EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO. BVIHC(C0M) 53 OF 2014 AND 27 OF 2022

BETWEEN:

[1] MING SUI HUNG,RONALD
[2] SHAW SHUI KUEN, BERTHA
[3] REGINA MING(PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE MING SHUI TONG)

CLAIMANTS

and

[1] J.F.MING INC

[2] MING SHUI SUM, LAWRENCE

DEFENDANTS

TRIAL -IN OPEN COURT (VIRTUAL HEARING)

Appearances: Christopher Parker KC, Joshua Folkard, Andrew Gilliland, and Malcom Arthurs for the Claimants

Blear Leahy KC, Eleanor Morgan, Sophia Christodoulou for the Defendants

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2023: May,2,3,4,10

2024: July 12, last of transcript received,
2024 November 20, judgment delivered

JUDGMENT

MANGATAL J :

INTRODUCTION

[1] This is the final substantive phase of unfair prejudice proceedings commenced as long ago as 2014. On any view, it is a really sad story of siblings unable to agree, and who have been locked in a battle for decades.

[2] I wish to apologize to the parties and the legal practitioners in this case for the delay in delivery of this judgment. I thank them for their patience in awaiting it. Unfortunately, the situation could not be avoided because the audio of the hearing/trial which took place online/virtually, with the Property Expert witnesses giving evidence from Hong Kong, presented difficulties for the Court Reporters. The transcript of the cross-examination was particularly important for this case, and unfortunately, I was not provided with the full transcript of that evidence until the middle of July 2024, over a year after the hearing came to an end.

The Parties

The Claimants

[3] The First Claimant is Ming Siu Hung, Ronald("**Ronald**") whose contact address is PO BOX 467, Shatin Central Post Office, Shatin, New Territories, Hong Kong.

[4] The Second Claimant is Shaw Shui Kuen, Bertha ("**Bertha**") who lives in Virginia, United States of America.

[5] The Third Claimant is the late Ming Shui Tong, formerly of Maryland, United States of America. He is now represented by his wife Regina Ming as the personal representative of his estate.

[6] Ronald, Bertha and Ming Shui Tong were three of seven children of Mr. Ming John Fook ("**John Fook**") who died in December 1992. The other children were (i) Ming

Shiu Chung ("**Hubert**"); (ii) Ming Shui Know ("**Alex**") and Ming Shui Wah ("**Kenneth**") as well as Lawrence, the Second Defendant, referred to below.

The Defendants

[7] The First Defendant JF MING INC is a British Virgin Islands ("**BVI**") company incorporated on 17 April 1991 ("**JFM**"). JFM with its subsidiaries set out below is known as the "Ming Group".

[8] The Second Defendant is Mr. Ming Shui Sum, Lawrence ("**Lawrence**"). He is the Claimants' brother. Lawrence was (i) between 18 April 1991 and 30 May 2004; and (ii) from 25 May 2006 a director of JFM. Lawrence's daughter Alica has also been a director of JFM since 19 May 2015.

JFM's subsidiaries.

The property-owning subsidiaries

[9] The subsidiary companies of JFM included five property-holding subsidiaries, which form the focus of the valuation exercise involved in this judgment. The companies are :

a. Easy Gain International Investment Limited ("**Easy Gain**"), a Hong Kong company which held (i) Flat A on the 26th Floor ("**26/F**"); (ii) portion A of the Main Roof; and (iii) Car Parking Space No.8 on Car Port Level 3, No 1 Tai Hang Road ("**Tai Hang Road**").

b. Ming Hsing Development Company ("**Ming Hsing**"), a Hong Kong company which held (i) Flat E on 25/F; and (ii) Car Parking Space No. 19 on C2 Floor, Excelsior Court, No. 83 Robinson Road, Hong Kong ("**Excelsior Court** ").

c. Iseday Limited ("**Iseday**"), a Hong Kong company which held certain: (i) shops; (ii) units; (iii) areas of the roof, and (iv) common areas and facilities at Jade Centre, No. 98 Wellington Street, Central, Hong Kong ("**the Jade Centre**").

As to Iseday: i. JFM owned 99.5 % of Iseday directly: see Qualified Expert Report of Barry Tong ("**Tong 1**"), and ii. Approximately 0.44% of Iseday was held indirectly by JFM through Ming Hsing: Tong 1

d. Two Hong Kong companies which jointly held: (i) the basement and certain(ii) shops; (ii) rooves; (iii) common facilities and areas and facilities at Kyoto Plaza, Nos. 491-9 Lockhart Road, Hong Kong ("**Kyota Plaza**"): i. Keep Forever Limited ("**Keep**

Forever") is a tenant in common of 2/5ths (40 % of the development). ii. Tierra Trading Limited ("**Tierra Trading**"), is a tenant in common of 3/5th (60%): Valuation Report Mr. Alnwick Chan ("**Alnwick Chan 1**") **Chan 1 (Kyoto Plaza**), (collectively the "**Property-Holding Subsidiaries**").

The non-property holding subsidiaries

[10] JFM had seven Hong Kong subsidiaries which did not hold properties, namely: a. Global Charm Inc Limited ("**Global Charm**"). b. Global City Inc Limited ("**Global City** "). Global City was 100% directly owned by JFM. c. Good Cheer International Limited ("**Good Cheer**"). Good Cheer was ultimately owned 93.75 % by JFM : (i) 50% directly through JFM; and (ii) 43.75% indirectly by Ming Ssing :**Tong 1 .** d. Lai Fook Construction & Engineering Company Limited ("Lai **Fook**"). Lai Fook was 50 % owned by JFM. e. Lai Sum Land Investment Company Limited ("**Lai Sum**'). Lai Sum was 50 % owned by JFM. f. Smart Giant Holdings Limited ("**Smart Giant** "). Smart Giant was 100 % directly owned by JFM. g. Sharegain Development Limited ("**Sharegain**") **87.31% of Sharegain was ultimately owned by JFM :** (i) 87.06% directly through Ming Hsing; and (ii) 0.25% indirectly through Lai Sum: **Tong 1,** (collectively known as "**the Non-Property Holding Subsidiaries**").

The Properties

(i) **Kyoto Plaza**

[11] Kyota Plaza is referred to as "**Property 2**" in (Calvin) Chan 1 as well as in the Joint Statement of Mr. Alnwick Chan and Mr. Calvin Chan ("**the Property Valuation Joint Statement** "). The Property is a development in the Causeway district of Hong Kong Island, at the northern side of Lockhart Road near its junction with Percival Street and Cannon Street. Its main entrance fronts onto Lockhart Street on the Ground Floor.

[12] The development occupies a rectangular site of approximately 447 square metres (approximately 4,812 square feet), with a total floor area of about 4,104 square metres. Kyoto Plaza is situated in an established commercial, tourist and shopping area and developments in the immediate vicinity comprise a mix of shopping arcades, high-rise commercial buildings and aged tenement blocks with retail shops on the ground floor (including banks, food and beverage and clothing retailers). The development sits right behind SOGO, the largest department store in Hong Kong.

[13] Exit C of the Mass Transit Railway ("**MTR**") Causeway Bay station is located opposite Kyoto Plaza, only a one-minute walk away.

(ii) **The Jade Centre**

[14] The Jade Centre is referred to as "**Property 1**" in (**Calvin) Chan 1** and in the Property Valuation Joint Statement. The Jade Centre is a development situated at the junction of Wellington Street and Cochrane Street in the Central district of Hong Kong Island.

[15] The central district of Hong Kong in which the Jade District is located is an established commercial area. The area comprises of a mix of shopping malls, commercial and office buildings of various ages and heights, as well as aged tenement buildings with retail shops on the ground floors (including food and beverage and clothing shops).

[16] On 2 May 2023, the first day of trial, the property valuers agreed the market value of Jade Centre at HKD 459,150,000 at the valuation date.

(iii) **1 Tai Hang Road**

[17] 1 Tai Hang Road ("**Property 4**") is a residential apartment situated in the Causeway Bay district of Hong Kong Island, at the north-eastern side of the road near its junction with Tung Lo Wan Road. This is a well-established residential area.

[18] In the Property Valuation Joint Statement the property valuers agreed the market value of 1 Tai Hang Road at HKD 19,350,000 at the valuation date.

(iv) **Excelsior Court**

[19] Excelsior Court ("**Property 3**") is also a residential apartment, situated in the Mid-levels district of Hong Kong Island at the south-western side of Robinson Road (near its junction with Castle Road and Seymour Road), also a well-established residential area.

[20] In the Property Valuation Joint Statement the property valuers agreed the market value of Excelsior Court at HKD 21,050,000 at the valuation date.

[21] Collectively, Kyoto Plaza, the Jade Centre, No. 1 Tai Hang Road and Excelsior Court are referred to as "**the Properties**".

THE PROCEDURAL HISTORY A. PHASE 1 PROCEEDINGS

(i) Leon J's Orders

[22] The Claimants commenced these unfair proceedings on 2 May 2014. Leon J's judgment is dated 16 August 2016 ("**the Phase 1 Judgment**"). From an early stage, Leon J ordered a bifurcation of the action into two stages:

a. First, determination of the liability of Lawrence for unfair prejudice and remedies (including the principle of whether a buy-out should be ordered). The parties have referred to this stage as "**Phase 1**".

b. Secondly, if a buy-out were to be ordered the assessment of: i. "The basis and principles for determining the price of the shares"; and ii. "The means by which the valuation process shall be conducted."

[23] Leon J made subsequent orders that set out precisely what matters were to be addressed at Phase 2. In particular, on 23 February 2016, the learned judge ordered that: "[T]he Future Hearing will determine whether the shares of each of the Claimants are valued at 1/7th or 1/17th of the value of the equity of [JFM]…."

The Phase 1 Judgment

[24] By the Phase 1 Judgment dated 16 August 2016, Leon J held that Lawrence had unfairly prejudicially conducted the affairs of JFM and ordered the following remedies: a. Setting aside resolutions of JFM passed by Lawrence; b. Amending Article 120 of JFM's Articles of Association to remove the words "unless such requirement be waived by resolution of members", in order to prevent JFM's members being deprived of adequate financial information; c. The provision by Lawrence to the Claimants of financial statements of JFM from the year 2006, "drawn up so as to give respectively a true and fair view of the profit or loss of [JFM] for that financial period, and a true and fair view of the state of affairs of [JFM] as at the end of that financial period."; d. A buy-out, by Lawrence, of the Claimants' shares in JFM ("**the Buy Out Order**").

The Phase One Appeals

[25] The Defendants appealed against the relief ordered by Leon J and succeeded before the Eastern Caribbean Court of Appeal on that issue. However, on the Claimants' appeal to the Judicial Committee of the Privy Council, Leon J 's Buy-Out Order was subsequently reinstated.

Phase 2 A Proceedings

[26] It is common ground between the parties that the first stage in quantifying the Claimants' shares in JFM for the purposes of the Buy-Out Order was dealt with by the determination of Jack J (Ag) in a phase which became known as "**Phase 2A**".

[27] By a judgment dated 23 August 2022, embodied in an order dated 23 August 2022, signed 17 October 2022 ("**the Phase 2A Order**"), Jack J determined the following: a. The valuation date would be 31 March 2017. b. The valuation would proceed on the basis that each of the Claimants is entitled to 1/17th of the share capital of JFM c. In valuing the share capital of JFM, the following were not to be included: i. "[A]ny elements reflecting claims of JFM against Lawrence, apart from any loans made by JFM and its subsidiaries to Lawrence as they appear in the books and accounts." In their written submissions the Claimants point out that they had contended that a value should be accorded to JFM's possible claims against Lawrence for appropriating corporate opportunities in the form of property purchases to himself; ii. "[A]ny claim(s) relating to dividend payments". The Claimants also had contended that if a pro rata valuation were not adopted the Court should calculate and add to the purchase price the amount that ought to have been paid to them by way of dividend. d. HK $36.2 million which was recorded in the books and records of JFM as 'loans' by JFM to the Claimants (in the sum of c.HK $12 million each) were not in fact loans, but rather payments "by way of dividend" and/or in respect of estate duty payable on John Fook's estate. Accordingly, the Share Valuation Experts (referred to in paragraph [28] below), agree that those sums should be "excluded as the assets of JFM".

Phase 2B

[28] The remainder of the valuation issues therefore have fallen to be determined in this Phase 2 B Phase. Though quite complex and convoluted, the main issue for trial is in essence the fair value of the Shareholding as at the Valuation Date.

[29] The assets of JFM are shares in companies holding real estate in Hong Kong. The parties have accordingly instructed both property valuation experts ("**the Property Experts**") and share valuation experts ("**the Share Experts**") to assist the Court to determine the market value of the Shareholding at the Valuation Date.

[30] The Property Experts are Mr. Alnwick Chan of Knight Frank ("**the KF Expert**") and Mr. Calvin Chan of Kroll ("**the Kroll Expert**"). The KF Expert is instructed by the Claimants, and the Kroll Expert is instructed by Lawrence. The Property Experts have undertaken a valuation of a total of four properties ("**the Properties**"). They have reached agreement in relation to the market value of three of the four Properties. However, there remain

significant disagreements between these experts in relation to the most valuable property in the portfolio, Kyota Plaza. Some of these disagreements have been somewhat narrowed after cross-examination. Their valuations are as follows:

	Value estimated by Kroll Value HK$	**Value estimated by KF (Income Approach) HK$**	**Value estimated by KF (Market Approach) HK$**
Property 2/ Kyota Plaza Properties	1,265,800,000	1,437,000,000	1,401,600,000
Property 1/Jade Centre	459,150,000	459,150,000	459,150,000
Property 3/Excelsior Court	21,050,000	21,050,000	21,050,000
Property 4/No. 1 Tai Hang Road	19,350,000	19,350,000	19,350,000
Total	**1,765,350,000**	**1,936,550,000**	**1,901,150,000**

[31] The Share Experts are Mr. Barry Tong of Grant Thornton and Mr. Cosimo Borrelli of Kroll. Mr. Tong is instructed by the Claimants and Mr. Borrelli is instructed by Lawrence.

