Neutral Citation Number: [2024] EWHC 1056 (Ch D)

Claim No: CR-2021-000718

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

IN THE MATTER OF SPRING MEDIA INVESTMENTS LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

The Rolls Building
7 Rolls Buildings
Fetter Ln
London EC4A 1NL

Date: 3 May 2024

Before:

MR. SIMON GLEESON
(sitting as a Judge of the Chancery Division)

- -

Between:

SAXON WOODS INVESTMENTS LIMITED **(a company incorporated under the laws of the Bahamas)**	**Petitioner**
- and -	
(1) FRANCESCO COSTA **(2) FAR EAST MEDIA HOLDINGS PTE LIMITED** **(a company incorporated under the laws of Singapore)** **(3) GROSVENOR INVESTMENT PROJECT LIMITED** **(4) HDO HOLDING LIMITED** **(5) BAY CAPITAL INVESTMENTS LIMITED** **(a company incorporated under the laws of Mauritius)** **(6) KHATTAR HOLDINGS PRIVATE LIMITED** **(a company incorporated under the laws of Singapore)** **(7) SIMON POWELL** **(8) SPRING MEDIA INVESTMENTS LIMITED**	**Respondents**

- -

- -

MR. EDWARD DAVIES KC and **MR. JACK RIVETT** (instructed by **Stephenson Harwood LLP**) appeared on behalf of the **Petitioner**

MR. RICHARD HILL KC and **LARA HASSELL-HART** (instructed by **DLA Piper**) appeared on behalf of the **First Respondent.**

THE SECOND TO EIGHTH RESPONDENTS were not present and were not represented

- -

APPROVED JUDGMENT

MR. SIMON GLEESON :

1. This Judgment addresses the large number of issues that were raised before me in the further hearing in this matter on issues consequent upon my Judgment of 22 February 2024. Both the Petitioner and the First Respondent seek to appeal against certain (different) aspects of my Judgement in this matter, and there are a number of other issues that are required to be dealt with. I address these in the order set out below. References marked J. in square brackets are to the relevant paragraph of my Judgment.

   (1) Directions for the trial of issues of quantum (the "Quantum Trial").

   (2) Leave to appeal – general.

   (3) The Petitioner's application for permission to appeal.

   (4) The First Respondent's application for leave to appeal.

   (5) The costs of the Liability Trial.

   (6) Injunctive relief in respect of the misuse of Company funds and its costs.

   (7) The form of the order.

The Facts

2. The basic facts, as set out in my Judgment, are that the Company was originally wholly owned by Mr Loy (his shares have now been transferred to the Petitioner to hold as nominee for – I understand - members of his family)[J.17]. His ownership was diluted through a series of capital raisings, each of which involved the making of a written shareholders agreement (SHA) between the company and its shareholders

[J.22]. By the time of the last of these, the Petitioner's holding had fallen to 22.33% of the Company [J.24]. The other investors were financial investors seeking a short-to-medium term return, and no one investor had overall control [J.19 and 22]. The SHA required all parties to "… work together in good faith towards an Exit [defined as a sale of all or substantially all of the shares in the Company] no later than 31 December 2019." and to "...give good faith consideration to any opportunities for an Exit [arising before that date]" [J.10 and 11].

3. No single investor had overall voting control of the Company, but the First Respondent, Mr Costa, had brought in a number of the investors, and they were inclined to leave control of the running of the company to him in his capacity as chairman [J. 200 and 225]. Mr Costa believed that the Company would raise a better price if its sale were delayed beyond 31 December 2019 [J. 208]. He therefore used his position as the director responsible for the conduct of the sale process to delay that process, and to rebuff offers received during the period [J. 208]. As a result of his conduct, the Company breached its obligations under the SHA [J.200]. The Petitioner, who throughout this period had been clamouring for the company to be sold by the specified deadline, alleges that it thereby suffered unfair prejudice within the meaning of s.994 of the Companies Act 2006.

4. I do not think that there is any doubt that the affairs of the Company were conducted in a way which was unfair to the Petitioner, and that Mr Costa was responsible for that state of affairs. However, there is real doubt as to whether the result of Mr Costa's conduct has caused any significant prejudice to the Petitioner. The reason for this is that it seems to have been agreed by all of the investors in the company (including the Petitioner) that an offer received below a certain level (I have found

$75m net of debt) would not have been accepted in any event [J.258]. There was (pursuant to the case management order) no evidence as to valuation before me at trial, but it was clear from the expert evidence submitted that the Petitioner believed that, given the state of the company at the relevant period, any offer received would have been in excess of that amount, and the First Respondent believed that, for the same reason, any offer received would have been below it. There is to be a separate trial on issues of quantum (the "Quantum Trial") in order to establish what the likely level of a binding offer received for the Company at that time would have been.

