IN THE SUPERIOR COURT OF JUDICATURE
IN THE HIGH COURT OF JUSTICE, COMMERCIAL DIVISION
HELD IN ACCRA ON THURSDAY, 24TH OCTOBER, 2024
BEFORE HER LADYSHIP JUSTICE JENNIFER ABENA DADZIE
JUSTICE OF THE COURT OF APPEAL SITTING AS AN ADDITIONAL HIGH COURT JUDGE

SUIT NO.: CM/MISC/0034/2022

IN THE MATER OF BCM GHANA LIMITED

AND

IN THE MATTER OF THE COMPANIES ACT 2019 (ACT 992)

IN A MATTER OF AN APPLICATION UNDER SECTIONS 218 AND 219 OF THE COMPANIES ACT, 2019 (ACT 992)

BETWEEN

ANGELA DIALA LIST	**===**	**APPLICANT**
VRS.		
1. PAUL LIST	**===**	**RESPONDENTS**
2. STANDARD CHARTERED BANK GH. LTD.		
3. BCM GHANA LTD.		
4. REGISTRAR OF COMPANIES		

PARTIES:

APPLICANT REPRESENTED BY JONATHAN ADONGO (ADMINISTRATOR)	**===**	**PRESENT**
1ST & 3RD RESPONDENTS REPRESENTED BY LAURENT GABA (HEAD OF LEGAL FOR 3RD RESPONDENT)	**===**	**PRESENT**

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.....REGISTRAR
HIGH COURT
COMMERCIAL DIVISION ICC-ACCRA

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2ND RESPONDENT REPRESENTED BY AMA AKOTO NKRUMAH YEBOAH (ASSISTANT RELATIONSHIP MANAGER)	===	PRESENT
4TH RESPONDENT	===	ABSENT

LEGAL REPRESENTATION:

GRACE TORGBOR FOR THE APPLICANT (HOLDING BRIEF FOR KIZITO BEYUO)	===	PRESENT
ISRAEL ACKAH FOR 1ST AND 3RD RESPONDENTS WITH RICHMOND ADODOADJI, MAAME ADJOA DZINPA EFFISAH AND GLORIA ATSWEI MENSAH	===	PRESENT
NAA AMAKUMA BARNOR FOR 2ND RESPONDENT (HOLDING BRIEF FOR DAVID ASIEDU)	===	PRESENT

JUDGMENT

[1] By an Originating Notice of Motion filed on 19th October, 2021, pursuant to sections 218 and 219 of the Companies Act, 2019 (Act 992), the Applicant herein seeks protective orders against oppression emanating from actions of the 1st and 3rd Respondents the Applicant alleges are illegal and oppressive of her as a director and shareholder of the 3rd Respondent Company.

[2] Briefly, the facts giving rise to this case, as can be gleaned from the record of proceedings, are that Applicant alleges that she is a director and a 30% shareholder of the 3rd Respondent or the "Company". The Applicant asserts that the Company, through the 1st Respondent, applied for a loan

facility of Ten Million United States Dollars (US$10,000,000.00) sometime in July 2021, from the 2nd Respondent and same was granted.

[3] However, due to the nature of the processes and the exigencies of the time, it was agreed between the parties that an initial amount of Two Million United States Dollars (US$2,000,000.00) be disbursed to the Company, which disbursement was subsequently carried out. It is this facility that the Applicant argues or alleges was contracted without the proper corporate approvals and its disbursement placed dire financial constraints on the 3rd Respondent.

[4] The Applicant argues that this facility far exceeds the stated capital of the 3rd Respondent as provided in its Constitution. For this reason, Applicant asserts that it was required that the facility should have been approved by all the Directors of 3rd Respondent through an ordinary resolution, instead of the processes to obtain the facility being undertaken on her blind side.

[5] Applicant also accuses the 1st Respondent of engaging in actions that amount to financial malfeasance and misappropriation of the resources of the Company for his benefit and that of his assigns, who are also employees of the Company. On this, Applicant alleges that the 1st Respondent appointed additional directors, dismissed the Company's Secretary and appointed a replacement without due process or notice to her.

[6] Based on the foregoing and the instances of alleged oppression as raised, the Applicant brings this application for the following reliefs:

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(1) A declaration that the facility obtained by the 1st Respondent in the name of the 3rd Respondent (the "**Company**") from Standard Chartered Bank Ghana Ltd ("SCB") in or about February 2021 is unauthorised, unlawful and therefore void;

(2) A declaration that the Company is not liable for the repayment of the said facility to SCB;

(3) A declaration that the appointment by the 1st Respondent on 1 March, 2021 of Jeremy List, Cameron List, Michael Cooke and David Abini, as directors of the Company is contrary to the provisions of the Companies Act, 2019 (Act 992) and therefore of no effect;

(4) An order of perpetual injunction restraining Jeremy List, Cameron List, Michael Cooke and David Abini from holding themselves out or acting as directors of the Company;

(5) A declaration that meeting held by the 1st Respondents on 16 July, 2021 purportedly as a shareholders meeting is contrary to the provisions of the Companies Act, 2019 (Act 992) and therefore of no effect;

(6) A declaration that the appointment of Jeremy List as a director on 16 July, 2021 by the 1st Respondent is contrary to the provisions of the Companies Act, 2020 (Act 992) and therefore of no effect;

(7) An order of perpetual injunction restraining Jeremy List from holding himself out or acting as a director of the Company;

(8) A declaration that the removal by the 1st Respondent of Jonathan Adongo and the appointment of Gilbert Williams as Secretary to the

Company is contrary to the provisions of the Companies Act, 2019 (Act 992) and therefore of no effect;

(9) An order of perpetual injunction restraining Gilbert Williams from holding himself out or acting as the Company Secretary;

(10) A declaration that any contracts entered into between the Company and Robert Nartey, Kofi Amoakohene and Michael Cooke for the provision of services to the Company is unauthorised and therefore void;

(11) An order that the said Robert Nartey, Kofi Amoakohene and Michael Cooke refund all payments made to them by the 1st Respondent from the Company's funds or in the alternative, any such payments be surcharged against the 1st Respondent;

(12) An order restraining Robert Nartey, Kofi Amoakohene and Michael Cooke from interfering with or having anything to do with the management of the Company;

(13) A declaration that the affairs of the Company are being conducted by the 1st Respondent or the powers of the director are being exercised in a manner oppressive to and or in disregard of the proper interests of the Applicant as a member of the Company;

(14) Further and in the alternative to (13) above, the acts of the Company as conducted by the 1st Respondent is unfairly prejudicial to the Applicant's interest as a member of the Company;

(15) An order that the 1st Respondent and/or the Company purchase the Applicant's 225,420 Ordinary Shares representing 30% to be fixed by

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such valuer ("the valuer") being a firm of chartered accountants/auditors, as may within 14 days be agreed upon by the 1st Respondent or the Company and the Applicant or failing such agreement as may be appointed by the President for the time being of the Institute of Chartered Accountants in Ghana;

(16) An order that until completion of the procedure at (15) above the 1st Respondent and the Company will serve the Applicant with all future notices convening board meetings and general meetings of the Company;

(17) An order regulating the affairs of the Company by directing the 1st Respondent not to interfere with the Applicant's negotiations with Abosso Gold Fields Ltd in respect of the early termination of the Damang Mining project compensation settlement, as it is in the best interest of the Company;

(18) An order directing the 1st Respondent and the officers of the Company to grant the Applicant unhindered access to all the Companies information including bank and other financial statements, management accounts and all information relating to the management of the Company;

(19) An order that the 1st Respondent issue a counter guarantee on a full indemnity basis in favour of the Applicant in the event that CAT Finance make a demand on the guarantee issued by the Applicant in favour of CAT Finance;

(20) An order directed at the 4th Respondent to reverse all the filings made by the 1st Respondent in respect of the appointment of Jeremy List, Cameron List, Michael Cooke and David Abini as directors and Gilbert Williams as a secretary and removal of J. Adongo as the secretary.

