134] Clause 19.5 states

> *Each of the parties undertakes with each of the other to do all things reasonably within his power, which are necessary or desirable to give effect to the spirit and intent of this agreement and the articles.*

[135] Counsel pointed out that the evidence showed that the claimant's actions were inimical to the interest of the company and was aimed solely at advancing its own narrow pursuits. He went on to note that Payout was bringing a claim which if successful would result in the company returning to insolvency and would resurrect the concerns of VMBS regulators, the BOJ. Counsel argued that since the debt to equity conversion the company's profits have been $16,656,423.00 for the year ending December 31, 2012, $26,774,832.00 for December 31, 2014. The accumulated deficit which stood at $65,798,169.00 as at December 31, 2011 fell to $11,860,312.00 as at December 31, 2014. The interest free current account balance due to VMBS was reduced from $96,626,396.00 as at December 31, 2011 to $13,565,335.00 as December 31, 2014.

[136] Counsel submitted that even Mr. Patsalos of Payout had to acknowledge under cross-examination that the liquidation of the demand loan was beneficial to the company and its shareholders. Counsel also claimed that Payout refused every single proposal made by VMBS and presented proposals favourable only to its position and prejudicial to VMBS. Counsel submitted that since Payout's concern has always been the dilution of its shares it has failed to explain why to date it has not made use of the continued opportunity to subscribe for the remaining 132,323 ordinary shares that are still unissued by the company.

[137] The defendant in respect to the claimant's submissions pointed to paragraph. 5 of its defence where it pleaded that its actions were contemplated by the expressed and/or implied terms of the understanding and/or agreements. The defendant claims that the actions it undertook was contemplated by the agreement and if not it was an implied term of the agreement that both parties would do what was necessary to further the interest of the company.

[138] I will firstly consider when and on what principled basis a term may be implied into a contract In **Attorney General of Belize and ors. v Belize Telecommunication Ltd. and anor.** [2009] UKPC, Lord Hoffman in delivering the judgment of the Privy Council at paragraph 17 stated that:

> *"The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen."*

[139] The Court of Appeal in **Paymaster Jamaica Ltd. v Grace Kennedy Remittance Services Ltd. and Paul Lowe** [2015] JMCA Civ. 20 at para. 118 shared this view. In **Attorney General of Belize** the issue was the construction of the Articles of Association of Belize Telecommunication Ltd. The Privy Council found that the articles should be read as providing by implication that when the special shares go the directors appointed by the special shareholders go with it. Lord Hoffman also stated that:

> *"The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see Investors Compensation Scheme Ltd v West Bromwich Building Society [198] 1 WLR 896, 912-913. It is this objective meaning which is conventionally called the intention of the parties."*

[140] Lord Hoffman also referred to the judgment In **Trollope & Colls Ltd. v North West Metropolitan Regional Hospital Board** [1973] 1 WLR 601 where Lord Pearson stated that:

> *"The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract. It is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."*

[141] Lord Hoffman also referred to the statement of Lord Steyn In **Equitable Life Assurance Society v Hyman** [2002] 1 AC 403 where he said that:

> *"If a term is to be implied, it could only be a term implied from the language of [the instrument] read in its commercial setting."*

[142] In **Marks and Spencer Plc v BNP Paribas Securities Services Trust Company (Jersey) Limited and anor.** [2014] EWCA Civ. 603, Lady Justice Arden in giving judgment in the Court of Appeal accepted that the decision of the Privy Council in **Attorney General of Belize** correctly identified the applicable principles when considering whether a term can be implied. That test summarised at paragraph 21 of Lord Hoffman's judgment asked the question "what the instrument, read as a whole against the relevant background, would reasonably be understood to mean."

[143] Lady Justice Arden also accepted that the Privy Council's decision meant that the implication of terms was now an exercise in interpretation. She went on to point out that the implication of terms by interpretation requires a high level of

loyalty to the parties' agreement read against the admissible background. Therefore the party seeking to establish an implied term must show that the term to be implied would have been part of the agreement (I suppose if the parties had put their minds to it).

[144] Lord Hoffman made it clear and this position was endorsed by Lady Justice Arden, that if the term is not expressly stated then the courts first position ought to be to refuse to imply a term because if the parties had intended that to be their position in relation to their relationship they would have included a term to that effect.

[145] **In Mediterranean Salvage v Seamar Trading** [2009] EWCA Civ. 531 the court noted that it would not imply a term as a matter of interpretation unless it was necessary to the agreement in order to achieve the parties' express agreement, purposively construed against the admissible background.

[146] A term may be implied if it is necessary to achieve the parties' intentions. Whether or not it is necessary to imply a term will depend upon the nature of the contract. Applying those principles to the case before me I see no necessity to imply any term to the shareholders' agreement. In my view the purpose of the agreement was to govern the relationship between the two shareholders. More specifically clause 9.2.1 was for the minority shareholder Payout (Jamaica) Ltd to maintain a degree of control and to restrict the Broad of Directors acting by a majority in certain circumstances. It was clearly meant to protect the minority shareholder from arbitrary dilution of its shares. It therefore must be read in conjunction with any other provision meant to provide similar protection such as clause 4 and clauses 12.1 to 12.8. These clauses are of specific effect and deal specifically with the procedure for the issue and allotment of shares and transfer of shares.