5. If the outcome of the Quantum Trial is that, even if Mr Costa had performed his obligations properly, the resulting offer would have been at a level which the shareholders (including the Petitioner) would have rejected, then it is impossible to say that the Petitioner has suffered any substantial prejudice – the prejudice of which he complains, and which was the platform for his case at trial, was that he had lost the financial benefit of the potential sale. The position is therefore that in order to show non-trivial prejudice, the Petitioner must show that the result of the unfair behaviour was that he lost the opportunity to exit the Company.

(1) Directions for the Quantum Trial

6. The question to be determined at the Quantum Trial is: "at what level an offeror who had done proper due diligence on the Company would have pitched their final binding offer" [J.256]. If it is concluded at the Quantum Trial that a final offer of more than $75m net of debt would have been received for the Company, then the First Respondent must purchase the Petitioner's shares at the price of 22.33% of that valuation [J.263].

7. This question is to be answered on the basis of expert evidence, with each party being permitted to adduce an expert in the field of share valuation with instructions to value the entire issued share capital by reference to what a buyer with knowledge of all material facts would have been prepared to pay to the existing shareholders for 100% of the issued share capital at or before the 31st December 2019.

8. This process must be conducted on a somewhat abstract basis. It is not possible to form any clear picture of what the position might have been had Mr Costa and the Company acted properly, or which bidders might have been attracted, on what basis, or when. It is no part of the hearing to determine whether any specific bidder would have bid or not – with one partial exception, it should therefore begin with a purely hypothetical bidder, and enquire what the level of any final binding offer following due diligence would have been.

9. Any exercise establishing the likely market value of a company must pay close attention to the factual position in which that company finds itself. In particular, because of the disclosure which has already been made, in this case the experts will have access to much fuller information than an actual bidder would have had. I do not think that that fact advantages or disadvantages either side.

10. The only partial exception to this is that a conditional offer was in fact received from one bidder – Metric. It will therefore be necessary for the Quantum Trial to consider what the specific position of Metric would have been. However, it would be an irrelevant distraction to conduct a factual enquiry as to what Metric would have bid - the enquiry should be solely a valuation enquiry as to what it might have bid. It is, of course, entirely open to the Quantum Trial to conclude that such a bid might not have been made at the minimum required level or at all.

11. The First Respondent argued that the terms of the order should make reference to the onset of Covid. In the trial before me, both experts agreed that if a final offer had been received before 31 December 2019, it would have been capable of completion before the onset of the Covid lockdowns. This point should not be reopened. However, it is clearly true that if the conclusion of the experts is that the best offer which would have been made would necessarily have had some characteristic which delayed its completion beyond the onset of the Covid lockdowns, the possibility of completion is a point which the Quantum Trial may have to consider, since an offer which, in the circumstances, could not be completed, would not be an offer for this purpose. I cannot see on the facts that I have considered that this is a probable issue, but the Quantum Trial may have to consider it.

12. The Court has already determined that these proceedings are suitable for costs management (see paragraph 13 of the order dated 9th December 2022 made by Deputy Insolvency and Companies Court Judge Agnello K.C.). However, the parties' costs budgets only cover the costs up to and including the hearing on consequential matters. The parties will therefore need to prepare fresh budgets for the purposes of the Quantum Trial.

13. Both parties agree that a CMC should be listed, with a time estimate of one day, to deal with matters pertaining to the second stage trial.

14. The Petitioner maintains that directions should be given now for the Quantum Trial in order to ensure efficient disposal. The First Respondent says that the matters of listing, trial directions and expert evidence are best dealt with at that CMC rather than considered now. On this point, I do not see anything to be gained by deferring the making of directions which follow logically from the Judgment.

15. The last issue that arises in respect of the Quantum Trial is as to when the CMC should take place. The First Respondent proposes that the CMC be deferred until after questions of appeal are settled, pursuant to the Court's discretion under CPR r.52.16, on the basis that to do otherwise risks a serious waste of costs. Should Mr Costa successfully appeal the Judgment the result is likely to be either: (a) a second trial is unnecessary; or (b) the parameters for the second trial might change.