[7] The 1st and 3rd Respondents filed a joint response in opposition to the application on November 11th, 2021. They challenged the capacity of the Applicant to initiate the proceedings in the first instance, claiming that she was neither a director nor a shareholder of the 3rd Respondent. They further denied the claims of the Applicant in their entirety.

[8] Expatiating on their stance, 1st and 3rd Respondents contend that Applicant had effectively resigned from her position as an Executive Director of the Company on 5th October, 2020. It is for this reason that they assert the Applicant is not a director of the 3rd Respondent Company and therefore lacked capacity to bring this action, among others.

[9] In their challenge to the shareholder status of the Applicant, the 1st and 3rd Respondents allege fraud among other illegalities in the execution of the Deed of Transfer (and the covering Board Resolution) by which the Board of BCM Investments Ltd, with 1st Respondent as Executive Chairman and Applicant as Director, purportedly transferred its shares held in the 3rd Respondent, BCM Ghana Ltd., to the Applicant. Their claim is that on the day the said Deed of Transfer and the Board Resolution were allegedly executed, no meeting was held at the supposed venue by BCM Investments Limited, an

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affiliate company wholly owned by the 1st Respondent [who is alleged to have transferred the shares to the Applicant].

[10] Regarding the loan granted to 1st Respondent by the 2nd Respondent, the 1st and 3rd Respondents assert that the Applicant was very much in the know and was actually involved in the processes required to secure the loan, until her resignation from the Company and its other affiliate businesses. This resignation, per the claims of the 1st and 3rd Respondents, created a vacancy that needed to be filled urgently, requiring 1st Respondent to appoint additional directors and other officers by virtue of his position as the majority shareholder and the sole surviving director.

[11] 1st Respondent further claims as the majority shareholder of the 3rd Respondent, he has managed the company prudently at all times and urges the Court to dismiss all the Applicant's allegations of financial crisis likely to be suffered by the company.

[12] The 2nd Respondent, likewise, opposes the application, denying all the claims of the Applicant by way of its Affidavit in Opposition filed on 18th November, 2021. The 2nd Respondent contends, similar to the arguments of the 1st and 3rd Respondents, that the Applicant was a part of the loan negotiating process at all material times and was copied in various correspondences in matters related to the facility, until it received notice the Applicant had resigned.

[13] The gravitas of the 2nd Respondent's claim is that it acted lawfully by granting the facility to the 3rd Respondent after assessing its credit worthiness

and should the liability of the 3rd Respondent for the loan be disturbed, it would lead to unjustly enriching the 3rd Respondent, who had benefited from the loan that was disbursed to it.

[14] It is instructive to note that the 4th Respondent, a statutory institution established to provide registration services for businesses and regulatory guidance to promote business growth and national development, opted not to participate in these proceedings for reasons best known to them.

[15] In the disposition of all issues raised before this Honourable Court in this matter and for any party to succeed on their claims and assertions, it is trite they assume the onus of proof. That party is therefore duty bound to establish the requisite degree of belief in the mind of this Court by adducing cogent evidence to prove that the likelihood of the circumstances they allege is more probable than not.

[16] Authority on this point worth refering to would include sections 10 and 14 of the Evidence Act, 1975 NRCD 323 and the Supreme court case of ***Ackah v Pergah Transport Ltd*** *[2010] SCGLR 728* at 736, where their Lordships stated:

> *"it is a basic principle of the law on evidence that a party who bears the burden of proof is to produce the required evidence of the facts in issue that has the quality of credibility short of which his claim may fail. The method of producing evidence is varied and it includes the testimonies of the party and material witnesses, admissible hearsay, documents and things (often described as real evidence) without which the party might*

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not succeed to establish the requisite degree of credibility concerning a fact in the mind of the court or tribunal of fact such as a jury. It is trite law that matters that are capable of proof must be proved by producing sufficient evidence so that on all the evidence a reasonable mind could conclude that the existence of the facts is more reasonable than its non-existence. This is the requirement of the law on evidence under section 10(1) and (2) and 11(1) and (4) of the Act.

[17] Consequently, I have given thoughtful consideration to the claims of the Parties as supported by the evidence on record and the arguments of their respective Counsels. It is on such grounding and in the light of the law and relevant authorities that I proceed to determine the issues before the Court.

[18] Before analysing the main arguments of the parties, however, I will first consider the issue of capacity of the Applicant to bring this action as raised by the 1st and 3rd Respondents, considering it is fundamental to the institution of this action. As Kpegah, JSC stated in ***Republic v High Court, Accra, Ex Parte Aryeetey [2003-2005] 1 GLR 537***, any challenge to capacity puts the validity of a writ (or any inception document such as the present originating notice of motion, in my view) in issue. He continued his discourse thus:

"It is a proposition familiar to all lawyers that the question of capacity, like the plea of limitation, is not concerned with merits so that if the axe falls, then a defendant who is lucky enough to have the advantage of the unimpeachable defence of lack of capacity in his opponent, is entitled to insist upon his rights: see the case of Akrong v Bulley [1965] GLR 469, SC."

[19] In an application, such as the present, where the right of action accrues from a statute, it is the statute's provisions that would set out the parameters under which a party may mount an action. In this instance, the Application is premised on section 218 and section 219 of the Companies Act, 2019 (Act 992) (hereinafter Act 992).

[20] For ease of reference and analysis, I will set out the relevant sections here.

Injunction or declaration in the event of illegal or irregular activity

218. (1) The Court on the application of a member may by injunction restrain the company,

(a) from doing an act or entering into a transaction which is illegal or beyond the power or capacity of the company or which infringes a provision of the constitution of the company, or

(b) from acting on a resolution not properly passed in accordance with this Act or the constitution of the company, and may declare that act, transaction or resolution already done, entered into, or passed to be void.

(2) Subsection (1) does not derogate from the protection afforded by a provision of this Act to a person dealing with the company...

Section 219 - Remedy against oppression

(1) A member or debenture holder of a company or, in a case falling within section 234, the Registrar may apply to the Court for an order under this section on the ground that

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(a) the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or debenture holders or in disregard of the proper interests of those members, shareholders, officers, or debenture holders of the company; or

(b) an act of the company has been done or is threatened or that a resolution of the members, debenture holders or a class of them has been passed or is proposed which unfairly discriminates against, or is otherwise unfairly prejudicial to, one or more of the members or debenture holders

[21] A careful reading of the aforementioned sections provides three classes of people who may seek a remedy thereunder, namely; (1) a member, (2) a debenture holder or (3) the Registrar of Companies for cases falling under section 234. No further class of persons are provided as having the capacity to initiate proceedings under sections 218 or 219 of Act 992. The question then is, does the Applicant fall within any of these classes of persons?

[22] This brings me to Applicant's claim of membership in the 3rd Respondent. Applicant asserts that she and the 1st Respondent were directors of the entity, BCM Investments Limited. As supported by the Deed of Transfer, marked and exhibited as **Exhibit "2"** of the 1st and 3rd Respondents, BCM Investments Limited held 250,733 shares of BCM Ghana Ltd., (the 3rd Respondent herein). As Transferor, BCM Investments Limited transferred to Applicant 225,420 of its shares in the 3rd Respondent. The transferred shares to Applicant represented 30% of BCM Ghana Ltd.'s issued shares.

[23] The remaining 25,313 shares of BCM Investments Ltd in the 3rd Respondent were also transferred to 1st Respondent, according to the Applicant, bringing the 1st Respondent's total shareholding in the 3rd Respondent to 525,980 shares. This represented the remaining 70% of the 3rd Respondent's issued shares.

[24] The 1st Respondent and the 3rd Respondent, however, question the legality of the Deed of Transfer, (ie **Exhibit "2"**), on the grounds that the entity "BCM Investment Services Ltd" quoted in the preamble of the document as Transferor, is not the owner of the shares of BCM Ghana Limited, but rather, "BCM Investments Limited".

[25] They argue further that this Court should find that Applicant's shares in BCM Ghana Ltd were obtained by fraud and/or the registration of same by the 4th Respondent was an operative mistake in respect of which the Court should determine that both the 1st Respondent and Applicant hold the shares in trust for BCM Investments Limited.