[32] The Share Experts agree that the Shareholding should be valued using the "Asset Based Approach". As such, they have made various adjustments (upwards and downwards) to JFM's NAV to opine on the market value of the Shareholding as at the Valuation Date. They agreed all adjustments prior to the start of the trial, except that in relation to the value of the Properties, Mr. Tong continued to take the KF Expert's value, and Mr. Borrelli continued to take the Kroll Expert's value. As a result of the substantial

areas of agreement between the Share Experts, they were not called to give live evidence at this virtual trial.

[33] The various disagreements between the Property Experts in relation to Kyota Plaza were the subject of fairly extensive cross-examination. During cross-examination the KF Expert accepted that in respect of the age adjustment for G/F shops at Kyota Plaza, a 0.8%, rather the 1% reduction advanced in the Property Valuation Joint Statement for every ten years would be appropriate.

[34] As set out in the written Closing Submissions of learned King's Counsel Mr. Parker on behalf of the Claimants, adopting that amendment to age adjustment, the KF Expert's revised valuation of Kyota Plaza would be: a. On the Income Approach, HK$1,433,200,000. b. On the Market Approach, HK$ 1,398,700,000.

[35] As tidily set out in the written Closing Submissions of learned King's Counsel Ms. Leahy, in addition to the market value of the Kyota Plaza, there are three other issues for determination:

(1) First, it is now common ground that as a matter of valuation, a minority discount of 17.8% should be applied to the Shareholding to reflect the Claimants' minority status. It is the Claimants' position that it would nevertheless not be 'fair' in all the circumstances of this case to apply that discount here and invite the Court to value their shares on a pro rata basis. It is common ground that this is not a quasi-partnership case. The general principle, submits Lawrence, is that, apart from quasi-partnership cases, a minority shareholding is to be valued 'as it is', i.e. with a discount. It was further submitted that although there are some English decisions where the Court has disapplied the minority discount in a non-quasi partnership case, there are no parallels between such cases and the present case, or any other special factors, which would support the idea of a pro rata valuation of the Shareholding. The Claimants disagree with this. Their position is that whichever test is ultimately applied by the Court, no minority discount should be applied on the facts of this case.

(2) **Second**, the Claimants seek interest on the buy-out price from the Valuation Date to the date of judgment. Lawrence's position is that the claim is not

supported by any evidence and for that reason alone falls to be dismissed. Ms. Leahy's submission is that the Claimant's position is "wrong-headed". This she says is because Lawrence is acquiring the Claimants' shares at their peak value, when he has not been responsible for their fall in value since the Valuation Date, and in circumstances where the delay in getting to this hearing lies squarely at the Claimants' door.

(3) **Third**, Lawrence seeks an allowance for the transaction costs that will be incurred in funding the buy-out price.

The Claimants' Submissions on the Experts and Valuation of Kyoto Plaza.

[36] It was the Claimants' submission that the KF Expert gave his evidence in a straight-forward and candid manner. This was demonstrated where he gave ground where appropriate, in particular in conceding in respect of the G/F shops at Kyoto Plaza the 0.8% age adjustment referred to above.

[37] They submit that following marked- up calculations circulated by the Claimants overnight before the Kroll Expert gave his evidence, he accepted in confirming his reports and contributions to the joint statement that errors had been made in his valuation of Kyoto Plaza, and that Kroll's updated figure was HK$1,265,800,000. It was submitted that the KF's Expert's evidence is to be preferred by the Court.

Failure to follow best practice and IVS 105

[38] Mr. Parker KC emphasized that the importance of using the methodology appropriate to the particular valuation exercise must be appreciated. It was suggested that whilst differences between valuers are inevitable, any differences should not be as a result of a failure to follow best practices. The Claimants point out that for the Phase 2A hearing concerned with the date of valuation, Lawrence used Citiland Surveyors Limited (" **Citiland**") who valued Kyota Plaza as at 31 March 2017 in the sum of HK$1,347,000,000. The Claimants submit that Lawrence, not being content with that figure, he then found the Kroll Expert to value Kyota Plaza as at the same date at HK1,286,900, more than HK$60 million less than Citiland's valuation. The submission continues that he then valued it at HK$1,286,900,000, more than HK$84 million less than Citiland's valuation. Having accepted a failure to take account of the agreed effective unit rate of his D5 comparable of HK$2,553,413 he now values it at

HK$1,265,800 (though the Claimants say that that itself is the result of mathematical error and should have been HK$1,267,300,000).

[39] Mr. Parker KC argues that the valuation exercise conducted by the Kroll Expert should be rejected as not being compliant with the IVS and not being in accordance with best practice. This, he submits, is because the Kroll Expert did not apply the Income Approach, not even as a cross-check to his use of the market approach. It was submitted that the Kroll Expert applied only the Market Approach and that his reasons for not applying the Income approach do not withstand scrutiny.

[40] Reference was made to the International Valuation Standards ("**IVS**") which themselves expressly state that they have been produced with a view to "securing their universal adoption and implementation…. across the world" and to "identify or develop globally accepted principles and definitions." It was posited that, as recognized by IVS 105 Valuation Approaches and Methods para. 10.6, the choice of methodology can affect greatly the outcome of the valuation exercise, leading to "widely divergent indications of value". Learned King's Counsel emphasized and reiterated that the choice of methodology is important and should not be based on personal preference. It was argued that it should take account of best practice: "Valuers should also have regard to recognized best practice within the valuation discipline or specialist area in which they practice…" RCIS VPS 5. It was asserted that the Kroll Expert purported to have complied with RCIS VPS, which incorporates IVS 105.

Best Practice is to comply with the IVS

[41] The Claimants say that in cross-examination the Kroll Expert acknowledged the views of valuers advising buyers and sellers as to the values of properties will inform what people are prepared to pay and accept.; they will influence what is market value i.e. the value of the market. It was submitted that it is important therefore when valuing a property to value it in the way that takes account of the general practice of valuers as set out in the IVS.

[42] The Kroll Expert in his report acknowledged the wisdom of following best practice by claiming that he was applying the "generally accepted" approach by using the 'Market Approach".

[43] The Kroll Expert also implied that whilst the market approach was his "primary" methodology he was also applying an alternative methodology, namely the "term and reversion" approach. The application of an alternative methodology would have accorded with best practice.

[44] However, the Kroll Expert accepted, as is obvious, continues the submission, that best practice is informed by compliance with the IVS, and the IVS is quite clear in stipulating that where the critical attribute of a property is its income producing ability then the income approach "should" (emphasis in the IVS) be followed. IVS 105, para 40.2 states as follows:

> "*The income approach should be applied and afforded significant weight under the following circumstances:*
>
> > *(a) The income-producing ability of the asset is the critical element affecting value from a participant perspective… and /or*
> >
> > *(b) reasonable projections of the amount and timing of future income are available for the subject asset, but there are few, if any relevant market comparables*

[45] *."* Consistent with that, submits learned Counsel, it is stated in the work of Ling and Archer, Real Estate Principles, 5th ed. At page 167, that: "The income approach is the dominant approach when estimating the value of income-producing property".

[46] The mandatory nature of the word "should" in the IVS is spelt out in para. 20.20:

> "*the word 'should' indicates responsibilities that are presumptively mandatory. The valuer must comply with requirements of this type unless the valuer demonstrates that alternative actions which were followed were sufficient to achieve the objective of the standards.*
>
> *In the rare circumstances in which the valuer believes the objectives of the standard can be met by alternative means, the valuer must document why the indicated action was not deemed to be necessary or appropriate.*
>
> *If a standard provides that the valuer "should" consider an action or procedure, consideration of the action or procedure is presumptively mandatory, which the action or procedure is not"*

(Claimants' emphasis)

[47] The Kroll Report does not mention the Income Approach. Furthermore, say the Claimants, this Report stated that the use of the Market Approach was justified on the false basis that it was the "generally accepted approach". The Claimants assert that Mr. Calvin Chan;s response under cross-examination was simply to make clear his personal preference for the market approach. Indeed, when faced with the KF Expert's valuation based on the income approach, in the joint statement he no longer asserted that the market approach was the "generally accepted approach", stating instead that the market approach was to him the "most acceptable" approach. Mr. Calvin Chan sought to justify the Market Approach, not on the basis that by following the Market Approach he was following best practice, but rather by denigrating generally use of the Income Approach.

[48] The Claimants go on to say that, having failed to follow best practice by applying the Income Approach, the Kroll Expert failed to follow best practice by not applying an alternative methodology as a cross-check on his market approach valuation. It was argued that generally, it is clear that his justification for using the Market Approach brought him within IVS 105 para 20.3:

> "*When using the market approach under the following circumstances, a valuer <u>should</u> consider whether any other approaches can be applied and weighted to corroborate the value indication from the market approach:*
> *(c) information on market transactions is available, but the comparable assets have significant differences to the subject asset, potentially requiring subjective adjustments*"
> (emphasis in the original)

[49] Mr. Calvin Chan claimed he had done so by also considering "the term and reversion" approach which is defined as "capitalizing current passing rental income from the existing tenancies (to derive the term value), plus the market value of the Properties <u>derived from the market approach</u> times present value factor (to derive the reversionary value)" (Learned Counsel's emphasis); i.e. the reversion element of this approach, mathematically far and away the most important element, had been arrived at by the market approach.

[50] It was submitted that a consideration of the difference between the Kroll Expert's "term and reversion" method and general usage showed that he had not at all used the term and reversion approach as it is generally understood which is, as set out in Larence's own Written Opening Submissions, as follows:

> *"70. The term value is calculated by capitalizing the current rental income produced by the current tenant. That is, the term value is the passing rent that the landlord will receive until reversion, which could be at the end of the lease or at then next rent review.*
>
> *71. The reversionary value is the estimated value of the property back in the landlord's possession. That is, the reversionary value is the amount of the market value it is estimated the landlord will receive from the date of that first reversion. This then must be capitalized by the valuer's chosen yield into perpetuity."*

[51] It was submitted that the Kroll Expert had not in fact used the term and reversion method and further, that he never explained why he had referred to term and reversion and indeed, in cross-examination never answered the question of whether he was aware of how that approach worked, at the time of his first report. Contrary to IVS 105 40.2, Mr. Parker KC argued that he had not considered it as an alternative approach to his adoption of the market approach.

[52] In response to the KF Report, Mr. Calvin Chan did not suggest that his approach was to be preferred as according with best practice IVS 105. He said that "Kroll", (not just himself Calvin Chan) "does" (not "did") as a matter of policy) "not adopt Income Approach -term and reversion because it involves the forecast of future income."

[53] It was asserted that Kroll here recognized that the Income Approach always involves a forecast of future income and stated that that is their reason for not using it. It was submitted that this cannot be a good reason for failing to follow best practice and value in accordance with IVS 105 para 40.2. The Kroll Expert was not saying he had not adopted the Income Approach because he did not consider that in the circumstances of this particular case comparables for market rentals could not be found,

[54] Mr. Calvin Chan also said that "It is observable that Hong Kong property market faced ups and downs in past decades". However, it was submitted that that was true of all

property markets and the Kroll Expert accepted that the HK standards that he purported to have followed were in line with the IVS and did not provide that the IVS 40 was inapplicable to the HK property market.

[55] Mr. Parker KC maintains that the essential point is that Mr. Calvin Chan, in accordance with the practice of Kroll, simply gave no thought to whether, in accordance with best practice, he should apply the Income Approach. It was pointed out that this is not a case where he endeavoured to apply the Income Approach but decided that he could not because he could not find any comparables on rent. The Claimants assert that he never looked. Indeed, the argument continues, Mr. Calvin Chan never explained why the comparable he used for his Market Approach would not on further investigation of the rentals at the comparable have provided comparables for an Income Approach. It was submitted that Mr. Calvin Chan would have had reliable comparables for an Income Approach, including the rentals of Kyoto Plaza.

[56] It was asserted that a consideration of the basis of Kroll's objection to the Income Approach shows that they do not understand the process at all. Reference was made to Mr. Calvin Chan's evidence that "it is unfair to use a long-term forecast of rental projection to reflect the rental value of this commercial property, as it assumes the rental market is always stable and rental level maintains constants as the time" (sic).

[57] However, the Claimants submit that there is nothing in the Income Approach that requires an assumption that the rental market is stable or that rental levels are constant. Reference was made to paragraph 72 of Lawrence's Written Opening Submissions, where it was stated :"72….. *as market rents go up or down, risk is attached to the reversion rent. This must be taken into account in the yield applied by the valuer."*

[58] However, the Claimants argue that there is an even more fundamental objection to Kroll's dismissal of the Income Approach on the ground of an alleged assumption in that approach that rentals are constant. It was argued that if in fact the practice of valuers using the Income Approach is to make that assumption, then market values are being and will be set on that basis: any individual valuation that proceeds on a different basis will not be able to accurately state what the value *in the market* is.

[59] Thus, the argument continues, if the market is assuming that rentals will be constant then the valuer must do so also, irrespective of his personal view as to what will happen

to rentals in the future. Ling and Archer, Real Estate Principles, 5th ed. At page 192, makes the point that the valuer is concerned to predict the market's view not his or her own view:

> "*it is not the appraiser's job to forecast the future cash flows based on her expectations. Rather, her job is to emulate the thinking and behaviour of market participants. As long as the appraiser properly identifies what the typical investor would expect to occur, the value estimate for the subject property will be credible."*

[60] During cross-examination Mr. Parker KC suggested to Mr. Calvin Chan that he should have carried out a cross-check to sense test his valuation and could have considered the position if one simply treated the passing rent as if it were a market rent: but the Claimants say Mr. Calvin Chan did not do even that. Under re-examination Mr. Calvin Chan claimed that had he done so he would have used a yield figure of between 2.75-3% for the reversion, but he did not explain how that was consistent with the RDV figure of 2.5% he used in his report. It was also submitted that where rentals are short-term rentals -as in Hong Kong- it would be unusual to have two figures, one for a short-term yield and another for a long-term yield. Reference was made to ***Shapriro*** at page 164. It was argued that indeed, given that Kroll never use the Income Approach it may be doubted that Mr. Calvin Chan has had much cause to consider the appropriate yield figure for the reversion (beyond adopting the RDV figure as part of his market approach taking account of existing tenancies approach."