16. On this point, I agree that there is a real risk of wasted costs if the CMC is progressed before the appeals are determined. Consequently, the CMC itself should be deferred pending the completion of the appeal process.

(2) Leave to Appeal

17. Pursuant to CPR, r. 52.6(1), permission to appeal may be given where the court considers that the appeal would have a real prospect of success or there is some other compelling reason for the appeal to be heard. It is well established that 'real' means that the prospects of success are realistic as opposed to fanciful (see *Tanfern Ltd. v. Cameron-MacDonald* [2000] 1 W.L.R. 1311 at [21] per Brooke L.J., adopting the same approach as that taken by Lord Woolf M.R. on a summary judgment application in *Swain v. Hillman* [2001] 1 All E.R. 91 (21st October 1999)). Put differently, the appeal must carry some degree of conviction and be better than merely arguable (see *ED&F Man Liquid Products Ltd. v. Patel* [2003] EWCA Civ 472 at [8] per Potter L.J. concerning the test on a summary judgment application).

18. Where the basis of a permission to appeal application is a challenge to a trial judge's findings of fact, in order for the appellant to succeed the appeal court would need to be satisfied that those findings were either unsupported by the evidence before the judge or that the decision subject to challenge was one that no reasonable judge could

have reached (see White Book, paragraph 52.6.2). It is hard to imagine any judge concluding that there is a realistic possibility that either his decision was unsupported by the evidence or that it was so unreasonable that no reasonable judge could have come to it. Unsurprisingly, I do not regard those criteria as satisfied in respect of any of the grounds of appeal put forward in this case.

(3) The Petitioner's applications for leave to appeal

19. The Petitioner seeks leave to appeal from some aspects of my Judgment. These are (i) the finding that no buy-out order should be made if the best offer reasonably obtainable would have been less than $75m net of debt, (ii) that the relief granted was inadequate given my findings of fact, and (iii) against my findings that Mr Costa did not breach his fiduciary duties to the Company.

(i) The $75m floor

20. The Petitioner says that I erred in law and in fact by finding that, if the Quantum Trial determines that the Company would not have reached a binding offer in excess of US$75 million net of debt by 31st December 2019, Mr. Costa should not be required to purchase the Petitioner's shares.

21. The ground for this argument is that there was no (or no adequate) evidential basis for my conclusion that the shareholders would have refused an offer of US$75 million net of debt. This in turn is based on the argument that in reaching this conclusion I had relied on the evidence of Mr Uberoi, who I had found to be an unreliable witness.

22. This is incorrect. What I had relied on (in para 258 of my Judgment) was the fact that Mr Uberoi, in discussing the Metric offer with other investors, clearly believed that telling them that the offer was in reality only worth $75m net of debt would ensure

that they regarded it as too low to be acceptable. There was no question that Mr Uberoi had in fact said this, or that it was produced and received as having that meaning. This was backed up by Mr Loy's evidence that "none of the shareholders would have been interested in a price of $72m at that point in time". I therefore do not believe that an appeal on this ground would have any prospect of success.

(ii) The relief granted was too limited

23. The Petitioner's second ground of appeal is that the jurisdiction under section 996 of the Act is to do what is fair and equitable, and the relief I have granted falls short of that measure. Mr Davis relied on the decision of the Court of Appeal in *Grace v. Biagoli and others* [2006] 2 B.C.L.C. 70 (C.A.) to the effect that "Although s 461(1) speaks in terms of relief being granted 'in respect of the matters complained of', the court has to look at all the relevant circumstances in deciding what kind of order it is fair to make. It is not limited merely to reversing or putting right the immediate conduct which has justified the making of the order." He therefore argues that the order which should have been made was for an immediate buy-out at whatever price was determined at the Quantum Trial, since only this would fully relieve the problem that Mr Loy had through being locked in as a minority shareholder.

24. I do not think *Grace v Biagoli* goes this far. In that case, it is notable that the Court of Appeal's grounds for suggesting that a buy-out was the only proper remedy included "what is said to be the overwhelming likelihood that similar acts of prejudice will be suffered in the future". That is not the case here. Mr Davies sought to identify other aspects of prejudice which the Petitioner suffered, but these seemed to me to be de minimis. The basis of his case was squarely presented as the Petitioner's having been deprived of the opportunity to exit. However, the obligation in the SHA was not to

exit, but to solicit offers. Thus the opportunity to exit would only have arisen at all if other shareholders had been prepared to accept a solicited offer. Thus in order to know whether Mr Loy was in fact deprived of such an opportunity, it is necessary to assess whether the offer received would have been acceptable to other shareholders.