[26] Building on the above assertion, the 1st and 3rd Respondents further contend that the Board Resolution, **Exhibit "1"**of the Respondents (also marked as **Exhibit "AL73"** of the Applicant) and the purported Deed of Transfer, **Exhibit "2"**, were ultimately procured by fraud because on 16th November, 2018, the Applicant was not present in the offices of the 3rd Respondent as no meeting was held between the Applicant and the 1st Respondent acting as directors for BCM Investments Limited and invariably the said documents should be declared as invalid and ineffective.

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[27] It bears stressing here that no challenge has been mounted against the signatures of the parties and/or the witnesses appearing on the **Exhibits "1"** and **"2"** as not being their mark or being inauthentic.

[28] It is trite that in construing the true meaning of a document, the document must be read as a whole to extract any meaning of its constituent parts or expressions. [See the case of ***Boateng v VALCO*** *[1984-86] 1 GLR 733* **at 738].** I have perused **Exhibit "2"** and find that its purpose is to transfer shares in the value of 225,420 to the Applicant and the remainder to the 1st Respondent. On the face of **Exhibit "2"**, the deed of share transfer was signed on behalf of the Transferor by the 1st Respondent and the Applicant, both directors of the Transferor, and in the presence of witnesses, David Abini and Jonathan Adongo.

[29] Additionally, in construing the **Exhibit "2"**, as a whole, I must say that with the exception of the preamble, which bears the name "BCM Investment Services Ltd", all other instances where the name of the Transferor appeared bore the name "BCM Investments Ltd". For instance, the name of the Transferor appearing on the Title page; the Transferor's address, which is the same as indicated for BCM Investments Ltd, and the Transferor's name appearing on the signature page, were all in the name BCM Investments Ltd. In like manner, both the 1st Respondent and the Applicant had indicated "BCM Investments Ltd" under their signatures as the name of the Transferor. The fact then that a 'different' name appears in the preamble with the inclusion of 'Service' may as well have been an error, in my clear thinking.

[30] It would have been a different assertion if the entire document reflected the name BCM Investment Services Ltd, for then, the intended transferor can conveniently be stated to have been a different entity. However, as in this circumstance, the fact that the difference only exists in one part of the document leads this court to believe that it was indeed a misnomer.

[31] I find support for the position I have taken in the authority of ***Davies v Elsby Brothers, Ltd. [1960] 3 All ER 672 at 676 (CA)*** where it was posited that

> *"The test must be: How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: "Of course it must mean me, but they have got my name wrong". Then there is a case of mere misnomer. If, on the other hand, he would say: "I cannot tell from the document itself whether they mean me or not and I shall have to make inquiries", then it seems to me that one is getting beyond the realm of misnomer."*

[32] Apart from this apparent error, **Exhibit "2"** fulfilled all the requirements of the law under the Companies Act, including its stamping as exempt under the **Stamp duty Act, 2005 (Act 689)** and submission to the Office of the Registrar of Companies for registration. Here too, neither the 1st Respondent nor the 3rd Respondent raised any issue with the registration at the time.

[33] **Exhibit "1"** and **Exhibit "AL73"**, which are the same copies of the board resolution passed by the 3rd Respondent on 16th November, 2018, to authorize

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the transfer of 225,420 shares to the Applicant, and the remaining 25,313 shares to the 1st Respondent, also bear the name BCM Investments Ltd., as Transferor and not BCM Investment Services Ltd. They are all signed by both Applicant and 1st Respondent in their positions as Directors.

[34] In addition to the foregoing, I find internal company documents all further pointing to the shareholding of the Applicant in the 3rd Respondent. These are documents the 1st and 3rd Respondents drew up or have had in their possession for years and had the liberty to draw the attention of the required authorities to any discrepancies therein if they were convinced there was some foul play going on.

[35] I am here referring to the Annual Reports and Financial Statements of the 3rd Respondent dated 31st December, 2018, the page 4 thereof, where the shareholding structure of the 3rd Respondent is recorded as follows: *"The Company is owned by Paul Edward List (70%) and Angela Diala List (30%)"*. These financial statements of the 3rd Respondent were approved by the Board of Directors on 7th October, 2019 and bear the signature of both the 1st Respondent and the Applicant as Directors.

[36] Reference is also made to pages 4 and 5 of the Annual Reports and Financial Statements of the 3rd Respondent approved by its Board on 24th December, 2020 for the period ending 31st December, 2019, signed by both Applicant and 1st Respondent and reciting the same shareholding structure of 3rd Respondent, *supra*, 70% for Paul List and 30% for Angela List.

[37] At Exhibit "AL43", a search report issued by the Registrar-General's Department and dated 24th August, 2021, preceding the commencement of this action, indicates the Applicant is registered in the particulars of the 3rd Respondent held at the 4th Respondent as a shareholder with subscribed shares in the 3rd Respondent.

[38] Further, at Exhibit "AL27" is an unsigned shareholders' resolution listing the total shareholding structure of the 3rd Respondent in the share of 70% to 1st Respondent and 30% to Applicant, with a covering email issued by one R.K. Nartey instructing one Kinta Petonia to reproduce the resolution on presumably a BCM letterhead for the review of Mr. Adongo and the signatures of Applicant and 1st Respondent. The evidence of the record and Applicant's plaint, show this R.K. Nartey had at some point been engaged to assist with the day-to-day administration of the Company.

[39] I find further as part of **Exhibit "AL35"**, a notice dated 12th April, 2021, by which the 1st Respondent, describing himself as a 70% majority shareholder of the 3rd Respondent, requisitioned an extraordinary general meeting of the 3rd Respondent.

[40] All these pieces of evidence support the Applicant's claim to be a 30% shareholder of the 3rd Respondent. It is rather unpropitious to the case of the 1st Respondent to question or reprobate the veracity of the shareholding status of the Applicant on the basis of **Exhibit "2"** when it suits his cause only to approbate same in these proceedings when the same document confers on him the 70% shareholding of the 3rd Respondent.

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[41] If indeed Applicant's shares had been fraudulently obtained or had been recorded by the 4th Respondent by mistake as the 1st and 3rd Respondents would have this Court believe, or without cause, the 1st Respondent had every opportunity before the inception of these proceedings to avail itself of the provisions of section 38 of Act 992 to rectify the 3rd Respondent's register.

[42] Further to the above, I find from the interactions with the 2nd Respondent that both 1st and 3rd Respondents held out the Applicant as a shareholder even to the general public and 2nd Respondent.

[43] On the basis of the foregoing, this Court finds that the Applicant became a member of the 3rd Respondent as of 16th November, 2018. All these documents support the conclusion of this Court that the parties knew the intended Transferor of the shares in 3rd Respondent to Applicant in **Exhibit "2"** to be BCM Investments Ltd., and that the inclusion of the word 'Services' in the transferor's name in the preamble was merely a misnomer, a mistake easily rectified.

[44] The power of the court to correct a typographical error on the face of a contractual document to give effect to the intentions of the parties is well established. For as Lord St Leonard is noted to have stated in the case of ***Wilson v Wilson (1864) 5 HL Cas 40 at 66,*** *"it is a great mistake if it is supposed that even a Court of Law cannot correct a mistake or error, on the face of an instrument..."* [See also the case of ***Nittan (UK) v Solent Steel Fabrications [1981] 1 Lloyd's Rep 633].***

[45] The English court in the case of ***Davies v Elsby Brothers Ltd*** *[1960] 3 All ER 672,* discussed the test for the construction of a document and stated as follows:

> *"In English law as a general principle the question is not what the writer of the document intended or meant but* ***what a reasonable man reading the document would understand it to mean;*** *and that, I think, is the test which ought to be applied as a general rule in cases of misnomer." [Emphasis added]*

[46] As above discussed, reading the Deed of Transfer as a whole, there is no gainsaying that the parties knew and understood the Transferor to be BCM Investments Ltd. Secondly, there is ample evidence pointing to the fact that the parties to the Deed of Transfer knew who the intended Transferor is, it being BCM Investments Ltd. On that basis, I find that the Transferor on the Deed of Transfer was BCM Investments Ltd., and I hold accordingly.