Failures of the Market Approach

The RZA

[61] It is the Claimants position that even aside from the Kroll Expert's failure to follow best practice and IVS 105, his application of the Market Approach was unsound. Ms. Leahy KC the Claimants say suggested that the biggest difference between the valuers was caused by the value ascribed to the ground floor (since this also dictated the value of the 1F and Basement). This, the argument continues, was caused by Mr. Calvin Chan's application of the Reduced Zoning Allowance ("**RDZ**"). The Claimants make two points on this:

(1) He accepted that his application of the RDZ was dependent on Units 4 and 5 not being used as one unit, as they are at present, but being let separately. But Mr. Alnwick Chan's point is a good one, namely that the owner of Units 4 and 5 would not let them separately when it was financially detrimental to do so. The effect of the layout of Unit 5 is to seriously reduce the overall value of the two units as compared to them being operated together, the very thing that the RZA highlights. If the RZA is not applied then Mr. Calvin Chan's valuation increases to HK $1,326,200,000.

(2) Furthermore, by then using the much reduced EA of Unit 5 when aggregating the EA of the ground floor when determining the value of 1F (60% of the EA of the G/F) and the basement (90% of the 1F), the value of the 1F and basement are much reduced by RZA being applied to Unit 5, even though their value would in practice be wholly unaffected by the lay-out of Unit 5 below (in the case of 1 F) or above (in the case of the basement). If this effect of the RZA on 1F and the Basement is removed, Mr. Calvin Chan's valuation rises to HK$1,280,900,000.

The comparables

[62] The Claimants make the point that Mr. Calvin Chan also did not have an answer for the tension in his approach between the need for comparables with a minimum of subjective adjustments and his use of comparables D1-D6. Mr. Alnwick Chan highlighted particular physical aspects of D2 and D3 that made their use as comparables questionable, particularly as D2 appeared to be something of an outlier. (The Claimants take the position that elimination of those two comparables gives a market value on Mr. Calvin Chan's approach of HK $1,336,700,000 or HK$1,403,200,000 with the RZA removed.)

[63] It was asserted that the extensive adjustments needed because of the importance of the location were clear. But that most striking of all was that if one considered the

comparable that, taking everything into account, Mr. Calvin Chan thought required the least adjustment from the subject property, namely D5, it is a fact on the basis of that comparable that the market value would be HK$1,516,000,000 (and HK$1,600,700,000 if the RZA were removed).

Conclusion on value of Kyota Plaza

[64] For these reasons given above, the Claimants ask the Court to reject Mr. Calvin Chan's evidence and adopt Mr. Alnwick Chan's /KF's valuation of Kyoto Plaza on the Income Approach at HK$1,433,200,000.

NO MINORITY DISCOUNT

Applicable Test

(i) Common ground that it is open to the Court to follow either branch of English law

[65] The parties are agreed that it is open to this Court to decide to apply either the approach to minority discount : (a) commented upon by Arden LJ in **Strahan v Wilcock** [2006] 2 BCLC 555 (who expressly left the point open); or (b) applied by a long line of English first-instance cases, including: (i) **Sunrise Radio Limited** [2009] EWHC 2893 (Ch) ; (ii) **Re Blue Index Limited** [2014] EWHC 2680 (Ch); (iii) **Re Addbins Ltd** [2015] EWHC 3161 (Ch); (iv) **Re Lloyds Autobody Ringway Ltd** [2018] EWHC 2336 (Ch); and (v) **Re Clive Smith (Oxford) Limited** [2022] EWHC 1035 (Ch).

[66] Research by Counsel and the teams on both sides has apparently shown a dearth of BVI/Eastern Caribbean authority as to the applicable test in this jurisdiction.

[67] The Claimants' primary position is that this Court should follow the **Sunrise Radio-Blue Index-Addbins-Lloyd's Autobody -Smith** line of case law, such that the following principles would apply to the application of a minority discount:

- **a.** Even in non-quasi-partnership cases, there is a "general rule" that no minority discount should be applied.
- **b.** It is only in "exceptional" cases that such a discount should be brought into play.
- **c.** Examples of such exceptional cases are those in which the minority shareholder(s) originally purchased their shares with the benefit of a minority discount, or otherwise acted so as to deserve their exclusion from the company.

[68] The Claimants also refer to the fact that Arden LJ's remarks in ***Strahan v Wilcock*** may also be contrasted with her observations in ***Annacott v Maidment*** [2013] 2BCLC 46 at [10-[11] where she noted that Counsel's submission that the valuation should be on a break-up rather than a going concern basis were an attempt to undermine the Judge's refusal to apply a minority discount and noted : "There is no inflexible rule that only in a quasi-partnership case can the court order a valuation on a going concern basis."

[69] Learned King's Counsel Mr. Parker also points out that Arden LJ's obiter comment in ***Strahan v Wilcock*** has subsequently been commented upon in England as follows:

a. "[T] his passage is plainly obiter. It is far from clear what conclusion Arden LJ would have reached had it been necessary for her to decide the issue" : ***Blue Index*** at [34] (R Hollington KC, sitting as a Deputy Judge of the English High Court).

b. "*This point was expressly left open, however"* in ***Strachan : Sunrise Radio*** *,* at [290] (HHJ Purle KC).

c. "*I note that in Strahan v Wilcock, Arden LJ expressed the view obiter that there was a presumption in favour of a discount in companies that are not quasi-partnerships….Applying the above as best I can to the present facts. I would, in the exercise of my discretion in granting relief pursuant to section 996 of the Act, have found that Tim's [the Petitioner's shares] should be valued on a non-discounted basis even if the Company could not properly be regarded as being a quasi-partnership company [sic] The principal considerations that lead me to this conclusion are : (I consider that the better view of the authorities is that there is no presumption in favour of applying a discount simply because the company is not a quasi-partnership company ":* ***Re Clive Smith*** at [146]-[147(i) (HHJ Cawson KC).

(ii) <u>Correct test as a matter of principle</u>

[70] The Claimants submit that the ***Sunrise Radio-Blue Index-Addbins -Lloyd's Autobody-Smith*** line is correct in principle and should be adopted as a matter of policy (as well as authority) in the BVI.

[71] The opposite approach, namely, to apply a presumption of minority discount in cases of unfair prejudice-would, it was asserted, reward the prejudicing party and provide an incentive for unfairly prejudicial conduct. This is because, rather than petitioning for just and equitable winding up (in which no minority discount would be applied), a party wishing a greater share in the company could engage in unfairly prejudicial conduct with a view to precipitating proceedings in which a minority discount would presumptively be applied.

[72] Reference was made to the work of David Chivers KC, a former acting BVI Commercial Judge, in *The Law of Majority Shareholder Power: Use and Abuse* (2nd edn, 2017), who stated that an approach such as that argued for in the instant case by Lawrence would be:

> "*(i) wrong in principle(ii) at worst an invitation to majorities to behave badly in the hope of provoking unfair prejudice proceedings for the purpose of acquiring minority shareholders' shares at a discount; and (ii) at best provides no incentive for majorities to treat minorities fairly."*

[73] It is the Claimants' stance that the whole purpose of the unfair prejudice remedy is to grant the oppressed minority a remedy which they would not otherwise have. It would substantially defeat the purpose of the new remedy if the oppressing minority were routinely rewarded by the application of a discount for minority shareholding. Authority for these principles can be found in the decisions in ***Lloyds Autobody***, ***Blue Index*** and in ***Addbins***.

[74] It is the Claimants' position that there is also Commonwealth authority supporting their position on this issue. Reference was made to decisions from Canada, Australia and New Zealand, in which the Courts interpreted their respective relevant statutory provisions.

Application of tests

[75] The Claimants' position is that whichever test is ultimately applied by the Court, no minority discount should be applied on the facts of this case.

(i) (Continued) relevance of facts relied upon by the Claimants

[76] As the Claimants point out, in their opening submissions, they relied in respect of minority discount upon (a) facts as found by Leon J in the Phase 1 Judgment; (b) the

contents of documents; and (c) evidence placed before this Court, particularly as recorded in the Phase 1 Judgment.

[77] In her Opening Submissions Lawrence's leading Counsel objected that the Claimants submissions: (i) were based only on the Claimants' pleaded case; (ii) were 'doubly abusive' because they raised issues which should have been raised and/or which were raised and rejected in the Hong Kong Proceedings and/or Phase 2A. The Claimants say that these points are to be dismissed.

[78] As to (i), it is denied that the Claimants submissions were based only on their pleaded case. As to (i), the Claimants deny that their submissions were based only on their pleaded case, because they say that their submissions were based on (a) facts as found by Leon J in the Phase 1 Judgment;(b) the Group's accounts; (c) facts admitted in the Points of Defence; and/or (d) facts recorded in the judgment of the HKCFA.

[79] As to (ii), the Claimants assert that none of their submissions have previously been considered judicially. They say that while much of the same evidence was put forward before Jack J in support of a submission that the evidence showed that (a) the Claimants were entitled to 1/7th each and (b) the company had claims against Lawrence for breaches of duty that needed to be valued, Jack J was concerned only with that submission: he was not considering whether the evidence was relevant to the entirely separate issue as to whether in the exercise of the Court's discretion a minority discount should be applied. It was submitted that Jack J's ruling that the Claimants could not ask for 1/7th and could not ask for the claims to be valued does not preclude then from relying on facts that have been already established or admitted that are relevant to the question whether a minority discount should be applied. Nor, it was submitted, could it be sensibly said that the Claimant should have asked the Hong Kong Court back in the 1996-2006 proceedings to determine as an issue whether, were the Claimants subsequently to bring in the BVI an unfair prejudice application and obtain a buy-out order, a minority discount should be applied.

[80] The argument continues that the goal of the Court at Phase 2B is to determine a fair value in all the circumstances of the case.

[81] The Claimants aver that they do not rely on the underlying factual matters as grounding claims, but rather simply as facts which go to the Court's broad discretion to determine

a 'fair' price in 'all the circumstances' and they submit that there is nothing objectionable in them doing so.

(ii)Dividends

The factual position

[82] Reference was made by the Claimants to Lawrence's Written Opening Submissions where at paragraph 107(2) it was stated : "*In the present case…..[t]he Claimants have received dividends from JFM, but the equivalent amounts have been paid to Lawrence as loans."* Mr. Parker KC states that this was a reference to payments made to the siblings in 1993 and 1994 as if each were a 1/7th shareholder, as well as estate duty.

[83] However, the argument continues, thereafter and following on from Lawrence's success in the HKCFA, no dividends were ever paid to the Claimants. The Claimants contend that this was found as a fact by Leon J in the Phase 1 Judgment. His Lordship held at para.[120] that:

> "*The Claimants did not receive a dividend from the Company [JFM] since 1994, if ever. Focusing on the period from about May 2006 when the Second Defendant [Lawrence] resumed control of the Company and its business affairs, and the Claimants ceased to have access to or be provided with any financial information, the Company never paid a dividend and there was no evidence that the Company ever considered whether it was commercially possible for it to distribute profits to members by way of dividends."*

[84] According to the Claimants, what Lawrence did do was have HK412,067,694.51 (the 1993-1994 payments and amounts equating to sums paid by the company as estate duty) in respect of each Claimant recorded in the books and accounts of JFM – see as at 31 March 2017, Note 5 to JFM's accounts.

[85] It is the Claimants' position that Lawrence maintained this position before Jack J in Phase 2A – see the Phase 2 A Judgment, para. 60 ("*Lawrence says that these monies are repayable by the claimants")*. By contrast, Jack J accepted the Claimants' submissions and concluded that:

> "*These three points in my judgment are compelling reasons for holding that the distribution of HK$6 million to each of the seven siblings was by way of dividend and I so find. The same goes for the payment of estate duty."*

[86] As a result, argue the Claimants, it was ultimately agreed between the company valuation experts that "*HK$ 36.2 million should be excluded as assets of JFM"-Company Valuation Experts' Joint Statement, para [19].*

[87] According to the Claimants, what this means is that Lawrence cannot rely on an allegation that "*[t]he Claimants have received dividends from JFM"* in support of his argument that a minority discount should be applied. The argument continues that there is no dispute, even on Jack J's approach, that the Claimants have received nothing from JFM since the 1994 dividend.

[88] The Claimants maintain that Jack J rejected Lawrence's argument requiring the classification of the HK$36.2 million booked as loans from the Claimants as dividends: Phase 2A Judgment, para [63]. The Claimants point to the fact that Lawrence's Leading Counsel in oral openings referred to this as "rough justice". Mr. Parker KC in his Written Closing Submissions remarks, that whether that is right or not, Lawrence cannot now rely on the fact that he lost on this issue before Jack J as somehow justifying application of a minority discount to the Claimants' shares in JFM.