[147] Clause 19.10 and clause 19.8 makes it clear that the terms of the agreement represent the entire and complete and exclusive agreement and understanding between the parties. So neither the claimant nor the defendant can rely on any implied term of the agreement. There is no room in the agreement to imply a term to do that which a term of the agreement expressly prohibits.

[148] The agreement in question expressly provides that certain things must not be done without consent. The good faith clause in 19.5 and clause 9.4 cannot be used to carry out actions which are expressly forbidden in certain circumstances. The court cannot use those clauses to imply that if one side refuses to consent to a certain course the other side can say it is acting in bad faith and proceed to carry out the prohibited act anyway. The defendant cannot rely on clause 9.4 or clause 19.5 to trump clause 9.2.1. In that respect I agree with counsel for the claimant. Clause 9.4 and 19.5 which are generalized clauses can only be read in light of specific clauses such as 9.2.1 and clause 4.

[149] In **Willkinson v West Coast Capital and ors (2005) EWHC 3009 (Ch)** the court was faced with a similar issue, that is the interaction between two clauses, one of general and one of specific application. In that case clause 7 of a shareholders' agreement placed an obligation on the shareholders to take reasonable steps to promote the interest of the company and clause 5 which required the consent of more that 65% of shareholders of the company for certain actions to take place. The Court found that clause 7 was in general terms and took effect subject to the specific provisions of clause 5. The court found that the obligations under clause 5 effectively qualified the obligations under clause 7. So that using all reasonable means would not include what was seen to be prohibited under clause 5. The court found that the duty to promote the interest of the company must be done in a way which did not conflict with clause 5 prohibitions:

[150] This approach commends itself to me as an entirely sensible one and I see no reason to depart from it. It follows therefore that the defendant could not rely on clause 9.4 and 19.5 to say that even if the claimant did not consent under clause 9.2.1 they were still obliged to agree under clauses 9.4 and 19.5 in promoting the interest of the company. However, as I said before, in light of my findings as to the scheme of the agreement and the relationship between clause 9'2/9.2.1 and

clause 4, it was not necessary for the defendant to rely on any implied term or understanding more specifically any implications from clauses 9.4 or 19.5.

Conclusion

[151] In the round then, the Court finds that the shareholder's agreement entered into by the parties is a binding and enforceable agreement. The agreement is a comprehensive document which covers the relationship and operations of the parties to it vis-a-vis each other and the company. The entirety of the agreement is embodied in its terms and there is no necessity to imply any further terms. The agreement itself indicates in its "entire agreement" clause at 19.8 and "waiver" clause at 19.10 that this was the parties' intention.

[152] The agreement does not expressly prohibit an increase in the share capital of the company and there is no basis in clause 9.2.1 to imply a term prohibiting such an increase. Even if the court were to imply such a prohibition, to the extent that the company was a party to the agreement and by virtue of clause 14.1 is bound by the terms and conditions of the agreement including clause 9.2.1, that clause would be invalid against the company as it would act as a fetter on the power of the company given to it by statute and its constitution to alter its articles to raise capital. Further, to the extent that the entire agreement is binding on future shareholders by virtue of clause 19.3 and by virtue of the definition of shareholder contained in the agreement, clause 9.2.1 would still be invalid because it would not be a personal agreement between shareholders inter se but would in fact act as a perpetual fetter on the power of the company to do that which it is authorised to do. This would be as obnoxious as if it had been a restriction contained in the Articles of Association.

[153] There being no prohibition contained in clause 9.2.1 to the company increasing its share capital, it did not require the consent of the shareholders under clause 9.2.1. The increase in share capital effected by the company was not a breach of the shareholder's agreement.

[154] Though the increase in share capital and the subsequent issue of shares could amount to a reorganization of the company's share capital as it is one of the transactions included, by description, in section 4 of the Transfer Tax Act and the description contained in paragraph 931 of *Halsbury's Laws of England*, it was a transaction otherwise provided for and or contemplated by the agreement. There was no necessity for the defendant to rely on clause 9.4 or 19.5 and they could not in fact effectively rely on those two clauses to take precedence over clause 9.2.1. However, clause 4 of the agreement provided for the issue of shares including newly created shares, in a particular manner. Because the shareholder's agreement did not govern the increase in share capital, there was no necessity for the shareholders to agree in writing to an increase before shares could be issued. Once clause 4 of the agreement was complied with regarding the issue of the new shares there was no requirement for written consent by any of the shareholders.

[155] Even if the procedure to issue the shares was not complied with to the letter, it does not invalidate the allotment. The affected shareholder's remedy would lie elsewhere.

Disposition

[156] The claim is dismissed with costs to the defendant to be agreed or taxed.