[47] The 1st and 3rd Respondent invite this Court to find, in this circumstance, that the Applicant holds the shares in trust for BCM Investments Ltd. As in all matters, the onus is on the one alleging to prove that the parties had intended the shares to be held in trust for BCM Investments Ltd. To my mind, in order to establish this, the Applicant must adduce evidence to show that the Applicant does not own the shares in issue here. In the case of ***Majolagbe v. Larbi & Others*** *(1959) GLR 190 – 195) at 192,* Ollenu, J, quoting his earlier judgment in the unreported case of ***Khoury and Anor. v. Richter*** *(1958)* stated that:

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"Proof in law is the establishment of facts by proper legal means. Where a party makes an averment capable of proof in some positive way, e.g. by producing documents, description of things, reference to other facts, instances, or circumstances, and his averment is denied, he does not prove it by merely going into the witness-box and repeating that averment on oath, or having it repeated on oath by his witness. He proves it by producing other evidence of facts and circumstances, from which the Court can be satisfied that what he avers is true."

[48] That party, within the meaning of sections 11(1) and (4) of NRCD 323 has an obligation to *"... introduce sufficient evidence to avoid a ruling against him on the issue" and the evidence provided must be sufficient to enable a reasonable mind conclude "... that the existence of the fact was more probable than its non-existence"*.

[49] However, nothing in **Exhibit "2"** or any of the pieces of evidence before this Court lends credence to this assertion or specifies that the shares are to be held in trust on behalf of the 3rd Respondent. **Exhibit "2"** shows that there was an absolute transfer of the shares to the Applicant. Having signed the Share Transfer Deed, thereby agreeing to the contents captured therein, I find that it does not lie in the mouth of the 1st Respondent to now dispute its implication. The only reasonable conclusion then is that BCM Investments Ltd., fully and absolutely parted with its shares in the 3rd Respondent in favour of the Applicant and I accordingly hold as such.

[50] The 1st and 3rd Respondents impute to the Applicant fraud and forgery in the manner in which **Exhibit "2"** was executed and entered into the

Register of the Registrar of Companies. They allege that **Exhibit "1"**, the copy of the board resolution dated 16th November, 2018, and **Exhibit "3"**, the minutes of the Board Meeting of 16th November, 2018, are forgeries.

[51] In proof of their allegations they rely on **Exhibit "3A"**, which they claim is the attendance record of all staff present on the premises of 3rd Respondent on 16th November, 2018, to prove Applicant's absence from the office on that day. On this basis, they conclude no board meeting was held on that day at which both the Applicant and 1st Respondent were present.

[52] It is trite that where a crime is alleged in a civil matter, the standard of proof required is that as laid down under ***Section 13 (1)*** of the ***N.R.C.D 323***, which provides that' *"in any civil or criminal action the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt"*. Thus, the Supreme Court, in the case of ***Sasu Bamfo v. Sintim [2012] 1 SCGLR 136*** on this subject held as follows:

> *"The law regarding proof of forgery or any allegation of a criminal act in a civil trial was governed by section 13 (1) of the Evidence Act...; that section provided that the burden of persuasion required was proof beyond reasonable doubt".*

[53] But in particular, as relates to fraud, it has been held in the case of ***In re Agyepong (Decd.); Poku v. Abosi [1982-83] GLR 254, CA*** that fraud must not only be pleaded but must be clearly and distinctly proved by the man who alleged it as fraud. Another authority on this point is the case of ***Ecobank Nigeria Plc v. Hiss Hands Housing Agency and Access Bank (Ghana) Limited,***

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Civil Appeal No. J4/49/2016, delivered on the 6th of December 2017), where it was held that *"Fraud is a serious matter and when pleaded in a civil matter converts into a criminal matter which must strictly be proved."*

[54] In ***Kerr on Frauds and Mistakes, 7th edition,*** the learned author states that fraud in all cases implies a willful act on the part of anyone, whereby another is sought to be deprived, by illegal or inequitable means, of what he was entitled to. The nature of an allegation of fraud is thus such that it must be proved strictly as would be done in a criminal case.

[55] As such, the burden of persuasion required is proof beyond reasonable doubt and where fraud is proved, it vitiates everything. Reference is here made to Lord Denning's famed statement in ***Lazarus Estates Ltd. v. Beasley [1956] 1 QB 702B,*** that *"Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever".*

[56] On the point of how fraud is proven, Lord Herschell, after the exhaustive and lucid treatment of the authorities in the case of ***Derry v Peek [1889] UKHL 1(01 July 1889),*** concluded as follows:

> *"... fraud is proved, when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false*

statement being fraudulent, there must, I think, always be an honest belief in its truth."

[57] In proving the alleged fraud, then, the 1st and 3rd Respondents must be able to lead such irrefutable proof in the mind of the Court that the Applicant knowingly misrepresented the validity of the exhibits. I have assessed the evidence proffered by the 1st and 3rd Respondents and conclude no credible evidence was led in proof of their allegations. In particular, I find no evidence of forgery or fraud on **Exhibit "2"**, primarily because of the presence of the 1st Respondent's signature on the document which was not disputed. There is, in fact, no evidence on record that disputes or questions the authenticity of the signature of 1st Respondent on **Exhibits "2"** and **"3"**.

[58] With respect to **Exhibit "3A"**, I find that it is an internally generated document, partly illegible with no date indicated thereon; no evidence was proffered to the Court to show how it is even connected to **Exhibits "2"** and **"3"**. This Court, cannot, in good conscience, rely on same. On this then, I find that the 1st and 3rd Respondents have failed to lead any satisfactory evidence to prove that the Applicant committed fraud or forgery in the exhibits under reference.

[59] On the issue of Applicant's membership in the 3rd Respondent, it is my finding, in conclusion, that she holds some 225,420 shares in the 3rd Respondent amounting to 30% of the share capital and is therefore a member of the 3rd Respondent.

[60] I will now turn my attention to the issue of the alleged resignation of the Applicant from the 3rd Respondent. Applicant admits, that as an executive director of 3rd Respondent Company, she tendered in a notice of resignation as a director to 3rd Respondent. She however maintains that she still remains a director of the Company as her purported resignation was ineffective, the 3rd Respondent having refused to accept her notice of resignation. In that event, she argues that she has capacity both as a director and a shareholder/member of the 3rd Respondent to mount this action.

[61] The 1st and 3rd Respondents, on the other hand, submit that the Applicant is no longer a director of 3rd Respondent and that she voluntarily resigned from her position of Finance Director and Director, respectively. They base their claim on Applicant's **Exhibit "AL11"**, dated 3rd October, 2020, which is a formal notice Applicant wrote to 3rd Respondent, notifying the 1st Respondent of her resignation from *"the BCM Contracting business (its affiliates and subsidiaries)"* effective, Monday 5th October, 2020.

[62] Resignation is as of right and every director of a company is *prima facie* entitled to resign as they see fit. Indeed, there is persuasive authority for the proposition that if a director no longer wishes to perform his duties or he finds it impossible so to do, he may properly resign: ***Re Galeforce Pleating Co Ltd [1999] 2 BCLC 704*** and further that a director is entitled to resign from office even where the circumstances of the resignation might have a disastrous effect on the business or reputation of the company; the power to

resign not being a fiduciary one: *Hunter Kane Ltd v Watkins [2003] EWHC 186 (Ch).*

[63] The question then is, was **Exhibit "AL11"** effective in determining the position of the Applicant in the 3rd Respondent by way of resignation? Section 175 of Act 992 provides for the means by which a director may vacate office as follows:

> *"Vacation of office of director*
>
> *175. (1) The office of director shall be vacated if the director*
>
> *a) becomes incompetent to act as a director by virtue of section 173,*
>
> *b) ceases to hold office by virtue of section 174, or*
>
> *c) resigns from office by notice in writing to the company.*
>
> *(2) The constitution of a company may provide for the termination or vacation of office in circumstances additional to those specified in subsection (1)."*

[64] By the wording of section 175(1), the position is *ipso facto* vacated by the application of any of the modes outlined, that is, by the director becoming incompetent, ceasing to hold office as a result of section 174 or resigning by issuing a notice of resignation in writing to the company. No further action is prescribed under Act 992 for the company to undertake to make the resignation effective. In essence, resignation is taken to be a final unilateral act and its effectiveness does not depend on the concurrence or acceptance of the company under the provisions of Act 992.