Jack J ruling that the Court will not inquire into the amount of dividends that could have been paid

[89] The Claimants' position in Phase 2A was that the Court should consider ordering an inquiry into the dividends which JFM ought to have paid the Claimants and (in Jack J's words) they sought an order which "*g[ave] them these 'missing' dividends with the interest"* -Phase 2 A Judgment. The Claimants accepted that there would be no need for such inquiry if a pro rata quantification was to be ordered. Jack J rejected the Claimants' claim on the following basis:

> "*In my judgment, this claim gives rise to an impermissible degree of double-counting. IF JFM had paid dividends, then JFM would have been unable to invest those monies in the business. The current valuation of JFM would therefore have [sic] lower. The claimants cannot claim both. The primary remedy sought is a buy-out, so the missing dividend claim falls away."*

[90] Accordingly, say the Claimants, Jack J in Phase 2A simply ruled that there would be no inquiry into dividend payments: he did not rule that the non-payment of dividends was irrelevant to the question of whether a minority discount should be applied.

According to the Claimants, indeed, he highlighted how non-payment of dividends increased the value of the company (without deciding whether that pointed to there being a pro rata valuation). That is unsurprising, it was argued, because the authorities make clear that the non-payment of dividends is a relevant factor in favour of a pro rata valuation (i.e. precisely the arguments advanced by the Claimants in this case):

a. HHJ Purle QC in ***Sunrise Radio*** gave as one of the "*reasons (which should be read cumulatively)"* for ordering valuation on an undiscounted basis (at 308(v) that "*the business of Sunrise [the Company] has been conducted with a view to capital growth rather than the payment of dividends. It is in all the circumstances unfair that Mr. Kohli [the Petitioner] should be deprived of any part of the fruits of that growth. "*In that case, only one dividend had been paid by the Company in 1999, despite "*substantial profits having] been made"; see [136].*

b. In ***Richards v Lundy*** [1999] BCC 786 Nicholas Strauss QC gave as a reason for refusing to apply a minority discount that conversations between the parties "*relating to the retention of dividends and the shares being regarded as a pension, would make it grossly unfair to make an order on the basis of a minority discount; the result would be that Mr. Richards [the Petitioner] would receive only a small fraction of the value built up in the company by his having foregone dividends": at 806H.*

c. The New Zealand Court of Appeal in ***M Yovich &Sons Ltd v Yovich*** *(*2001) 9NZCLC 262, 490 (CA) stated (at [56]) that the principle that application of a minority discount would encourage unfairly prejudicial conduct "*is apparent in the present case where any discount would largely reflect the respondent's lack of influence over the dividend policy of the appellant and the appellant's insistence on continuing its longstanding policy of not paying dividends despite plainly having the means to do so "*(McGrath)

[91] Accordingly, maintain the Claimants, the dividend position of JFM points strongly against ordering a minority discount.

(iii) The 3/7ths vs. 3/17ths point

[92] Mr. Parker KC denies that in oral openings as accuses Ms. Leahy KC, that he repeated submissions made before Jack J in Phase 2A on the 3/7ths vs. 3/17ths point. It is pointed out that the evidence relied upon was either not in dispute or was taken from the relevant judgments to date. Further that it is this Phase 2 B stage that is concerned with the question of Minority Discount, whereas the Phase 2A Judgement was not.

[93] It was submitted that the authorities make clear that the factual situation at the date the shares are acquired constitutes an important part of 'all the circumstances of the case' which the Court is directed to consider. The Claimants submit that on the facts of this case, this includes the point that each sibling was intended to hold interests in JFM on the basis of equality, which points strongly away from the application of a minority discount.

(iv) Lawrence's alleged development of the business of JFM

[94] The Claimants have referred to the fact that Lawrence's Counsel, in her oral opening submissions alleged that the Claimant's assertion that Lawrence had since 1992 done nothing to develop JFM's business was factually incorrect, placing Lawrence's reliance on paragraph 26 of the Hong Kong Court of Appeal ("**CFA**") decision.

[95] However, Mr. Parker KC points out that this appears to overlook the fact that the Hong Kong CFA decision was handed down in May 2006 (over a decade before valuation date) and that Ribeiro PJ was commenting on Lawrence's role in the business "*over 20 years*" prior to that date. Thus, that the Hong Kong CFA said no more than Leon J said at [10] of the Phase 1 Judgment.

[96] The Claimants say that in more recent times, (including around the valuation date) Lawrence's own representation to the Claimants was that he had made what he described as a "*commercial decision …..in good faith"* not to develop the business of JFM. In the "*Answers to questions raised in the agenda of the proposed meeting of J.F.Ming Inc"* appended as Annex B to the Points of Claim, the Claimants raised the issue :"*Business development and declaration of dividends"*, namely that "[n]*o business development has been carried out throughout the years of sole directorship of …Lawrence…" Lawrence responded as follows:*

> "*It is a commercial decision taken by…Lawrence in good faith that no business development should be undertaken …There are no statutory*

requirements for business development in to declared for any companies registered in the British Virgin Islands [sic].."

[97] Aside from Lawrence's own representations to the Claimants, the Claimants say that his protestations that he has developed JFM's business in any way or at any time relevant to the valuation date is simply not borne out by the facts. So for example the Claimants say that the properties owned by JFM's subsidiaries as at the valuation date were acquired a long time beforehand :

[98] a. The Jade Centre was acquired in July 1988, with registration taking place in September 1988.

b .. Interests in Kyota Plaza were first acquired in June 1988 (registered in July 1988), with "*DATE OF INSTRUMENT"* entries running up to March 1991.

c. Excelsior Court was acquired in May 1990, registered in July 1990.

d. Tai Hang Road was acquired and registered in March 2010.

[99] It is the Claimants position that no other properties were acquired for JFM or other subsidiaries thereafter. Accordingly, the Claimants proclaim that they are right to say that Lawrence had since 1992 done nothing to develop JFM's business (bearing in mind 3 properties had been sold).

(v)<u>Lawrence's other conduct</u>

[100] Three other points were relied upon by the Claimants in relation to Lawrence's conduct in oral opening submissions:

a. First, Lawrence reneging on his 1993 agreement to liquidate JFM (i) Claimants' Opening Submissions, [103] and (ii) Lawrence's Supplemental Witness Statement in the Hong Kong Proceedings [27]

b. Second, receipt of very significant 'remuneration' (in addition to the benefit of very large loans) whilst the Claimants were paid no dividends.

c. Third, conduct in relation to the three Shanghai properties owned by Good Cheer.

[101] The Claimants aver that, for the avoidance of doubt, in accordance with the decisions of Jack J in Phase 2B these points were simply relied upon as facts supporting the Claimants' case on minority discount. No fresh claims have been advanced on the basis of these undisputed and undisputable facts. Specifically, it was submitted that there is nothing abusive in asserting facts which are relevant to determination of a 'fair value' for the Claimants' shares.

[102] As to the point about conduct in relation to the three Shanghai properties, the Claimants say that they understood Lawrence's Counsel to say that it was not in dispute that the Ming Group was in an economic mess for which the Claimant were responsible when the Receiver was appointed in 2005-2006. It was argued that whilst the Receiver expressed some pessimism there is no hard evidence of JFM's financial position at that time and nothing to suggest that any economic difficulties were caused by the Claimants' very brief stewardship of the Company. It was suggested that Lawrence certainly did not seem to think that JFM was in dire straits at this point in time.

(vi) Unjust enrichment of Lawrence

[103] The Claimants forcefully contend that Lawrence would be significantly unjustly enriched were a minority discount to be applied. This is because he would thereby receive full ownership of a company always intended to have been equally shared with his siblings, by paying only the economic value of a minority discount.

[104] Lawrence's answer to this point in oral opening submissions was that Lawrence would not be unjustly enriched because the properties are not worth what they were in March 2017. According to the Claimants there are insuperable problems with this argument as follows:

a. It ignores the fact that the valuation date is March 2017. If, it is contended, a minority discount were not appropriate then it is difficult to see how it has

become appropriate now as a result of the delay by Lawrence's ultimately unsuccessful appeal in Phase 1. The issue of whether a minority discount should be applied should not turn on the particular state of the Hong Kong Property market at the time the issue falls to be decided.

b. Jack J ruled that the valuation date was 31 March 2017. Lawrence's argument asks that that ruling be diluted by applying a minority discount that would not otherwise have been applied.

c. Any changes in the value of the properties since 31 March 2017 are not the fault of the Claimants: they should not be penalized because of events for which they are not responsible.

d. Lawrence has in any event adduced no evidence as to the value of Kyoto Plaza and the Jade Centre as at 2023.

e. In any event, the Court's order is that Lawrence must buy the Claimants' shares: it is not that the properties are to be sold. It was submitted that there is no logical connection between the date when the minority discount is to be determined and the hypothetical date of sale of any of the properties. It was posited that it is up to Lawrence when (and if) the Group sells the properties. That, it was contended, is an entirely independent matter to the issues before the Court. If the current values of these properties are lower than in March 2017 (which is not admitted), then Lawrence could wait to sell until the market has recovered. The Claimants say that there is no way that the Court would be able to 'police' or control this and it should not be taken into account.

[105] The Claimants then turned to submissions made in Lawrence's oral openings on liquidation value, and say that these were also misguided, because:

a. There is no requirement that such break-up value be precisely the same as the price sought. Rather, it is the Claimants' position that this is simply a relevant factor in deciding whether to apply a minority discount. Reference was made to paragraphs [301]-[303] of ***Sunrise Radio*** where it was stated as follows:

i. "*Another relevant factor in any given case may be to consider whether the facts would, apart from section 994, justify a winding- up on the 'just and equitable' ground, in which event each shareholder would receive a rateable proportion of the realized assets. A minority in those circumstances should not ordinarily be worse off than in a winding up"*

ii. "Given that possible alternative, the Court should not in general put a shareholder in a worse position than would be the case in a winding-up, if the facts would otherwise justify invocation of the 'just and equitable' jurisdiction."

b. The Claimants take the view that, notwithstanding that there was no expert evidence on the point, it seems very unlikely that the assets of JFM on a 'break-up' basis would be significantly lower than on a 'going concern' basis. By far the most significant assets of JFM are the Properties which would have remained static since at least 2010. There is, it was submitted, accordingly no reason to think that an orderly sale of JFM's assets on a 'break-up' basis would generate significantly less value than the value of JFM as agreed between the company valuation experts (though on a break-up sale and liquidator costs would be incurred).

c. Moreover, say the Claimants, this is an argument in favour of a minority discount not being applied; it is not an argument that the Claimants be awarded the value they would receive on a liquidation.

(vii)<u>Claimants not willing sellers</u>

[106] The Claimants indicate that they cannot in any sense be described as willing sellers. This is because they are selling by virtue of a buy-out order granted following a successful unfair prejudice action. Reference was made to ***Re Bird Precision Bellowes Limited*** [1984] Ch. 419, where Nourse J stated the matter thus at 430 E:

> "*On the assumption that the unfair prejudice has made it no longer tolerable for him to retain his interest in the company, a sale of his shares will invariably be his only practical way out short of a winding up. In that case it seems to me that it would not merely not be fair,*

but most unfair, that he should be bought out on the fictional basis applicable to a free election to sell his shares in accordance with the company's articles of association, or indeed on any other basis which involved a discounted price."

[107] The Claimants say that this observation is particularly apposite in this case because Leon J held that the Claimants had been unfairly prejudiced by Lawrence's failure to provide them with financial information relating to JFM. It was Lawrence who approached the Claimants with a view to purchasing their shares after years of ensuring that they had received nothing at all from their shares, not even the financial information to which they were entitled. In particular, Leon J held at paragraphs [142]-[145] as follows:

"*[142] When the possible purchaser was the Second Defendant, it was abusive of the Second Defendant not to provide the information to which the member, in this case the Second Claimant, wanted to have and was entitled to have. The abusive actions of the Second Defendant, as sole director of the Company, in and of itself were oppressive, unfairly prejudicial and unfairly discriminatory to the Second Claimant initially and then to all the Claimants.*

[143] There was no proper basis to justify the Second Defendant deciding that the Company should operate under cover of darkness and as if the Company were his alone. There was no proper basis for the Company to do so.

[144] The Company's failure to provide Financial Statements in each year from 2006 was not for the benefit of the Company or for any other proper purpose but rather for the improper benefit of the Second Defendant, including to keep from the Claimants and other minority shareholders information about the financial affairs, operations and state of the Company (including in relation to the Second Defendant himself as sole director and operator of the

Company and in respect of matters about which he could potentially be called upon by minority shareholders to explain and justify) and its ability to pay dividends, and the value of the Claimants' shares in the Company.

[145] The failure to provide Financial Statements was oppressive, unfairly discriminatory and unfairly prejudicial to each of the Claimants in their capacities as members of the Company."

[108] The Claimants argue that Lawrence's behaviour was particularly egregious because he refused to provide financial information to the Claimants whilst making what (is now obvious) was a vastly under-valued offer for the Claimants' shares. The Claimants refer to Phase 1 Judgment, paragraph [106] which shows that Lawrence offered US $1.4 million in November 2013. At the time, 1 US$ was worth less than 7.76 Hong Kong Dollars, making Lawrence's offer worth HK$10.8 million. Even Mr. Borelli's/Kroll original report valued each Claimant's share in March 2017 at HK$84.2 million.

[109] The Claimants say that in the face of that behaviour, the Claimants have had to vindicate their rights in a legal battle which involved an appeal all the way to the Privy Council. They should not they say be treated as willing sellers whose interest in JFM would be discounted.

[110] For these reasons, the Claimants posit that the Court should value the Claimants' shares pro rata.