25. Mr Davies, I think, suggests that I have construed s. 996 more narrowly than is appropriate, and considered that the remedy to be granted should be geared in a specific way to the wrong complained of – an approach which was held to be wrong in *Grace v Bagioli*. However, what I have sought to do is to relate the remedy to the position of the parties. Mr Loy was not a newcomer to the Company whose investment was secured solely by the promise to achieve an exit. He was, prior to the actions complained of, and prior to the entry into by the Company of the commitment whose breach he relies on, a minority shareholder in the Company. It is therefore wrong to say that the Petitioner has been deprived of the benefit which was the sole or main basis for its ongoing participation in the Company.

26. The fact that the relief granted may, depending on the facts, leave him continuing in that position is not *per se* an indicator that the relief which he would receive is too narrow. Put simply, although most s.996 orders result in a buy-out order, the mere fact that an order is not made in these terms does not per se render it inadequate. Mr Davies points out that there were other aspects of prejudice which the Petitioner suffered which should have been taken into account, and if they had been they should have enlarged the scope of the available relief. These are that (a) the Petitioner was deprived of the opportunity to consider what offers might have been available if the Company had complied with its obligations and to form a view as to what would have been an acceptable price at which to sell, and (b) the effect of clause 6.3 of the

Shareholders' Agreement was that Saxon Woods had a veto right, which would have enabled the Petitioner to dictate the terms of its ongoing participation in the Company in return for its agreement not to force an Exit. The first of these is simply a restatement of the main grounds of the Petition, and the second is unsupported by the evidence.

27. Finally, on this ground, Mr Davis says that the misuse of Company funds to finance Mr. Costa's defence to these proceedings, which I found constituted a further ground of unfair prejudice, demonstrates that neither the Court nor The Petitioner can be confident that its rights will be respected. I think that this puts the matter too high – I think it is clear that the Company, having taken legal advice, was under the impression that it was obliged to make these payments. I do not think that this constitutes a real and present danger to The Petitioner position. I also think that it is relevant that all of the other investors in the Company are financial investors, who seek to exit the Company at a profit in the shortest possible time – an objective which is entirely aligned with that of The Petitioner The risk of prejudice to The Petitioner here does not seem to me to be more than notional.

28. Mr Davies' draft grounds of appeal referenced an additional ground, although I am not sure it was addressed in argument. This was the idea that I was wrong to conclude that shareholders could have rejected an offer which they regarded as financially inadequate. This is (I think) based on the terms of clause 6.3 of the SHA, which provides that where an offer of an Exit is received, and its terms are approved by the board, individual investors are required to "procure, as far as they lawfully can, that such Exit is achieved". It is therefore suggested that shareholders were obliged to accept such an offer. This is, however, beside the point. Given that the shareholders

and the board were (broadly) the same people, the idea that the shareholders *qua* directors might have approved an offer which they would have rejected *qua* shareholders is fanciful.

29. I can therefore see nothing here which gives any arguable ground of appeal.

(iii) Mr Costa's alleged breach of duty

30. Mr Davies also seeks leave to appeal against my finding that Mr. Costa did not act in breach of his duties under sections 172 and 174 of the Act.

31. I think it is clear that Mr Costa's position throughout the events considered in my Judgment was that he simply sought to sell his shares for the best possible price. He took the view that this would be achieved by delaying the sale past the end of the period by which he and the company were contractually obliged to seek to effect a sale. Mr Hill, at trial, sought to persuade me that Mr Costa had a positive fiduciary duty to obtain such a price which overrode both his and the Company's contractual obligations. I rejected this argument. Mr Davies, by contrast, argues that causing the Company to breach its obligations in order to maximise the return on sale to shareholders is itself a breach of fiduciary duty. I reject this argument as well. As I said in my Judgment [J. 205], it is wrong to say that a director who causes a Company to breach a contractual obligation in circumstances where he is of the view that the breach is in the best interests of the shareholders and/or the Company necessarily commits a breach of fiduciary duty, even where he is also a shareholder and may thereby benefit financially from the breach. The test to be applied here, as I said in [J.207], is that set out by Jonathan Parker J in *Regentcrest plc (in liquidation) v Cohen* [2001] 2 BCLC 80 at [120] – did the director honestly believe that his act or omission was in the interests of the Company? I have found that, on balance, Mr

Costa did so believe. I therefore do not think that there is any reasonable possibility of an appeal on this point succeeding.