[65] The section further provides that the constitution of the company may provide for additional circumstances to govern the resignation, a factor which the 3rd Respondent did not avail itself of.

[66] Now, **Exhibit "AL11"** shows that the Applicant had availed herself of the third option under section 175. This she deposed to in paragraph 54 of her Affidavit in Support as follows:

> *"... by a letter dated 3 October 2020 I offered to resign from the Company effective 5 October 2020 due to the 1st Respondent's insistence on allowing his friends to interfere in the affairs of the Company. I however offered to stay on until 9 October 2020 to assist in the transition as a result of my resignation. I annex marked as AL11 a copy of my resignation letter."*

[67] According to the Applicant, however, **Exhibit "AL12"**, which is the 3rd Respondent's response to the resignation, negated this resignation. In pertinent parts, **Exhibit "AL12"** stated as follows:

> *"I, Paul List, the CEO of BCM Ghana Ltd, BCM International Ltd and its subsidiaries, wish to respond as follows;*
>
> *1. Your resignation is not accepted.*
>
> *2. Your resignation is not appropriate at this time and not warranted.*
>
> *3. Roles played by staff in the BCM Group especially at very senior levels are not distinct. Any attempt to distinguish between the mining and contracting sections of the Group Company will lead to a division of the Company. The*

divisions of the BCM Group are mutually supportive and BCM Ghana Ltd, BCM International Ltd and subsidiaries provide services to the mining division, including senior management, staff and equipment.

Such a division will not be in the interest of the BCM Group at this crucial stage of its development.

4. The issues should be discussed further between yourself and I.

Myself and the general staff of BCM recognize your important role in the development of the Company up to this stage and your services should be available to all sections of the company going forward.

I, by this letter propose a meeting between yourself and I on Wednesday 7th of October 2020 at 3:00pm at the BCM Office in Labone to discuss further and resolve..."

[68] The question I find myself asking at this point is what is the effect of **Exhibit "AL12"** on **Exhibit "AL11"**? Did it indeed have the proposed effect as argued by the Applicant? To answer this, I have given careful consideration to the Constitution of the 3rd Respondent and the wording of Act 992, the section 175 thereof and I find no indication or authority bestowed on the board of directors to accept or deny the resignation of a director.

[69] Section 175(1) uses the imperative word "shall": *"The office of director shall be vacated"*. According to section 42 of the Interpretation Act, 2009 (Act 792) the use of the imperative "shall" confers a mandatory interpretation to it. Thus, once a director *"resigns from office by notice in writing to the company"*,

the office of the director is deemed vacated. What is more, I find nothing in the Constitution of the 3rd Respondent that prescribes additional action(s) to be undertaken by the board in the event of the resignation of a director under these circumstances.

[70] The case law, traced from **Glossop v Glossop [1907] Ch. D. 370** is that the resignation of a director becomes effective on and from the date proper notice is tendered or submitted. Neville J is noted to have held as follows:

> *"I have no doubt that a director is entitled to relinquish his office at any time he pleases by proper notice to the company, and that his resignation depends upon his notice and is not dependent upon any acceptance by the company, because I do not think they are in a position to refuse acceptance."*

[71] The learning from the law and this authority is that it is the director who takes the step to resign and therefore, it is an act independent of the company and remains unaffected by any action of the company, whether concurrence, acceptance or even refusal of the resignation by the company. In these circumstances, it is my candid view that **Exhibit "AL12"** had no effect on the resignation of the Applicant in the manner argued by the Applicant.

[72] To my mind, what **Exhibit "AL12"** sought to do was to persuade the Applicant to withdraw her resignation from the board and continue in office, a common happening in the corporate world. However, such withdrawal cannot be unilateral on the part of the Applicant. The question whether such withdrawal can be unilateral came up for determination in Andhra Pradesh

High Court, India, in the case of ***Smt. Renuka Datla v Biological E Ltd.*** *(65 Taxmann.com52)*. It is stated the court held that

> *"... whilst it is the prerogative of the Director to resign his position unilaterally, the withdrawal of the resignation cannot be unilateral and it can be acted upon only if the Board has reconsidered the issue and allowed the Director to withdraw his resignation. Till such time this happens, the resignation of the Director shall continue to be valid."*

[73] This decision is in keeping with the earlier case of ***Glossop v Glossop case***, *supra*, where Neville J aptly stated in the concluding part of his discourse referenced above that

> *"...Consequently, it appears to me that a director, once having given in the proper quarter notice of his resignation of his office, is not entitled to withdraw that notice,* ***but if it is withdrawn, it must be by the consent of the company properly exercised by their managers, who are the directors of the company [emphasis added]***

[74] I am persuaded by the foregoing authorities that the proposition that a Director who has by notice resigned, may withdraw that resignation, but only with the consent of the Company is sound in law and I shall apply it to the case at hand. Further, such withdrawal, in my opinion, may be express, as in a written notice or implied, by the director continuing to act in that capacity with the consent and validation of the board of directors. Whether or not the

Applicant withdrew her resignation thus becomes a question of fact to be established by the evidence on record.

[75] It is not clear to the Court, from the record before it that the Company held any follow up discussions with the Applicant to resolve their impasse following her resignation, as indicated on **Exhibit "AL12"**. What is clear from the record, though, is that Applicant, subsequent to the resignation date of 5th October 2020, continued in her position as Executive Finance Director.

[76] This fact was understood and accepted by the 1st Respondent and the 3rd Respondent, as they continued to hold her out as a director in all dealings internally and to third parties, well past the 9th October 2020 date stated in the paragraph 54 of Applicant's Affidavit in Support, *supra*, and until that fateful March 18th 2021 email, **Exhibit "AL20"** was received.

[77] The fact that the Applicant continued in her work as Director is borne out by such acts as approving and signing the 2018 Annual Reports and Financial Statement of the 3rd Respondent at the 24th December 2020 board meeting, copy of which is marked as **Exhibit "AL10"**. Implicit in **Exhibits "AL13"** and **"AL16"**, which are the email correspondence of R. K Nartey and Jonathan Adongo, wherein Applicant is referenced as a director, is the fact of the acknowledgment by the 1st and 3rd Respondents that the Applicant continued in her role as a director of the 3rd Respondent well into the year 2021.

[78] In particular, paragraph 1 of **Exhibit "AL13"** sent on 1st March 2021 is instructive; it states

"I will discuss the matters relating to Board membership with Paul and Angie and get back to you on the proposed additional members on the Boards of BCM Ghana Ltd and BCM International Limited",

and further at paragraph 4 that

"Given that currently, there are only two members of the Board in the person of Mr and Mrs List, four additions are requested to be added as members, bring the total to a 7-man Board, with the Board Secretary".

Again, at page 3, paragraph 2, Mr. Nartey continued as such

"continuation of the email correspondence between R.K Nartey and Jonathan Adongo: that in executing the above assignments, Mrs List is a director and shareholder of BCM Ghana and BCM International. Do inform her of developments with the consent of Paul".

[79] In **Exhibit "AL16"**, which is dated 15th March, 2021, R.K. Nartey sought to convince *"Paul and team"* to accept Applicant's resignation effective 1st February 2021, as the "line manager in the company (i.e. manager, administration and finance) and also as a sitting director" to avoid, what he stated, *inter alia*, the collapse of BCM within 90 days therefrom to enable Paul to take full control of operations of the company. The Paul referred to here, I must add, is the 1st Respondent herein.

[80] Before I conclude on this issue, I will comment on **Exhibit "AL21"**, which was sent to Applicant by the email captured in **Exhibit "AL20"**. If the purpose of **Exhibit "AL21"** was to accept the resignation of the Applicant,

which was to be effective 5th October 2020 per **Exhibit "AL11"**, why then was the effective date quoted therein as February 2021? I find that **Exhibit "AL21"**, which purports to accept Applicant's resignation is of no effect, for to hold otherwise would be to allow the 3rd Respondent, and in effect, the 1st Respondent, to have held the Applicant as a puppet to its whims and caprices, easily to be dispensed with at a time of their choosing.