INTEREST

A. Correct approach to whether evidence required

[111] In oral opening submissions, the Claimants pointed to Lawrence's leading Counsel's use of extracts from ***Profinance Trust SA v Gladstone*** [2002] 1 BCLC 141, which were cited in the Claimants' Opening Submissions. The attempted use of these extracts was to say that where interest is sought, evidence is required as to: (i) whether the Claimants would have borrowed to make up for the lack of payment or make different investments; and (ii) what the Claimants' loss(es) would have been in the

counter-factual which would have eventuated. The Claimants contend that there are at least two fundamental problems with this submission:

a. The interpretation of ***Profinance*** advanced in Lawrence's opening submissions is incorrect. The right interpretation is that set out in the work **Joffe**, *Minority Shareholders: Law, Practice and Procedure (*6th edn, 2018) at [7.132(b)-(c), namely:

> "*[I]f the petitioner seeks an early valuation to be augmented by the equivalent of interest, he must put the claim forward clearly and persuade the court by evidence that this is the best way to a fair result…*
>
> *[U]nless the petitioner is merely seeking simple interest at a 'normal' rate, he must adduce evidence on which the court can decide what amount if any to allow"*
>
> i.e. It is the request for an early valuation date that must be supported by evidence.

b. The case ***Re Scitec Group,*** cited by Lawrence, it was submitted confirms Joffe's interpretation of ***Profinance***. :

> i. In ***Re Scitec*** the valuation date chosen and agreed was 13 March 2007, namely the date of the Petitioner's resignation as a director. However, the buy-out order was not made until 19 July 2010 (i.e. over three years later)
>
> ii. What Newey J said at [42] was that a reason in support of the conclusion not to award interest was that the Petitioner could have asked for his shares to be valued as at the date of the purchase order (i.e. July 2010), but rather asked for his shares to be valued at an earlier date. Accordingly (at[42]) "*the three-year interval between the date of valuation and this hearing is attributable to a choice on [the Petitioner's} part."*
>
> *iii. In this case, the valuation date of 31 March 2017 was after the buy-out order date (16 August 2016) and was selected on the basis*

that it was tied to that date. Specifically, at Phase 2 A Judgment, Jack J held: "Standing back and considering in the round the exercise of my discretion in this matter, there are, in my judgment insufficient reasons to change the valuation date from that which would have followed from the Leon J judgment, had there been no appeal."

[112] The Claimants assert that "*early valuation"* refers to a case in which the Petitioner seeks a valuation rate by reference to an event before the date of the purchase order.

[113] The Claimants say that they are not seeking a borrowing rate of interest based on personal borrowings that they have had to incur so that there was no need for them to evidence such borrowing.

[114] Therefore, the argument continues, consistent with the second limb of *Joffe's* interpretation of ***Profinance*** no evidence is required because here the Claimants do "*merely seek…. simple interest at a normal rate" : Joffe, Minority Shareholders Law, Practice and Procedure (6th Edition 2018) at 7.132(c)*

[115] The Claimants have asked for as the appropriate 'normal rate' the usual Hong Kong rate, namely 1% over the Hong Kong best lending rate ('prime rate'). This submission was supported with three leading authorities from the Hong Kong Courts and no submission was made by Lawrence disputing that this was the 'normal' Hong Kong rate.

[116] The Claimants in opening suggested that the 'normal' 'Hong Kong rate' is appropriate because all the valuations in this case are in Hong Kong dollars; all of JFM's subsidiaries were Hong Kong companies; and all the Properties were in Hong Kong. Alternatively, the Claimants say that they seek interest at 2% over the Bank of England base rate.

[117] Accordingly, say the Claimants the Court can clearly award the Claimants a commercial rate of interest in the absence of any more specific evidence as to loss.

Lawrence's submissions on Interest

(i) The Pleading Point

[118] Lawrence's leading Counsel argued in oral opening submissions that the Claimants' claim to the sum sought for being kept out of their money until the terms of a buy out order are finalized (i.e. quasi-interest) should fail because they had not pleaded the rate at which they seek such interest. It was the Claimants' position that there is nothing in this point because :

(a) The Points of Claim makes the usual plea to "*simple interest…at such rate and for such period as the Court thinks fit…"* Lawrence did not at any time prior to trial or in his Points of Defence object to the Claimants' interest plea. On behalf of the Claimants it was submitted that there is nothing objectionable in a party quantifying the precise sums sought by way of interest in a "schedule of loss" filed after its Points of Claim.

(b) In any event, the Claimants alternative response is that the sums sought by the Claimants for being kept out of their money is a claim for 'quasi-interest' : ***Profinance*** at [31] and [47]. Accordingly, any procedural rules relating specifically to the pleading of interest *per se* in general cases do not apply.

Alleged delay on Claimants' Part

[119] The other major arguments that Lawrence makes against the Claimants as to why the Court should exercise its discretion not to award interest is that the Claimants have been guilty of what Lawrence styled as 'calculated and culpable delay' in these proceedings. The Claimants say that those points are wholly misguided.

VII. No Allowance for Sale Costs

[120] What the Claimants say is the background to this issue is that Lawrence has known since Leon J's Phase 1 judgment in August 2016 (and at the very latest, the Privy Council's decision in January 2021) that he would have to purchase the Claimants' shareholding in JFM at fair value.

[121] Further, they say that Lawrence has known that the valuation date was to be 31 March 2017 since August 2022 and indeed, already had evidence indicative of the sort of sums that would be needed to fund the

purchase. The Claimants suggest that the time period for completion should be 28 days.

Sale Costs in Principle

[122] The Claimants point out that the Court is concerned with an order for the buy-out of the shares and thus the price that would be paid for the *shares* by a willing seller: a. Neither of the parties company share valuation experts suggested that a purchaser of the shares of the Company would factor into their calculations the cost that would be incurred were the properties to be sold. Presumably that would be because the purchaser was unlikely to be buying the shares with a view to an immediate sale of the properties. b. The Claimants' company valuation experts have agreed on the value of JFM subject to the determination by the Court of the market value of the properties. The market value of the properties does not take into account sale costs and both property valuers have opined on that basis.

[123] According to the Claimants' Closing Submissions, whilst in oral opening submissions Lawrence's leading Counsel did not cite any legal authority on this point, she said that the relevant authorities on allowance for sale costs were already in the Bundle. The Claimants identify the authority on allowance of sale costs as being ***Annacott v Maidment*** [2013] 2 BCLC 46. However, they say that this case does not assist Lawrence.

[124] The Claimants say that in ***Annacott***, the company was formed to make capital profits through property disposal, consistent with which the properties had actually been sold-see para [42]. Thus, the fact that the actual (much lower) sale costs of the transfers at an undervalue were deducted rather than the sale costs based on market value shows that the decision was predicated on there having been an actual sale. The Claimants point out that the principle that a Court could take into account actual events or liabilities which post-dated the valuation date (established in ***Bwllfa Merthyr Dare Steam Collieries (1981) Ltd v Pontypridd Waterworks Company*** [1903] AC 426, para [19], was accordingly applied.

Elias LJ held at para [42] of ***Annacott*** that :"*it is ….consistent with the Bwllfa principle to look at what costs were in fact incurred rather than to speculate."*

[125] It was the Claimants' contention that that reasoning has no application to the facts of this case, in which the long-term retention of the properties is manifest.

Claimants' proposed date for completion of the sale in 28 days

[126] The Claimants in their proposed draft order ask that there be a date for completion of the share purchase within 28 days. This they say is primarily for the following reasons: a. Leon J noted in the Phase 1 Judgment that: "*[174] The commencement of litigation did not lead the Second Defendant to reconsider his hardball approach [175] To the contrary, he "circled the wagons", sought to defend his actions and failings, and took positions designed to make the Claimants go through all possible hoops to obtain the Financial Statements, taking the position that if they succeed in their claim, their relief should be an order requiring the Financial Statements to be provided. [176] To what end? "b.* Lawrence appealed Leon J's August 2016 order, seeking to set aside his order for a buy-out. That appeal was ultimately unsuccessful. c. Lawrence cannot point to any reasonable offers made to the Claimants to purchase their shares since Leon J's Buy-Out Order.

[127] The Claimants assert that they are concerned that Lawrence is seeking to delay payment to the Claimants of the fair value of their shares in JFM.

[128] In particular, the Claimants say that after the exchange of written opening submissions in the matter, Lawrence's legal practitioners' send the Claimants' solicitors a letter stating only that : "*As we approach the Phase 2B Hearing within which the value of your clients' shareholdings will be determined, our client has been considering ways in which to find the buy-out.*

Our client has decided that a prudent way to finance the buy-out price is not through borrowing but through the sale of JF Ming Inc property. Therefore,

instructions will shortly be given to an agent to commence the marketing process.

We will be inviting the Court to make an allowance for the costs of the sale process within the valuation process."

[129] These assertions have come out of the blue, say the Claimants, and are not backed by any evidence whatsoever. They say that this letter is clearly a harbinger of Lawrence continuing his attritional war to avoid making any payment to the Claimants for as long as he possibly can.

[130] In conclusion, the Claimants invite the Court to:

a..Adopt Mr. (Alnwick) Chan's /Knight Frank's valuation of Kyoto Plaza on the 'income approach'

b. Value the Claimants' shares *pro rata* (as opposed to applying any minority discount).

c. Award the Claimants pre-judgment interest of 1% over the Hong Kong best lending rate from 31 March 2017 until the date of judgment in Phase 2B; alternatively, 2% over the Bank of England base rate.

d. Refuse to make any allowance for unspecified 'sale costs' of the Properties in the valuation of the Claimants' shares.

LAWRENCE'S SUBMISSIONS ON VALUATION AND EXPERTS Experts

[131] Ms. Leahy KC in her submissions expressed the view that valuation is an art not a science. In other words, that there are frequently elements in any valuation to which "*there cannot be said to be exclusively one correct answer*": ***Joiner v George*** [2003] BCC 298 at [101]. Nevertheless, the argument continues, valuation is not a speculative exercise but one to be based upon evidence to reach the fair value in the context of the hypothesis of a willing, commercially minded but responsible purchaser and vendor.

[132] Reference was made to the decision in ***Chilukuri v. RP Explorer Master Fund*** [2013] EWCA Civ 1307 at paragraph [59], where Lewinson LJ explained:

"*the first and fundamental principle of valuation,* {is] *namely that things are to be taken as they are in reality on the valuation date, except to the extent that the exercise requires a departure from reality. In the old cases this is summarized in the Latin phrase rebus sic stantibus. In the more modern cases it has been described as the principle of reality. In order to value the shareholding the judge had to hypothesize a sale. But the reality principle means that it is necessary to adhere to reality subject only to giving full effect to the hypothesis. In particular it is critical that any departure from reality must either be compelled by the hypothesis, or at least based on solid evidence rather than assumption or speculation. "*

[133] It was submitted that when the reality principle is correctly applied, the valuation should make commercial or business sense. Reference was made to the judgment of Briggs LJ (as he then was) in ***Chilukuri*** at paragraph [52] where he expounded as follows:

"It is axiomatic that in any complicated process of valuation, the valuer must take the relevant aspects of the world as he finds them (unless constrained by his instructions), and that he must, after looking at each element of the process, stand back and ask himself whether his provisional valuation makes commercial or business sense, viewed in the round."

[134] Lawrence's leading Counsel submits that, having arrived (with the assistance of the experts) at the market value of the relevant shares, the Court may in principle depart from the reality principle if that is necessary to arrive at a fair value on the facts of the case. In particular, if in the real world, the hypothetical willing buyer would apply a minority discount to the relevant shareholding, the Court may nevertheless order a non-discounted buy-out price in certain circumstances. It is Lawrence's case that none of those circumstances arise here.

[135] It was further submitted that the Court has power to apply 'the equivalent of interest" (also described in the cases as "notional interest" or "quasi-interest") on the buy-out price if that is the best way to a fair result.

THE PROPERTY EXPERTS

[136] As previously pointed out, the Property Experts have agreed valuations for Property 1/Jade Centre, Property 3/Flat E and Property 4/Flat A, but they have not agreed the valuation for Property 2, Kyoto Plaza.

[137] In Lawrence's Closing Submissions, Counsel asserts that ordinarily there would be reluctance to comment on expert witnesses, in relation to which the Court will have reached its own views. However, it was asserted that here, the difference between the two experts was so marked that it merits some short observations.

[138] Lawrence posits that the Kroll Expert gave his evidence in a straightforward and considered manner and was not partisan in his approach.

[139] However, comments Lawrence's Counsel, by contrast the KF Expert's testimony was coloured by his clear desire to argue the case on behalf of the Claimants. It was argued that he was excessively wary of accepting even the most obvious suggestions put to him in cross-examination. Further, that rather than make appropriate concessions, he put forward new justifications for his opinions, none of which had appeared in his reports and all of which proved to be "bogus". By way of example, reference was made to the exchanges during cross-examination in relation to the question of methodology. It was submitted that although at the start of the cross-examination he accepted that the Market Approach was the preferred approach wherever there was a sufficient number of reliable comparables, when it was put to him that he had more comparables for the Market Approach than for his (preferred) Income Approach, he made a complete volte face. The submission continues that when then faced with an extract from a textbook consistent with his original answer, he changed his evidence again, making what Lawrence describes as "the astonishing

claim" that Kyoto Plaza was being valued as one single property such that there were *no* market comparables available for the block of units, only for the single units. When this was shown to be false, he reverted to his mantra that the Income Approach was the correct approach because Property 2 was an income generating asset.

Basis of Valuation

[140] Lawrence's submissions point out that the first task of the valuer applying the IVS is to choose the appropriate basis for the valuation assignment.

[141] The basis of value must be appropriate to the terms and purpose of the valuation, as it may influence or even dictate the valuer's selection of method, inputs and assumptions: *IVS -General Standards -10.1:*

"Bases of value (sometimes called standards of value) describe the fundamental premises on which the reported values will be based. It is critical that the basis (or bases) of value be appropriate to the terms and purpose of the value assignment, as a basis of value may influence or dictate a valuer's selection of methods, inputs and assumptions, and the ultimate value."

[142] The Property Experts agree that the basis of valuation is Market Value. Market Value is defined in the IVS General Standards at para 30.1 as: "*the estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion."*

[143] The Property Experts further agree that the factual circumstances of the actual owner are not part of the consideration because the willing seller is a hypothetical seller, and equally that the factual circumstances of the actual purchaser are not part of the consideration because the willing purchaser is a hypothetical purchaser.