(4) The First Respondent's applications for leave to appeal

32. The First Respondent seek to appeal on a number of grounds in relation to (i) construction of the SHA; (ii) the finding of breach by the Company; (iii) the finding of unfair prejudice; and (iv) relief.

(i) Construction

33. The First Respondent's position is that the Judgment erred in two respects on construction:

34. The first of these respects is that it is argued that there is a possible construction of the term "work together in good faith towards an Exit no later than 31st December 2019" under which Mr Costa's conduct did not breach that obligation. What he suggests is that on a true construction of this clause, the company was not obliged to work towards an exit by 31 December 2019, but merely to prepare itself for the commencement of a marketing process to begin after that date. This seems to me to be so at variance with the clear words used – the term "no later than" seems unambiguous - that it has no prosect of success.

35. The second respect is as regards the true construction of the term "Exit". It is not clear to me how a successful appeal on this point would affect in any way the decision which I have reached, but I will address it in any event. Mr Hill argues that, even if the Metric indicative bid had proceeded to a firm bid, it would not have constituted an "Exit" as defined in the SHA. His basis for this is that the structure which Metric envisaged at the time of delivery of their conditional offer was that the bid would be

made by a leveraged acquisition vehicle in which Mr Loy would have an equity investment [J.189]. He therefore argues that a deal in which a substantial shareholder or shareholders would reinvest in the acquisition vehicle would not constitute an "opportunity for an Exit", since these shareholders would, as he put it, "roll over". He therefore argues that the Judgment should have found that there was no obligation on the Company to consider the Metric deal.

36. There are two points here. The first, and most significant, is that even if the fact of such a rollover could have justified the Company in declining to consider the Metric offer without breaching clause 6.2, that would only have been the case if it had known that the offer had that characteristic. At the relevant time the Company had no such knowledge. Consequently, it must still have been a breach of its obligations to consider the offer to decline to engage with it.

37. More importantly, I do not think that Mr Hill's submission in respect of the meaning of the term "Exit" has any prospect of success. As I said in my Judgment [J. 188-190], there is a significant difference between a mere rollover and a bid by a new entity, with an entirely different structure, in which some of the former shareholders are investors. It is almost certainly true that there would be room, on different facts, for a substance over form approach to construction, such that a transaction which was legally a sale of 100% of the shares to a new entity, but which economically had the effect of preserving the rights and interests of a majority of shareholders in an economically identical form, might not be regarded as an "Exit" with the meaning contemplated in the SHA. However, that is not the case here, and I do not believe that there is any reasonable prospect of an appeal on this ground succeeding.

(ii) Breach

38. This point largely follows from the first point. Mr Hill argues that having found that the Company was taking some steps to pursuing an Exit (although not by the specified date) and that the decision to defer marketing until after the CEO had been appointed was thought by all to be a "sensible decision", it was wrong of me to find that the Company had breached an obligation to work in good faith towards an Exit. I think this is clearly wrong. There is no doubt in my mind that the Company was in breach of its obligation. As I have said, it is quite clear that directors can legitimately take a decision, in good faith, that a company's best interests may be served by breaching a contract, and if they take such a decision and act on it they will not necessarily be in breach of their duties. However, the mere fact that they have acted in good faith has no bearing at all on the question of whether the terms of the contract have been breached, or what the consequences of such a breach should be. I find that this does not reach even the threshold of arguability.

(iii) Unfair prejudice

39. The First Respondent's position is that there was no basis on which to find unfair prejudice. His point is that the Petitioner could not have shown that it had suffered detriment or prejudice if it could not be demonstrated that a final offer would have been made at a level that the shareholders would have accepted [J.231 and J.262], and that there was no evidence before the court that would have enabled a determination as to whether an offer at that level would have been made [J.231]. He therefore argues that, following *Rock (Nominees) Ltd v RCO Holdings plc (in liq.) & Ors* [2004] BCC 466, I should have found that the Petitioner had not satisfied the burden of proof that prejudice had been suffered, and that I should therefore have dismissed the Petition.

40. There would be something in this submission if I had had valuation evidence before me and found it insufficiently probative. However, by the order of ICC Judge Burton questions of valuation were deferred to a Quantum Trial to be heard after the primary trial on liability, which this was. This meant that the expert evidence before me was limited to questions of investment banking practice, and the experts were instructed not to (and did not) address issues of valuation. In these circumstances, I think the argument that I should have dismissed the Petition on this ground has no chance of success.