[81] From the foregoing, it is my finding that on the record, even though by **Exhibit "AL11"** Applicant resigned her position as Director of the 3rd Respondent, there is ample evidence that supports a finding that she subsequently withdrew that resignation with the consent of the Company by her continuing in her position of finance director of the Company well past the effective date her resignation had been pegged.

[82] On the basis of the foregoing then, I find that the Applicant remains a director of the 3rd Respondent and I hold as such accordingly.

[83] I have, from the foregoing resolved that the Applicant is a member of 3rd Respondent and a director of same. I find, therefore, she has the capacity to institute this action. I will proceed to examine the substantive issues raised. As the claim of the Applicant is hinged on both sections 218 and 219 of Act 992, the core issue to be determined is whether the facts support such finding of oppression as she alleges.

[84] Having satisfied the first leg of the sections pertaining to who can institute an action under these sections, the next step is to ascertain whether the acts complained of concerning the conduct of the affairs of the Company

or the exercise of the powers of its directors are oppressive or in disregard to the interest of the 1st Applicant as a member/director/officer of the company.

[85] In determining this issue, the question I find myself asking is who has the conduct of the affairs of the company? The answer to this query is found in the judgment of Justice Taylor, (as he then was), in the case of ***Luguterah v. Northern Engineering Co., Ltd. And Others*** *[1978] GLR 477-509*, where he commented on the unanimous ruling of the House of Lords in the landmark United Kingdom company law case of ***Salomon v. Salomon & Co Ltd.*** *[1896] UKHL 1*, stating that even though a company is a separate legal entity from its members, a company cannot act by itself and that it is a fundamental philosophy of modern company law that upon incorporation a company acts by or on the authority of its directors or its members.

[86] It is important to note however that not every such act of the directors or members constitutes an act of the company. Section 147 of Act 992 defines "acts of a company" to be:

> *"An act of the members in general meeting, of the board of directors, or of a managing director while carrying on in the usual way the business of the company, is the act of the company; and accordingly, the company is criminally and civilly liable for that act to the same extent as if the company were a natural person."*

[87] These are the categories of persons with the authority to bind the company. It is also clear from Section 148(1)(a) of the Companies Act that an officer or agent of a company also may act on behalf of a company at any time.

But, for the actions of the officer or agent of the company to qualify as acts of the company, that officer or agent must have either impliedly or expressly been authorised to so act in the matter by the categories of persons above mentioned, that is,

(i) The members in general meeting;

(ii)The board of directors; or

(iii)The managing director.

[88] Were the alleged acts complained of 'committed' by any of these categories of persons? To adequately determine this, I will here set out in detail the acts that the Applicant complains of. The Applicant has alleged that the 1st and 3rd Respondents have undertaken the following acts without regard to her and which acts are prejudicial and detrimental to her interest as a minority shareholder and can be characterized as oppressive:

a) That without her involvement and approval, the 1st Respondent contracted a loan facility in the name of the 3rd Respondent from the 2nd Respondent of Ten Million Dollars of which Two Million Dollars has been drawn down and disbursed.

b) That the 1st Respondent unilaterally appointed Jeremy List, Cameron List, Michael Cooke and David Abini as directors in March 2021 without her knowledge nor approval and sought to requisition an extraordinary meeting to ratify the appointments on 22 April 2021 and subsequently, 16 July 2021, all in breach of the provisions of the

Companies Act, 2019 (Act 992) and the constitution of the 3rd Respondent.

c) That the 1st Respondent caused the filing of Form 17 to be filed, notifying the 4th Respondent of the alleged appointment of the above-named on March 30, 2021 without Applicant's approval

d) That the 1st Respondent held a meeting that resulted in the appointment of Jeremy List, Cameron List, Michael Cooke and David Abini as directors of the 3rd Respondent.

e) That the 3rd Respondent called a purported shareholders meeting on July 1 2021 without her knowledge

f) That the removal of Jonathan Adongo was not sanctioned by the Applicant and the Applicant did not authorize the appointment of Gilbert Williams as the new secretary.

g) That the 3rd Respondent has refused to give notices of any meetings to the Applicant and has refused to furnish her with all statutory documents such as financial statements that affects the 3rd Respondent.

h) That the 1st Respondent is misusing the resources of the 3rd Respondent for his own individual benefit and has allowed his 'cronies' to be meddling into the affairs of the business.

[89] From the above, it is obvious that the 'source of these alleged actions complained of is none other than the 1st Respondent who is both a director, as well as a member. Secondly, these acts complained of are actions deemed

to be comprised in the management or administration of the company, to wit: appointment of directors, convening of meetings, removal of directors etc., and concern decisions taken which are the prerogatives of either members or directors at a properly convened meeting.

[90] These acts, although allegedly initiated by the 1st Respondent, carry with them the weight of the Company as a whole and can be deemed as acts of the Company properly so called in so far as they were made during either shareholders' meetings or directors' meetings.

[91] The final leg the Applicant must satisfy is to show that the acts complained of are oppressive to her. As held in the case of ***Asafu-Adjaye & Ors v. Agyekum*** *[1984-86] 1 GLR* 382 relying on the case of ***Okudjeto v. Irani Brothers*** *[1974] 1 GLR 374, "to bring the petition at all under section 218 (1) there must be proof that the conduct complained of is oppressive to one or more of the members"*. This case was decided pursuant to the provisions of the repealed Companies Act, 1963, Act 179; the equivalent section under the current Act 992 is section 219.

[92] Of the word "oppressive", Apaloo JA (as he then was), in ***Mahama v Soli*** *[1977] 1 GLR 215*, stated as follows:

> *"The word "oppressive" in section 218 (1) of Act 179 is not a term of art. In Re H. R. Harmer Ltd. [1958] 3 All E.R. 689 at p. 690, C.A. it was said the word must be construed in its ordinary sense and means, burdensome, harsh and wrongful."*

[93] Similarly, in the case of ***Asafu-Adjaye v. Agyekum***, *supra,* the court stated, relying on the cases of ***Scottish Co-operative Wholesale Society Ltd. v. Meyer*** *[1959] A.C. 324* and ***In re Lundie Brothers Ltd.*** *[1965] 2 All E.R. 692* that the word oppressive means:

> *"...burdensome, harsh and wrongful, and a petitioner must establish not only that the affairs of the company have been conducted in an oppressive manner in this sense, but also that there has been some element of lack of probity or fair dealing to him in his capacity as a shareholder".*

[94] The pronouncements in ***Pinamang v Abrokwa*** *[1991] 2 GLR 384 @ 388,* which provide a further useful guide to the attitude of the Courts when remedies against oppression are sought, state that it must be proved that:

a) The action was commenced with the genuine object of obtaining the relief claimed and not for exerting pressure in order to achieve a collateral purpose.
b) The matters complained of must affect the person alleged to have been oppressed in his character as a member of the company and not in any other capacity.
c) The applicant must adduce evidence seeking to show a chain of events and occurrences of harsh and burdensome conduct which continued up to the date of presentation of the petition.
d) The court is, however, precluded from inquiring into matters of internal management or, at the instance of a shareholder, interfering with transactions which though prima facie irregular and detrimental to the

company, were capable of being rectified by an ordinary resolution of the company in general meeting.

[95] Can the acts complained of then be deemed oppressive? Per the provisions of Act 992, specifically, section 172, the power to appoint a director is by the continuing directors (in respect of a casual vacancy) or by the shareholders at an ordinary meeting. The decision to choose either or even both is relegated as the prerogative of the company itself through its Constitution. In the case of the 3rd Respondent, it is apparent from **Exhibit "AL41"** that that responsibility is left to the members of the company.