[144] It therefore follows, it was submitted, that the Property Experts were required to choose a valuation method that is able to identify the perspective

of participants in the market generally rather than the perspective of a particular owner or prospective buyer.

[145] Lawrence then made the point that the Market Value basis is to be contrasted with the Investment Value basis. Investment Value is defined in IVS 104 as "*the value of an asset to a particular owner or prospective owner for individual investment or operation objectives."* Counsel commented further that essentially, the Investment Value is a subjective judgment of an asset's value whereas the market value is the objective value of the asset's value.

Method of Valuation

[146] It was suggested that the goal in selecting the appropriate valuation method is to find the most appropriate method under the particular circumstances: IVS 105, 10.3. That is, Lawrence's submissions point out, and as the KF Expert agreed in cross-examination, the valuation method most suitable for the type of property which is being valued.

[147] Further, in order to select the method a valuer is required to consider, amongst other things, the availability of reliable information needed to apply the method. It was submitted that the KF Expert accepted during cross-examination, that there must be sufficient relevant and reliable data to compute the value estimate whatever method of valuation you are using.

[148] The argument continued that valuers are not required to use more than one method for the valuation of an asset, particularly when the valuer has a high degree of confidence in the accuracy and reliability of a single method. It was suggested that the KF Expert was reluctant to accept this was the position in cross-examination, despite the clear wording of IVS 105.

[149] With reference to IVS 105, 10.7, it was argued that, whatever method they choose, valuers are required to mazimise the use of observable market information.

[150] It was submitted that price information from an active market is generally considered to be the strongest evidence of value.

[151] It was pointed out that Kroll Expert preferred the Market Approach for all four properties. Further, that however, to ensure that his valuation also gave appropriate value to the rental stream under the existing tenancies, he capitalized the rental payable under those tenancies until their reversion dates by 2.50% and added this amount to his market valuation.

[152] On the other hand, the KF Expert preferred the Income (term and reversion) Approach for Properties 1 and 2, with the Market Approach as a (so- called) 'sense-check'.

(**i) Market Approach**

[153] Lawrence's Counsel describe the Market Approach as one that estimates value based upon the price, in the local market, necessary to acquire a property of similar location, quality, size, age, and condition. It essentially compares the subject property to other similar properties which have been sold at or around the same time.

[154] It was suggested that in cross-examination, the KF Expert accepted the following:

(1) that the Market Approach is also known as the sales comparison approach.

(2) The valuer's first task is to gather appropriate evidence, i.e. sales transactions in relation to comparable properties. The valuers must choose their comparables by reference to the closest real-world analogues to that transaction that they can find. One very important factor will be the date of the transaction. The closer in time to the valuation date, the more meaningful the comparison will be and *vice versa*. Another is location, and another is the type of business which is undertaken at the premises.

(3) Once comparables are gathered, the valuer must then analyse and adjust the comparables to ensure that they reflect the subject property as much as possible.

(4) If the comparable property is inferior to the subject property with respect to valuable characteristics, the comparable property's sale price should be adjusted upward.

(5) Conversely, if the comparable property is superior to the subject property, the sale price should be adjusted downwards.

[155] Ms. Leahy argues that in the present case, the Property Experts have made adjustments to their comparables to reflect the dates the comparables were sold, their different locations, age and size, and other features including their street exposure, headroom and floor level.

(ii) Income Method (Term and Reversion)

[156] The Income (term and reversion) approach assesses rental values (market rent0 and a market-based yield. A yield is essentially the annual return on investment expressed as a percentage of capital value.

[157] Lawrence's Closing Submissions assert that in cross-examination, the KF Expert accepted that:

(1) The term value is calculated by capitalizing the current rental income produced by the current tenant. That is, the term value is the passing rent that the landlord will receive until reversion.

(2) The reversionary value is the estimated value of the property back in the landlord's possession. That is, the reversionary value is the amount of market rent it is estimated the landlord will receive from the date of that first reversion. This must then be capitalized by the valuer's chosen yield into perpetuity.

[158] Lead Counsel also suggests that the KF Expert also accepted in cross-examination that the term and reversionary values are calculated as follows:

(1) For the term value the valuer first calculates the net income receivable under the current terms of the tenancy of the subject property.

(2) For the reversionary value, the valuer first calculates the estimated rental upon reversion, i.e. at the end of the term of the current lease by:

a. Gathering in data in relation to recent rental transactions in relation to comparable properties.(This is the same as the first step in the Market Approach, save that the valuer is collecting rental transactions rather than sale transactions); and then

b. Making any adjustments that need to be made to the comparables to convert each comparable property into a closer approximation of the subject property. (Again, this is the same as the second step in the Market Approach).

(3) Next, the valuer capitalizes the term and the reversion by the market capitalization rates. There are two ways to do this. The valuer can choose one capitalisation rate for the term and another for the reversion or, the valuer can choose a blended capitalization rate.

(4) The capitalization rate for the term will generally be lower than the capitalization rate for the reversion.

(5) This is because the term rent is perceived to be relatively secure. However, as market rents can go up or down, risk is attached to the reversion rate. This must be taken into account

in the yield applied by the valuer. Even a minor difference in assessing the correct capitalization rate can throw the valuation out.

(6) In order to select a capitalization rate for the reversion, the valuer looks for similar market transactions in the market and will also consider data published by the Hong Kong Rating & Valuation Department ("**the RVD**").

(7) This exercise will produce a range of capitalization rates. The valuer will have to choose an appropriate rate within that range that adequately reflects the risk factors at play.

Market Approach v Income Approach

[159] Reference was made to segments of the cross-examination by Mr. Parker KC of the Kroll Expert where he suggested that the Expert as mandated by IVS 105, 40.2 to adopt the Income Approach. Lawrence submits that this is wrong for two reasons.

[160] Firstly, it was argued, IVS 105, 40.2 applies where "*the income producing ability of the asset is the critical element affecting the value from a participant perspective".* The KF Expert accepted during cross-examination that in Hong Kong, commercial real estate is held for both capital growth and for its income generating qualities. It follows, the argument continues, that the income producing ability of Property 2 was not the critical element affecting value from a market participant perspective, and that therefore, IVS 105, 40.2 has no application on the facts.

[161] Second and in any event, it was submitted that even in the case of income generating assets, a Market Approach is to be preferred wherever reliable, verifiable and relevant market information is available. This, it is said, is what the Claimants' own expert (eventually) accepted in cross-examination. It is also what IVS 105, 20.2 mandates, and for good reason. Reference was made to ***Shapiro on Real Estate Principles*** (5th Ed.) where it is explained: *There is a clear order of preference for methods of appraisal.*

An appraiser generally prefers to estimate value directly from the market, that is, from the actual sales of comparable properties. That way the appraiser can rely on the value judgments of actual buyers and sellers, whereas other valuation methods only simulate these judgments. Often, however, adequate sales comparables are not available. In this case, an appraiser simulates market judgment for income-producing properties through an income capitalization approach. If there are no comparable dales md there is no income to measure and value, as a last resort the appraiser must turn to the cost method. .."

Why the Market Approach Should Be Preferred in this case

[162] Reference was made to two reasons that the KF Expert gave in his first report and in the Joint Statement for adopting the Income (term and reversion0 approach. The first was that he considered Property 2 to be an "income generating asset". The second was that he considered there to be insufficient comparables to enable a *Market* Approach Valuation to be undertaken.

[163] Learned King's Counsel Ms. Leahy suggested that there are at least three reasons why the Court should reject the KF Expert's Income Approach Valuation.

(i)The KF Expert's reasons for adopting an income approach

[164] It is argued that the first reason the Court should reject the KF Expert's evidence is that his reasons for adopting the Income Approach do not stand up to scrutiny.

[165] The KF Expert, according to Lawrence, accepted that in Hong Kong, commercial real estate is held for both capital growth and for its income generating qualities. Therefore, by adopting the Income Approach, KF Expert was confining the market participants to those seeking income rather than capital growth. It was submitted that this is not permissible where the basis of valuation is Market Value.

[166] In any event, as previously discussed, even in the case of income generating assets, the Market Approach trumps the Income Approach,

wherever there are a sufficient number of reliable sales comparables available.

[167] It was submitted that the KF's contention that there were not a sufficient number of reliable sales comparables of Kyoto Plaza was not credible.(1) The KF Expert adopted the Market Approach for Properties 3 and 4. The reason he gave was that "*there were relevant comparable sales transactions available in the market*". In both cases he had 4 comparables. However, by the time of the Joint Statement, the KF Expert had more sales comparables for Kyoto Plaza than he had for Properties 3 and 4 and the KF Expert had more sales comparables than rental comparables.

[168] Therefore, the argument continues, to get around this difficultly, the KF Expert suggested in cross-examination (for the first time) that the main reason for adopting the Income Approach in the present case was that the Group's properties at Kyoto Plaza were being valued as one unit, and there were only sales comparables available for individual units not the block.

[169] However, Lawrence says that this was not true, as the KF Expert was forced to accept when shown the Schedules in the Joint Statement. Further, it was argued that had it been true, then a very significant block discount would have been applied by the Experts(which the KF Expert also accepted).

(ii) Lack of rental comparables

[170] The second reason advanced by Lawrence why the Court should reject the KF Expert's Income Approach is because it is submitted that the KF Expert did not have a sufficient number of reliable rental comparables, in particular, the majority of comparables used by the KF Expert for his Income Approach for Property 2 were significantly out of date and therefore not true comparables.

(iii) Capitalisation rate too low

[171] It was advanced that the third reason that the Court should not accept the KF Expert's Income Approach valuation is that his chosen capitalization rate was too low.

[172] As the Kroll Expert explained in re-examination, the capitalisation rate is intended to reflect the risk of occupancy voids, insolvency of the tenant and market changes.

[173] As to market changes, the KF Expert included a report published by the RVD with his four reports for 2017. This report stated as follows:

> *"In the coming year, our local economy will remain vulnerable to change in various external and internal factors (sic), such as the domestic and international economic outlook, the US monetary policy normalization process, as well as the movement of international funds etc. Future change in supply will also affect the property market significantly. The Government will remain vigilant , and prudent, and continue to closely monitor property market movements and ever-changing external conditions, with reference to a series of indicators like property prices, home purchases affordability ratio, and local and global economic developments."*

[174] Lawrence avers that the KF Expert was originally unwilling to accept that the above-mentioned factors were relevant. However, during cross-examination, he ultimately conceded that he did need to take into account the factors set out in the RVD Report.

[175] Lawrence points out that the Kroll Expert's evidence was that the appropriate capitalization rate for Property 2/Kyota Plaza, was at least 2.75% and Lawrence says that he was not cross-examined on this. In Closing Submissions, it was stated that the Kroll Expert in re-examination, when asked what capitalization rate he would have used had he undertaken the 'sense-check' Mr. Parker KC had suggested in cross-examination, said it would have been between 2.7% and 3%.

[176] Lawrence next turned to the KF Expert's evidence regarding Property 1 / the Jade Centre, where he said he had adopted a capitalization rate of 2.75%. However, it was pointed out that he adopted a capitalization rate of only 2.5 % for Property 2/Kyota Plaza and Lawrence claims that he gave no satisfactory answer for this difference.

[177] Further, the submission continues, the KF Expert's Capitalisation rate bore no relation to the market capitalization rates he purported to rely upon in his statement.

[178] Lawrence's Counsel argues that the KF Expert sought to escape this difficulty by saying that his 2.50% rate was consistent with the RVD published rate. However, it was argued, the RVD published rate is an average yield of all transactions in all Hong Kong locations, good and bad. Ms. Leahy KC argued that the whole point of using comparables (i.e. similar properties) rather than the RVD rate on its own is to find a rate that most appropriately captures the risk factors associated with the subject property.

[179] King's Counsel further submitted that had the KF Expert adopted a 2.75% or 3% blended yield for Property 2/Kyota Plaza, then his valuation would have been significantly lower.

[180] **Cross-examination of the Kroll Expert on the Income (term and reversion) Approach**

[181] According to Lawrence, most of the Kroll Expert's cross-examination was taken up with questions about his use of the Income (term and reversion) approach. Ms. Leahy KC commented that Mr. Parker KC appeared to suggest that the Kroll Expert had in fact used the Incoe (term and reversion) approach, but had misapplied it. It was posited that however, these questions were premised on a fundamental misunderstanding of the Kroll Expert's evidence, and the valuation exercise he undertook.

[182] It was argued that the Kroll Expert valued Property 2/Kyota Plaza using the Market Approach. But to ensure that his valuation also gave appropriate value to the rental stream under the existing tenancies, he capitalized the rental payable under those tenancies until their reversion dates by 2.50% and added this amount to his market valuation.

[183] Lawrence argues that, in other words, the Kroll Expert employed the Income Approach simply to calculate the value of the existing tenancies, not the value of the reversion. As the Kroll Expert explained in re-

examination, had he also valued the reversion and added this value to his Market Approach valuation, he would have been double-counting.

[184] Lawrence also claims that the Kroll Expert was wrongly criticized for undertaking the Income Method valuation as a 'sense-check'. As previously argued, a valuer is not required to use two valuation methods if the valuer has a high degree of confidence in the accuracy and reliability of a single method: IVS 105, 10.4. However, the argument proceeds, there were in any event insufficient rental comparables to undertake a meaningful Income Approach valuation in the present case. Reference was made to the fact that Mr. Parker KC put to the Kroll Expert in cross-examination that he could have taken rental comparables from the buildings he used as sales comparables. However, it was submitted, this question wrongly assumed that there were rental transactions available for these buildings.

The Property Experts' Property 2/Kyoto Plaza Market Approach Valuations

[185] In their Closing Submissions, Lawrence's Counsel state that the Property Experts have agreed all relevant factual data in relation to the units at Property 2. The main reasons, as they see it, that account for the differences between the Kroll Expert and the KF Expert's respective Market valuations of Property 2/ Kyoto Plaza are addressed below.

(i) Basement

[186] The Property Experts are apart by HK $10.3m (6.2%). In this case, the Kroll valuation is higher than the KF valuation.

(ii) Ground Floor

[187] Under this head, the Property Experts are apart by HK $89m (25.8%). This difference is due in part to the approach the experts have taken to the valuation of the units on the ground floor. In particular, Unit 5 has an irregular shape part of which can only be used for storage. As such, the Kroll Expert has valued Unit 5 using the Reduced Zoning Area ("**the RZA**") method reducing the effective saleable area from 67.36 sqm to 30.59

sqm. The KF Expert, however, has not adopted the RZA method but instead made a 3% downwards adjustment for layout.

[188] Lawrence claims that the KF expert accepted in cross-examination that : (1) Retail property is generally considered to have its most important space right at the front of the shop, where most people will see items for sale as soon as they enter the property-after they first see-through any shop window from the street. Retail shops therefore tend to have lots of important stock right at the front of the shop on display, to leave the less essential goods and operations like the till and changing rooms further back in the shop.(2) If a retailer had a choice, they would pay for additional front space to easily sell items rather than lots of wasted space at the back of the store that shoppers tend to walk less into. As the KF Expert said, "*the longer the front, the more valuable it is."* (3) The RZA concept is based on the principle that the area closest to the frontage is the most valuable part of the shop, and that as the distance fro the shop front increases, the value per unit decreases. (4) When applying this method a value per square metre is arrived at for the zone closest to the frontage by reference to comparable sales, and the value attributable to the zone at the back or the rear is derived formulaically. (5) Unit 5, with 67.36 sq.m , has the greatest area among the subject ground floor shops. However, copared to Units 1 to 4, unit 5 has only 18.34 sq.m with similar layout. The rest of the 49.02 sq.m. sits at the back north-west corner of the unit. The Kroll Expert used the RZA method to calculate the value of the rear of unit 5. (6) It is permissible to use the RZA method in Hong Kong. (7) The KF Expert sought to adjust for the irregular layout by applying a 3% downwards adjustment. (8) The KF Expert did not use an industry formula to calculate the impact of the irregular layout of Unit 5. (When it was put to him that his 3% adjustment was "entirely arbitrary" he said it was his "opinion".

[189] It was submitted that there was no sound basis for criticizing the prudent and industry standard approach which the Kroll Expert took in relation to Unity 5. The Court was asked to prefer his evidence to that of the

KF Expert, whose 3% adjustment was characterized as being entirely arbitrary.

[190] Other differences between the Experts in relation to the Ground Floor related to the chosen comparables, location, and age adjustments made. The Court was asked to prefer the methodology used by the Kroll Expert over that of the KF Expert.

(iii) 1F to 3F

[191] The Property Experts are apart by HK $7.5m(4.1%). Ms Leahy KC submitted that this difference is primarily reflective of the fact that they differ in their valuation of the ground floor, which has been used as a reference point for their valuations of 1F to 3F.

(iv) Upper Floors

[192] Lawrence has indicated that the Property Experts are apart by HK 438m. (5.4%). It is maintained that the main reason for this is the Property Experts' choice of Comparables as well as the fact that they applied different age adjustments for these floors.

Summary

[193] All told, Lawrence suggests that the Court should prefer the Kroll Expert's evidence over the KF Expert's evidence and value Kyoto Plaza using the Market Approach, the Kroll Expert's comparables and the Kroll Expert's adjustments.

SHARE EXPERTS

[194] There has been much movement in the position of the Experts, to the point where the parties decided that there was no need to call them to give viva voce evidence.

[195] The Share Experts agreed that the market value is the appropriate basis of value to be adopted. As to methodology, the Share Experts also agree that the 'Asset-based Approach' to valuation is the most appropriate and reliable approach to value JFM and its subsidiaries.

[196] Both Experts started with the same net asset value figure for JFM as at the Valuation Date. Prior to the preparation of the Joint Statement,

there were wide-ranging disagreements between the Experts as to the adjustments to be made in order to arrive at a market value of the Shareholding as at the Valuation Date. However, after the Joint Statement, the Experts' values then got much closer. What was clear was that, in monetary terms, the application of a minority discount was a significant disagreement between the Experts. Mr. Tong did not consider that any minority discount should be applied, and Mr. Borelli considered that a discount of 17% should be applied to reflect the fact that the Shareholding represents only a small block of shares in a private company.

[197] For ease of reference, and so as to state clearly what Lawrence has indicated to the Court, I quote below paragraphs 134-136 (inclusive) of Lawrence's Written Closing Submissions:

> *"134. The remaining matters of disagreement between the Share Experts relate to what amounts are required to be added to the net asset value ("**NAV**")* or subtracted therefrom to arrive at the market value of *JFM as at the Valuation Date. Overall, however, Mr. Borell's valuation of JFM's NAV is HK$190.5m lower than that of Mr. Tong:*
>
> *(1) Value of real estate (HK$197.6m) :this is the main difference. Mr. Tong has adjusted the net balance upwards in accordance with the KF Income valuation of the Ming group's real estate, and Mr. Borelli has adjusted the net balance upwards in accordance with the (HK$197.6M) lower Kroll Market valuation. This has resulted in a difference of HK$197.6m between the Share Experts.*
>
> *(sic)*
>
> *135. However, if one removes the different property valuations from the calculation (which is a matter for the Property Experts), the net effect of Mr. Borell's*

adjustments to the NAV was in fact more favourable to the Claimants than Mr. Tong's.

	HK$m
Borelli valuation of JFM(per Borelli Addendum Report)	***1,731.4***
Difference between the Real Estate Experts	*197.6*
Borelli Adjustment of Intercompany Balances	*(15.4)*
Value of Sharegain	*7.5*
Adjustment of non-controlling interest	*1.9*
Smare Giant- use of different accounts	*(1.1)*
Tong valuation of JFM (per Joint Statement)	

136. As a consequence, on the eve of trial, the Claimants agreed to accept Mr. Borelli's calculation of the NAV and that as a matter of valuation, a 17.8% minority discount would apply in this case."

MINORITY DISCOUNT

[198] Ms. Leahy KC in her submissions expresses the matter fairly simply at first, when referring to ***Hollington***, 9th Ed. at 5-6, she states that, the reason a discount is usually applied in real life is because a minority shareholding does not confer any control over the company and so in purely commercial terms is less valuable than a majority shareholding, which does confer such control.

[199] It was submitted that Mr. Tong failed to provide any sound reasons why he has departed from the normal position in this case. It was asserted that he appears to have confused his role as expert-to opine on the market value of the Shareholding- with the Court's role-to determine the 'fair value' of the Shareholding.

[200] It was submitted that in quasi-partnership cases there is a presumption <u>against</u> the Court applying a minority discount, but that however, even in those cases, it is only a presumption.

[201] As regards non quasi-partnership cases, it was argued that the authorities do not speak with one voice as to whether there is a presumption <u>in favour</u> of applying a minority discount.

[202] Reference was made to ***Strahn v Wilcox*** [2006] 2 BCLC 555 where Lady Arden (with whom Richards and Mummery LLJ agreed) held (obiter) at [17] that "*when the court is considering the price to be paid for the petitioner's shares under an order for purchase in unfair prejudice proceedings, exceptional circumstances must exist for the shares to be valued without a minority discount if the company is not a quasi-partnership."*

[203] Reference was made to numerous cases in which this 'exceptional circumstances" test was said to be applied-paragraph 145 of Lawrence's Written Closing Submissions.

[204] Reference was also made to the first instance line of authority in England referred to in the Claimants' Written Closing Submissions where the Judges have held that there is no presumption of a minority discount in non-quasi-partnership cases.

[205] Reference was made to the fairly recent English High Court decision in ***Otello Corp ASA v Moore Freres*** [2020] EWHC 3261 (Ch), where the Judge conducted a review of the relevant authorities at [237] to [255], and concluded at [254] to [255] as follows:

> "*[254] …My task is to determine the basis for a fair price which MFC should be required to pay for the Shareholding. That is not necessarily a binary choice between applying a minority discount to the valuation and not applying a minority discount to the valuation. Any basis of valuation selected must be fair in all the circumstances. It must provide a remedy which is proportionate to the unfair prejudice suffered by the relevant petitioner. An order for purchase on a pro rata basis may be appropriate in certain circumstances when a company is not a quasi-partnership, but there is no presumption in favour of this basis of valuation, in contrast to the position of a true quasi-partnership.*
>
> *[255] To this I would add that the conflict in the authorities which I have considered above may be more apparent than real. In a non quasi-partnership case, the starting point is that a minority shareholding should be valued for what it is, namely a minority shareholding. This is however only the starting point. If the minority shareholding would, as a matter of valuation, sell in the market at a discount reflecting its minority status, the question which arises is whether it is fair, in all the circumstances of the relevant case, for that minority discount to be reflected in the price which the majority shareholder is required to pay pursuant to a purchase order. Adopting the language of Oliver LJ in Bird Precision Bellows, it may be fair and equitable, in all the circumstances of the relevant case,*

to adopt a different basis of valuation in order to put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the majority. This may justify the non-application of a minority discount, or it may not. I am doubtful that it is useful, or necessary, to approach this question on the basis of any rule or principle of law that a minority discount should or should not ordinarily be applied in a non quasi-partnership case."

[206] Lawrence also referred to the decision of the Judicial Committee of the Privy Council (a case on appeal from the Cayman Islands Court of Appeal) in ***Shanda Games Ltd. v Masco Capital Investments*** [2020] UKPC 2, where Lady Arden (delivering the judgment of the Board) referred at para. [38] with approval to the approach taken by the English Court of Appeal in ***Strahan v Wilcox*** in the context of unfair prejudice petitions. She went on to state at para. [42] that:

"*In the opinion of the Board, it is a general principle of share valuation that (unless there is some indication to the contrary) the court should value the actual shareholding which the shareholder has to sell and not some hypothetical share. This because isn a merger, the offeror does not acquire control from any individual minority shareholder* [which Lawrence says is the case here also]. *Accordingly, in the absence of some indication to the contrary, or special circumstances, the minority shareholders' shares should be valued as a minority shareholding and not on a pro rata basis."*

[207] Ms. Leahy KC submits that the correct test is that a minority discount is justified where there is no quasi-partnership unless there are exceptional circumstances to justify a different approach. She argues that that approach is the preferred one given its approval by the Privy Council in ***Shanda Games*** as recently as 2020.

[208] It was further submitted that in any event, regardless of which test is the correct test, neither is satisfied on the facts here.

A minority discount should be applied

[209] It is Lawrence's position that, even accepting that it may be appropriate in certain circumstances to not apply a discount, this case is totally different from the cases in which a discount was denied. Reference was made to the decision in ***Re Sunshine Radio*** on which the Claimants place significant reliance. It was argued that in that case, the Court considered the relevant factors to include that : (i) the minority had purchased their shares at a non-discounted price,(ii) the majority had breached their fiduciary duties, (iii) the minority was not a willing seller and (iv) the conventional discount could have been as high as 80%. The judge also emphasized that these factors must be considered cumulatively and by themselves did not justify a pro rata valuation.

[210] It was posited that in the present case:

(1) The Claimants did not buy their shares at a non-discounted price. In fact, they received them for free.

(2) The Claimants have received dividends from JFM, but the equivalent amounts paid to Lawrnce have been treated as loans-Phase 2 Judgment at [62] and [64]. The result is that the Claimants have not only received dividends totaling HK $36.2 m (a figure agreed between the Share Experts), but will also receive 3/17ths share of the value of Lawrence's loans.

(3) Lawrence has not been found to have misappropriated any assets of JFM or otherwise acted in breach of duty.

(4) The Claimants are desirous of being bought out since (at the very latest) 2014. They are therefore not unwilling sellers.

(5) Lawrence alone has taken the financial risk of the business failing: he is the only one of the siblings to have put management time into the business, and the only one of the siblings to have given guarantees to support the Ming group's borrowings.

(6) As recorded in the Phase 1A Judgment, the Claimants conceded that "*this was not a case of the Claimants having*

been unfairly excluded frommanagement roles" [41], and that "*The Claimants are minority shareholders in the Company with no greater-and no lesser-rights than those to which minority shareholders are entitled"* [43].

(7) The suggested discount is only 17.8% which is below the bottom of the range of discounts which have been applied in the cases (25% to 40%)- See ***Hollington***, 9th Ed at 8-56.

[211] Lawrence also refers to the Claimants Points of Claim, and avers that there the Claimants say that they are entitled on a pro rata, non-discounted valuation for four separate reasons. Lawrence takes the position that none of those reasons justify making an order for purchase on a pro rata basis.

[212] In sum, Lawrence submits that the Claimants' shares do not have and never did have that enhanced value, as a minority shareholding, and there are no considerations binding the other shareholders that require them, or any of them, to treat the share as having a pro rata value.

[213] Ms. Leahy KC's comment on the line of cases relied upon by the Claimants is that they were old, including the Commonwealth authorities relied upon. She argued further that they largely involved quasi-partnerships, or cases in which the Petitioner was excluded from management.

INTEREST

[214] Ms. Leahy KC acknowledged that there is jurisdiction to make an order for the payment of a sum equivalent to interest (quasi-interest) on the purchase price for shares ordered to be purchased. Reference was made to the decision in ***Profinance Trust SA v Gladstone*** [2002] 1 BCLC 141 at [32]. However, she submits, that as pointed out in that decision, it is a "*power that should be exercised with great caution"* and only where it is necessary to achieve a just result.