[96] In the instant case, the 1st Respondent sought to appoint these individuals and then ratify the said appointments through the extraordinary shareholder's meeting he requisitioned subsequently. [See **Exhibits "AL32" and AL 35**]. It was for this reason that the Applicant states she remonstrated against the appointments evidenced in **Exhibit "AL33"** and "AL 35", the Notice of Change of Director or Notice of Change in the Particulars of a Director or Secretary, by a letter dated 21st April, 2021, a copy of which is marked in evidence as **Exhibit "AL33"** and then again for the extraordinary meeting slated for 16th July 2021, copy of which is marked **Exhibit "AL40"**.

[97] There is no evidence provided that notice was given to the Applicant for a meeting to appoint these persons before their appointments were effected. What 1st Respondent sought to do instead was to request for a meeting to ratify the appointments which Applicant objected to. Despite her objections, the record reflects that the 1st Respondent proceeded to hold the

said meeting, without quorum, to regularise the appointments of the directors and further to remove Jonathan Adongo as secretary and appoint Gilbert Williams in his stead.

[98] I must here state, as I have earlier found, that there was no vacuum created in the management board of the 3rd Respondent, as Applicant was still continuing in her office as director of the 3rd Respondent. Additionally, there was no due process followed in the making of the aforementioned appointments and removals. There is no gainsaying, then, that these actions were also against the interests of the Applicant. They therefore can very well be deemed as oppressive of the Applicant.

[99] I find further that the refusal of the 1st and 3rd Respondents to furnish Applicant with relevant company information is an act of oppression. A member with shares in a company is entitled to know the operations of the company and must be furnished on demand, with the financial statements, meeting records, contracts, and records of share transactions of the company, for instance. I find that the case of the Applicant has been made out on this score.

[100] I will now turn to the issue of the loan facility granted 3rd Respondent by 2nd Respondent. From the evidence before this court, the following chronology of events can be ascertained. The 3rd Respondent applied for a Ten Million Dollar facility from 2nd Respondent in the early part of 2021 for the purpose of refurbishing their company's mining equipment which was subsequently approved. On 24 February, 2021, the 2nd Respondent offered to

disburse Two Million Dollars Facility bridge loan to the 3rd Respondent and this offer was accepted by the 3rd Respondent on 25 February, 2021. 2nd Respondent then proceeded to disburse the funds on 26 February, 2021.

[101] However, on 10th March, 2021, the Applicant sent a letter to the 2nd Respondent cautioning it to refrain from disbursing any facility to the 3rd Respondent on the grounds that Applicant had not consented to this facility. A copy of this letter is marked in 2nd Respondent's evidence as **Exhibit "TAA5"** and in the Applicant's as **Exhibit "AL14".**

[102] Also, the Applicant attached **Exhibit "AL28"**, a letter to one David Abini, an employee of the 3rd Respondent cautioning him to desist from signing the facility letter for the loan. But, by this time, the 2nd Respondent had already disbursed the abridged loan of Two Million Dollars to the 3rd Respondent before it received the letter of caution from the Applicant on 26th February, 2021 as shown in **Exhibit "TAA7".**

[103] According to the Applicant, the facility of Ten Million Dollars from the 2nd Respondent was in excess of 3rd Respondent's stated capital, which is valued at GH¢751,000.00 as shown in its Financial Statements, **Exhibit "AL41"** contrary to section 189(9) of Act 992. Secondly, that the named officers who acted on behalf of the 3rd Respondent and gave instructions to receive the mandate to draw down on the facility of Two Million Dollars were unauthorized to do so because it is only the Shareholders who can request and authorize the grant of such facilities in an ordinary resolution.

[104] *Byers v Chen Ningning [2021] UKPC 4***Error! Bookmark not defined.**, a decision emanating from the Privy Council of the UK and only of persuasive authority, held that *"a director who knows that a fellow director is acting in breach of duty or that an employee is misapplying the assets of the company must take reasonable steps to prevent those activities from occurring"*, which is what Applicant sought to do when she objected to the grant of the facility under discussion. The question this raises is whether her fears are justiciable?

[105] ***Section 189(9) of Act 992*** provides as follows:

> *"Except as otherwise provided in the constitution of a company, the directors of a company with shares shall not, without the approval of an ordinary resolution of the company, exercise the powers of the company to borrow money or to charge any of the assets of the company where the moneys to be borrowed or secured, together with the amount remaining undercharged of moneys already borrowed or secured, apart from temporary loans obtained from the bankers of the company in the ordinary course of business, will exceed the stated capital for the time being of the company."*

[106] 2nd Respondent, on the other hand, argues that it has at all material times transacted with the 3rd Respondent in good faith. As a lender, it conducts due diligence on every borrower on their creditworthiness. It further says that given the past transactional history between the 2nd Respondent and the 3rd Respondent, it had no doubt that the Ten Million Dollar facility would be repaid.

[107] I must here state that during the pendency of this matter, the 1st and 3rd Respondents adduced evidence to show repayment of the Two Million Dollars ($2,000,000.00) to the 2nd Respondent as per the terms of the facility agreement. As such, I find that the issue raised by this relief had been settled to a large extent. However, for the purposes of this Judgment, I will proceed with the analysis of the issue. It is pertinent to note that section 189(9) of Act 992 does not automatically render a facility obtained in excess of the stated capital of a company unenforceable. This is because of the exceptions stated in section 189(10) of Act 992.

[108] Act 992 envisages a point where a person may have dealt with the company in good faith without knowledge of the fact that the transaction may be classified as unlawful due to its excessive nature. The relevant provision, Section 189(10) of Act 992, provides that "a *person dealing with the company in good faith or registering a disposition of, or title to, property shall not be concerned to see whether the conditions of this section have been fulfilled, and sections 147 to 151 shall apply to a transaction of the type referred to in this section although the conditions have not been fulfilled*".

[109] A lender, as the 2nd Respondent, acting in good faith is therefore under no obligation to inquire into the dealings of a borrower to find out if it has complied with the conditions in section 189. Section 189, in my clear thinking, is an innovative step seeking to do away with the ultra vires doctrine as it relates to corporate management as existed under the repealed Companies Act, 1963, Act 179, see section 25.

[110] From the evidence before this Court, I find that the 2nd Respondent only became apprised of the internal wrangling between the Applicant and 1st Respondent after it had disbursed the facility. To this end, I am convinced it acted in good faith in approving and disbursing the facility to the 3rd Respondent.

[111] Indeed, in the email correspondence between the 3rd Respondent and the 2nd Respondent, I find that the Applicant was copied in them and can be deemed to have known of the loan facility weeks before she wrote that letter to the 2nd Respondent. If the Applicant knew as a fact that the facility was above the stated capital of the 3rd Respondent and therefore required shareholder approval, why did she not speak up earlier, but sat down at least two weeks after that February exchange before notifying the 2nd Respondent.

[112] Secondly, nothing has been placed before the court to prove that the disbursed funds were not used for the purposes intended, to wit, the refurbishment of 3rd Respondent's mining equipment and that it was exclusively used for the benefit of the 1st Respondent as alleged by the Applicant. If this is so, then it stands to reason that the 3rd Respondent has benefitted from the facility granted and further stands to make profit from the use of the refurbished equipment and by extension, the Applicant herself, as a shareholder.

[113] To accede to the request of the Applicant to hold 1st Respondent solely liable for the facility will be nothing short of disingenuous on her part and the 3rd Respondent would have unjustly enriched itself. On the equitable

principle of unjust enrichment, see the concurring opinion of Edusei, JA, in *Quagraine v Adams [1980] GLR 599* relying on *Brook's Wharf and Bull Wharf Ltd. v. Goodman Brothers [1937] 1 K.B. 534* at p. 545, C.A. The test of recovery based on the principle of unjust enrichment has been generally suggested to be, not a loss to the party who has parted with the benefit, but an unjust gain to the other party, out of whom such gain must be compelled. It was the 3rd Respondent that benefited from the facility. 3rd Respondent thus cannot be allowed to enjoy this benefit without repaying the 2nd Respondent.

[114] So, is the Applicant entitled to her claims? With respect to reliefs (1) and (2) seeking a declaration that the facility obtained by the 1st Respondent in the name of the 3rd Respondent Company from Standard Chartered Bank Ghana Ltd., in or about February 2021 is unauthorised, unlawful and therefore void and that the company is not liable for its repayment, having earlier found no evidence of it being unauthorized or unlawful, and that 3rd Respondent benefited from the facility, I find that the relief of the Applicant must fail and I hold so accordingly. Reliefs (1) and (2) therefore fail and are dismissed.

[115] On relief (3) seeking a declaration that the appointment by the 1st Respondent on 1st March, 2021 of Jeremy List, Cameron List, Michael Cooke and David Abini, as directors of the Company is contrary to the provisions of the Companies Act, 2019 (Act 992) and therefore of no effect, having found that indeed the appointments contravened the provisions of Act 992 and were made without due process, I hold the appointments to be invalid and of no effect. Relief (3) is granted accordingly.

[116] On the same reasoning, I find that the meeting of 16th July 2021, and the appointment of Jeremy List as a director on said date are also of no effect, not having complied with the statutory requirements. Reliefs (5) and (6) are therefore granted.

[117] On reliefs (4) and (7) which seek an order of perpetual injunction restraining Jeremy List, Cameron List, Michael Cooke and David Abini from holding themselves out or acting as directors of the Company, I must here restate that the appointment of directors is the prerogative of the board of directors or the members of a company. Therefore, should the 3rd Respondent, following due process and through its members/director wish to appoint said individuals as directors, this court cannot proscribe them from doing so. In light of this, a perpetual injunction cannot be placed on them from acting as directors in so far as the proper means have been utilized in appointing them in the future. Reliefs (4) and (7) are dismissed.

[118] With regards to Reliefs (8) and (9), having earlier found that the removal of Jonathan Adongo as secretary and the subsequent appointment of Gilbert Williams were made contrary to the provisions of Act 992, I hold that the appointment and removal are invalid and of no effect. However, with same reasoning given in respect of reliefs (4) and (5) above, this court cannot grant an order of perpetual injunction for futuristic actions of the 3rd Respondent. Relief (8) is granted whiles relief (9) is denied.

[119] Concerning reliefs (10), (11) and (12), and the contracts between the 3rd Respondent and Robert Nartey, Kofi Amoakohene and Michael Cooke for the

provision of services, Applicant argued that said contracts were unauthorized and thus void. The Court notes that the nature of business between the 3rd Respondent and these named individuals is contractual in nature. Applicant contended that due to the familiar relationship between these named individuals and the 1st Respondent, they will collude to dissipate or misuse the resources of the 3rd Respondent. I find no evidence before this Court to support this assertion.

[120] The 1st Respondent in his capacity as the Managing Director of the 3rd Respondent, engaged these individuals in different capacities to perform diverse roles and provide different services for the 3rd Respondent. The Applicant failed to show how their contracts of engagement were unauthorised and also failed to show in what way the collusion or dissipation of resources occurred or would occur. Without more, this Court cannot invalidate the contracts between the 3rd Respondent and Robert Nartey, Kofi Amoakohene and Michael Cooke for the provision of services on the basis of the presumption of regularity. [See section 150 of Act 992]. Reliefs (10), (11) and (12) are also denied and dismissed.

[121] On reliefs (13) and (14), having earlier found that the actions of the 1st Respondent complained of were inimical and prejudicial to the interests of the Applicant and further that the said actions were oppressive, I find that the claim of the Applicant in this regard has been made and I hold as such. Accordingly, reliefs (13) and (14) are granted. It is therefore declared that on the evidence of the record, the affairs of the 3rd Respondent Company are

being conducted by the 1st Respondent in a manner oppressive to and or in disregard of the proper interests of the Applicant and/or is unfairly prejudicial to the Applicant's interest as a member of the Company.

[122] Flowing from the above, then, I find that due to the impasse between the parties, the activities of the 3rd Respondent will be unduly affected. As such, it will be prudent to grant the relief (15) of the Applicant to have the 1st Respondent and/or the Company buy her out of her shares of 225,420 representing 30% of the shareholding in 3rd Respondent Company. A fair market value is to be assessed and fixed by a valuer appointed by the Applicant and the 1st Respondent within fourteen (14) days from this Judgment or failing such agreement, as may be appointed by the President for the time being of the Institute of Chartered Accountants in Ghana.

[123] Pending this buy-out, the Applicant, being a director and member of the 3rd Respondent, is to be served with all future notices convening board meetings and general meetings of the Company. Similarly, Applicant is to be furnished with all necessary documents and granted unhindered access to Company information including bank and other financial statements, management accounts and all information relating to the management of the Company. Reliefs (15), (16) and 18 are hereby granted as well.

[124] Applicant by her relief (17) seeks a Court Order regulating the affairs of the Company by directing the 1st Respondent to not interfere with the Applicant's negotiations with Abosso Gold Fields Ltd., in respect of the early

termination of the Damang Mining project compensation settlement, as it is in the best interest of the Company.

[125] The Applicant contends that it is in the best interest of the Company if she continues to lead negotiations with Abosso Gold Fields Ltd., in respect of the early termination of the Damang Mining Project compensation settlement. Yet, at the same time, she is making serious attempts to severe her relationship with the Company by asking this Court to order for a buy out of her shares. The Court hereby refuses such a request as a grant of it will be impracticable especially as Applicant's relief (15) of a buy-out has been granted by this Court. Applicant's relief (17) is therefore denied and dismissed.

[126] Concerning Applicant's relief (19), which seeks an order for the 1st Respondent to issue a counter guarantee on a full indemnity basis in favour of the Applicant in the event that CAT Finance make a demand on the guarantee issued by the Applicant in favour of CAT Finance, I find that Applicant admits that the One Hundred Million Facility with CAT Finance had been repaid in paragraph 55 of her Supplementary Written Submissions filed on 16th February, 2024.

[127] It is trite that where a party has admitted a fact in controversy, no principle of law requires the other party to prove that admitted fact. This is a legal proposition well known to lawyers and is succinctly captured in the case of *West African Enterprises Ltd v. Western Hardwood Enterprise Ltd [1995-96] 1 GLR 155 -176.*

[128] The exceptions to this principle are where that admission is contradicted subsequently by showing that it was made through a palpable mistake, or that the admission was obtained by fraud, or no such admission was made in the first place, none of which exceptions is at play here. Applicant's deliberate, clear, and unequivocal admission about the repayment of the One Hundred Million Facility to CAT Finance is, therefore, binding and conclusive against her.

[129] In any event, 1st Respondent also exhibited a Deed of Discharge, marked as **Exhibit "13A"**, to further confirm that the CAT facility has been repaid. On this basis, I find that no issue arises in respect of this relief for determination as same is moot, the fear anticipated by the applicant no longer existing. The relief (19) is therefore denied.

[130] Relief (20) seeks an order directed at the 4th Respondent to reverse all the filings made by the 1st Respondent in respect of the appointments of Jeremy List, Cameron List, Michael Cooke and David Abini as directors and Gilbert Williams as a secretary and the removal of J. Adongo as the secretary.

[131] I have earlier found in this Judgment that the respective appointments and removal of the named individuals did not follow due process and were effected in violation of the Companies Act. It is therefore appropriate, as I find it, for the 4th Respondent to reverse all filings effected in respect of the appointments and removal in issue until such time that due process is followed to appoint them or other persons as the 3rd Respondent decides. Relief (20) is accordingly granted.

[132] Consequently, it is hereby ordered that 4th Respondent reverse all the filings made by the 1st Respondent in respect of the appointments of Jeremy List, Cameron List, Michael Cooke and David Abini as directors and Gilbert Williams as a secretary and the removal of J. Adongo as the secretary.

[133] In conclusion, the case of the Applicant succeeds in part and judgment is entered accordingly. On the issue of costs, I award costs of Fifteen Thousand Ghana Cedis (GH¢15,000.00) in favour of the 2nd Respondent assessed against the Applicant. In respect of the Applicant, the 1st and 3rd Respondents, and the 4th Respondent, I make no order as to costs. Each of these parties is to bear the costs occasioned to them by reason of these proceedings.

(SGD)
JUSTICE JENNIFER ABENA DADZIE
JUSTICE OF THE APPEALS COURT
(SITTING AS ADDITIONAL HIGH COURT JUDGE)

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