[215] The Claimants seek interest at 1% over the Hong Kong Best Lending Rate from the Valuation Date to the date of judgment Lawrence

submits that the claim for interest is without merit for the four reasons set out below.

Reason 1: the Claimants did not properly plead their claim for interest

[216] It was submitted that if the Claimants wished to invite the Cour to determine the rate of interest I this way by reference to borrowing, that should have been pleaded.

Reason 2: the claim for interest is not supported by evidence

[217] It was submitted that in ***Profinance*** at para. [32], the English Court of Appeal held that any claim for interest must be supported by evidence as follows:

> *" If a petitioner seeking an order for the purchase of his shares contends (either as his only claim or in the alternative) that they should be valued at a relatively early date but then augmented by the equivalent of interest, he must put forward that claim clearly and persuade the court by evidence that it is the only way, or the best way, to a fair result. It should not be a last-minute afterthought (as it may have been, to some extent, in Re Bird Bellows and Re Planet Organic)). Unless a petitioner is asking for no more than simple interest at a normal rate he should also put before the court evidence on which the court can decide what amount (if any) to allow."*
>
> (Learned King's Counsel's emphasis)

[218] It was argued that, thus, if a claimant seeks quasi-interest he must support that claim with evidence. Firstly, it must include evidence as to the losses suffered by the claimant. Secondly, save where the claimant is seeking no more than simple interest at a normal rate, it must also include evidence as to the applicable rate of interest. Reference was made to ***Otello*** at [291],[292], and[296].

[219] Lawrence's Submissions make the point that it is important to appreciate that the Court's approach to quasi-interest is different to the

Court's approach to the award of interest on damages in ordinary commercial cases.

[220] Summarised, the point made was that in commercial cases, the Court assumes that the claimant has suffered loss by being kept out of his money and seeks to identify the theoretical cost to a person with the claimant's general characteristics of borrowing sums withheld such that the use to which the party paying interest has put his money is not relevant to the exercise of the Court's discretion. By contrast, in the context of unfair prejudice petitions, quasi-interest will only be awarded if (i) actual loss is proved and (ii) there is something "*out of the ordinary so as to justify the claim for interest"*-***Re Clearsprings (Management)*** [2003] EWHC 2516 (Ch) at [39] to [42].

Reason 3: the Claimants have not transferred the Shareholding to Lawrence

[221] Reference was made to the decision in ***Re Southern Counties Fresh Foods*** [2010] EWHC 3334 per Warren J at [96] for the proposition that interest on the buy out will only run from the date on which the minority shar shav been transferred. It was pointed out that in the present case, the Claimants have not yet transferred the Shareholding to Lawrence. As such, the submission continues, there is no conceivable reason why the Claimants should be entitled to interest on the buy-out price. Lawrence asserts that this is the third free-standing reason why the claim for interest should be dismissed.

Reason 4: there is nothing to take this case 'out of the ordinary'

[222] It was submitted that there is nothing in this case that takes it "*out of the ordinary*" or would otherwise justify an award of interest. On the contrary, that this is a case where an award of interest would result in an unfair windfall to the Claimants.

[223] Lawrence claims that firstly, the date fixed by the Court for share valuation purposes is often a relevant factor: ***Profinance*** at para 30. For example, continues Lawrence's submission, in ***Re Apollo Cleaning***

Services Ltd. [1999] BCC 786, where a current valuation date was adopted and the continued profitability of the company was reflected in the valuation, it was held that no award of interest should be made. The position is *a fortiorari* where the minority elect an early valuation valuation date because they consider that to result in a more favourable outcome or where the delay in valuing the shares has been caused by the minority.

[224] Lawrence states that the Claimants elected 31 March 2017 as their valuation date, and that the Valuation date is very favourable to them in light, in particular, of the unrest in Hong Kong and the recent global pandemic and financial crisis: reference was made to the Phase 2A Judgment at [69]. Thus, the six-year interval between the Valuation Date and this trial is therefore attributable to a choice on the Claimants' part that the earlier valuation date would benefit them more than a later valuation date.

[225] Secondly, that interest rates have been at a historic low throughout the relevant period.Thirdly and relatedly, Lawrence has not received any dividends from JFM whereas the Claimants have received dividends totalling HK$36.2 M. Further, that all monies paid by JFM to Lawrence have been treated as loans from JFM, and therefore as assets of JFM for the purposes of the valuation. As a consequence, in addition to their dividends, the Claimants will receive the 3/17ths of the value of Lawrence's loans.

[226] Fourthly, Ms. Leahy KC asserts that the Claimants have <u>never</u> participated in JFM's activities (save for a brief period when they wrongfully removed Lawrence as a director) and have never risked their personal fortunes to keep JFM afloat. Since the Phase 1 trial, it is asserted, Lawrence has continued to risk his personal fortune, as sole guarantor of bank loans, so as to keep the business afloat.

[227] Fifthly, there has been calculated and culpable delay on the part of the Claimants, and the delay in getting to this hearing lies at the door of the Claimants.

[228] Tables of rates of interest were produced on behalf of Lawrence in Reply Submissions.

ALLOWANCE FOR SELLING COSTS

[229] The final argument advanced by Lawrence was in relation to selling costs. It was submitted that JFM cannot realise any value from the Properties without paying selling costs. Reference was made to the decision of the English Court of Appeal in ***Annacott v Maidment*** [2013] 2 BCLC 46 where it was held that an allowance should be made for selling costs in such a case at (at least 1.5%) -paras. [25] and [43].

[230] The Submissions refer to the cross-examination of the KF Expert where he said that selling costs in Hong Kong were between 1% and 3% for estate agents fees alone, and dependent on the property in question, further costs might be incurred in the form of statutory taxes. In the present case, it was indicated that Lawrence intends to sell one of the Ming group's properties in order to pay the buy-out price (as the cost of financing has increased dramatically). Once that has happened, the argument continues, the actual costs will be known. Lwrence therefore seeks an appropriate deduction from the buy-out price as determined by the Court.

[231] **CLAIMANT'S REPLY/RESPONSE RE SELLING COSTS and other matters**

[232] It was submitted in Reply that it is not that Mr. Borelli had always put forward a figure higher than Tong's re NAV and that Mr. Tong belatedly accepted it. Further, that one main issue as to the approach of the Property Experts has to do with the question of the quality of comparables. As regards the issue of Minority Discount it was submitted that it was the father John Fook who really developed the assets. Further, what is really being sold here is real estate property, and so it is unfair to say that the Claimants, siblings of Lawrence, should receive share value based on a minorty discount. In relation to interest, Mr. Parker KC argued that what is unusual here is that the Buy Out is taking place six years after the Valuation date. If Lawrence had to borrow money, he would have paid interest. As regards

selling costs, it was submitted that the Court ordered buy out can only take place by selling assets, and therfore therefore it is not appropriate to deduct sale costs.

DISCUSSION AND ANALYSIS

FIRST ISSUE-VALUATION OF KYOTA PLAZA

[233] The first matter that I recognize here is that the Court is not an expert on valuation of real estate and thus the Court must rely on the evidence placed before the Court, and in particular, that of the Property Experts.

[234] As stated earlier, a number of matters were agreed between the parties, some on the eve of trial and this includes the valuation of the other three properties, i.e.The Jade Centre, agreed at HK$459,150,000. 1Tang Road, agreed at HK$19,350,000, and Excelsior Road, agreed at HK$21,050,000. That leaves the matter of the valuation of Kyoto Plaza.

[235] There was some narrowing of the issues after cross-examination, where Mr. Alwyn Chan of KF accepted that in respect of the age adjustment for G/F shops at Kyoto Plaza a 0.8% (rather than 1%) reduction for every 10 years would be appropriate. KF's revised calculation at Kyoto Plaza was a. On the Income Approach, HK$1,433,200,000, b On the Market Approach, HK$1,398,700,000.

[236] Mr. Calvin Chan was also presented with some marked-up calculations from the Claimants overnight and he too did some recalculations. Properly calculated the Kroll figure should be HK$1,267,300,000,

[237] In my judgment, the evidence of the KF Expert, Mr. Alwyn Chang is to be preferred. This is because KF's approach complied with the IVS Standards, and that of the Kroll Expert, Mr. Calvin Chan, did not. I also found that that Mr. Alwyn Chan gave his evidence in a candid and straight-forward manner. On the other hand, I found the evidence of Mr.Calvin Chan,

particularly when speaking about the Income Approach was confusing. In his Report, the Kroll Expert did not even mention the Income Approach.

[238] The whole aim of the IVS is to secure their universal adoption and implementation across the world. The IVS are quite clear in stipulating that where the critical attribute of a property is its income-producing ability, then the income approach should be followed.

[239] IVS 105, PARA 40.2 states that "*The income approach should be applied and afforded significant weight under the following circumstances: (a) The income-producing ability of the asset is the critical element affecting value from a participant perspective….; and or (b) reasonable projections of the amount and timing of future income are available for the subject asset, but there are few, if any relevant market comparables."*

[240] It became clear that even when the Kroll Expert claimed that he had used the "term and reversion approach", he had not used that approach as the term is generally used because he still arrived at the reversion element, which is by far the most important element, by using the market approach.

[241] At the end of the day, I was left with the impression that either Mr. Calvin Chan, or his Firm Kroll were not too familiar with the Income approach.

[242] But even Kroll's use of the Market Approach presented difficulties. I accept Mr. Parker KC's arguments that Kroll 's application of the RZA was faulty because of his treatment of Units 4 and 5.

[243] I also am satisfied that Kroll's use of comparables required significant subjective adjustments, and in particular, the particular physicial aspects of D2 and D3 used by Kroll made their use as comparables questionable. It is for these main reasons that I accepted the Alwyn Chan and KF evidence over the Calvin Chan /Kroll evidence.

Second Issue- Whether the Court should make a minority Discount

[244] As learned Counsel on both sides have indicated, there is no BVI decision on this point. As Ms. Leahy KC pointed out in her written Closing

Submssions, in quasi-partnership cases, there is a presumption against the Court applying a minority discount. However, even in those cases it is only a presumption. As regards non-quasi-partnership cases, the authorities do not speak with one voice as to whether there is a presumption in favour of applying a minority discount. However, there has been a long line of English First Instance cases where the judges have made no presumption in favour of a minority discount in non-quasi-partnership cases.

[245] I accept the Claimants' primary position that the Court should follow the ***Sunrise Radio-Blue Index-Abbins-Lloyds Autobody-Smith*** line of case law, such that the following principles would apply to the application of a minority discount:

a. Even in non-quasi partnership cases, there is a "general rule" that no minority discount should be applied.
b. It is only in "*exceptional"* cases that such a discount should be brought into play.
c. Examples of such exceptional cases are those in which minority shareholders originally purchased their shares with the benefit of a minority discount, or otherwise acted so as to deserve their exclusion from the company.

[246] The oppositie approach-namely- to apply a presumption of minority discount in cases of unfair prejudice- would reward the prejudicing party and provide an incentive for unfairly prejudicial conduct. I have reviewed the numerous Commonwealth authorities cited by the Claimants and I am of the view that they support the approach favoured by the Claimants.

[247] There are a number of arguments that Lawrence put forward emanating from other aspects of this case, eg. from the Phase 1 Judgment of Leon J or the Phase 2 A Judgment of Jack J.

[248] However, in my view, the Claimants are not relying on the underlying factual matters as grounding claims, but rather simply as facts which go to the Court's broad discretion to determine a fair price in all the circumstances. There is nothing objectionable in them doing so.

[249] In my view, the Dividend Position of JFM, particularly as of since the 1994 dividend, points strongly against ordering a minority discount.

[250] It is also my view that if a minority discount were to be applied Lawrence would be significantly unjustly enriched because he would thereby receive full ownership of a company always intended to have been equally shard with his siblings, by paying only the economic value of a minority discount.

INTEREST

[251] I have read the submissions made by both parties as to interest and I do not find that there is any merit in any of the pleading or delay points. Although the Valuation Date is 31 March 2017, and it may be that the properties were worth a higher value then than they are now, the Valuation Date is not a valuation date by reference before the date of the purchase order. Money paid in 2023 or 2024 is worth less than money paid in March 2017. The Claimants are entitled to interest at a normal commercial rate which is 1% over the Hong Kong lending best rate, tables of which were exhibited to the Claimants' Opening Submissions.

SALES COSTS

[252] Lawrence's Counsel has argued that Sale Costs should be deducted. However, the Claimants' Company Valuation Experts have agreed on the value of JFM, subject to the determination by the Court of the market value of the properties. The market values of the properties do not take into account any sales costs, and both property valuers have opined on that basis. In my judgment, there has been no proper basis advanced for deducting the sale costs.

COSTS -FUTURE HEARING BEFORE A DIFFERENT JUDGE

[253] I note that at this trial, no doubt advisedly based on the amount of detail involved, no arguments were addressed as to costs. The Costs of the Phase 1 Judgment were reserved for a future hearing. I also note that the draft Order attached to the Claimants' Closing Submissions at paragraph 8, referred to the Costs of Phase 1, one-third of the Phase 2A Costs, and the

Costs of Phase 2 B from 24 August 2022, are to be the subject of a future hearing. All of these cost matters will have to be the subject of a future hearing before a different judge.

8 AUGUST 2024 CONSENT ORDER

[254] On the 8 August 2024, the parties entered into a Consent Order. I am not precisely sure how if at all it affects the figures in this Judgment. Subject to that, it appears to me that I am to assess the value of the Claimants' shares at HK$342,948,353.29(being the total value of JFM of HK$1,943,374,002 divided by 17, multiplied by 3)

[255] Quasi-interest as at the date of delivery of this judgment from 31 March 2017 to 20 November 2024, the date of delivery of judgment, at 1% over the Hong Kong best lending rate.

[256] The Claimants are to file a finalized Order/Judgment that accords with my Rulings and findings.

Mangatal J

High Court Judge

By the Court

Registrar