41. Mr Hill also argues that I misdirected myself as to the significance of the board meeting of February 2019 and that, had I given proper consideration to the events which occurred at that board meeting, I would have concluded that there was no unfairness in what happened to Mr Loy, since he had himself consented to those events. Mr Hill emphasises the unanimous board resolution in February 2019 to go to market after the new CEO had been identified. In particular, he says that because Mr Loy voted in favour of this resolution, he is therefore debarred from complaining about anything that Mr Costa failed to do prior to the arrival of the CEO. I do not think that there is anything in this argument. The minutes of that board meeting make clear that the essence of the resolution was to instruct Jefferies to begin marketing the Company immediately, the assumption being that the new CEO would be identified within a few weeks and might be in place as early as April. There was no suggestion that waiting for the new CEO to be identified would cause the Exit to be delayed beyond the target date [J.46]. This resolution was absolutely not, as Mr Hill seeks to present it, a mandate to Mr Costa to down tools until the new CEO had arrived, established himself and fully taken up the reins. As I said in my Judgment with regard to this point, Mr Costa cannot rely on the argument that it was the board as a whole

who had caused the Company to breach its obligations, since the Board's decisions in the matter were the result of the fact that he had misled it. [J. 202]. I cannot therefore see that the application for leave to appeal on this ground has any prospect of success.

42. Finally, Mr Hill suggests that my finding that had the company performed its contractual obligations it would have had "at least one or two conditional offers on the table by the end of the Investment Period" (§254) is challengeable, since it is contingent on my finding that the Metric offer constituted an "Exit". That is not, however, the basis for the conclusion. The fact that the Metric offer was made, and the terms on which it was made, seem to me to be powerful evidence that bidders would have been interested in bidding at sensible levels if the opportunity to bid had been presented to them. This is entirely unconnected with the question of whether the structure of the Metric bid would have debarred it from consideration.

(iv) Relief

43. The First Respondent submits that it was not appropriate to make a buy-out order against him personally. He argues that he did not breach his fiduciary duties to the Company and was not negligent. He therefore argues that responsibility for any unfair prejudice does not rest solely with him, and that he therefore should not be the sole subject of the buy-out order. However, I have found that in practice Mr Costa had sole control of the process, and that the fact that the board acted as it did was the result of the fact that he had regularly misled it as to the actual state of the disposal process [J.225]. I therefore do not see any reasonable prospect of success in an appeal on the basis that Mr Costa should not be the sole recipient of the buy-out order.

44. During the consequentials hearing, Mr Hill explained that he wished to add several further grounds of appeal. These were provided to me in an e-mail after the hearing,

and the Petitioner has made written submissions on them. I deal with them below.

Additional ground 1: Appropriate counterfactual at the second stage

45. It is argued that I erred in my directions for the appropriate counterfactual at the second stage, because it was wrong to direct that part of the counterfactual should include that "the Company should not have paused the marketing process whilst the search for a new CEO was ongoing, since this is incompatible with the idea of a good faith attempt to obtain offers by the end of 2019", in circumstances where this decision related to a unanimous board of directors (including the Petitioner's own nominated director and beneficiary). I think this is simply a restatement of the "February board meeting" point which I have dealt with in para 41 above. As I say there, I do not think that this argument has any prospect of success.

46. The remainder of the first further ground restates the argument as to the possible construction of clause 6.2, which I have addressed in para 36 and 37 above. I think that they do not add anything to the arguments already advanced on these points, and that there is no reasonable prospect of success there.

Additional ground 2: The order regarding the Company's ability to indemnify Mr Costa and the injunction

47. The second proposed ground is that I:

(a) wrongly directed myself as to the proper approach of whether a company may indemnify a director (who is not a shareholder) in an unfair prejudice petition, where that petition is brought against the director in his role qua director and not qua shareholder, and failed to give appropriate weight to that fact.

(b) wrongly concluded that the Company was not a "genuine protagonist" when the proceedings were founded on an allegation that the Company had breached its obligations under a contract, and

(c) failed to give proper weight to the finding that the First Respondent had not breached his duties, and

(d) erred in the assertion that "as a useful acid test for whether a company can indemnify a director for the costs of any particular action, the question of whether the Company could properly step in to and conduct the action concerned is itself is a useful indicator as to whether the action is of a kind which it is permissible for the Company to indemnify", which, it was suggested, has no basis in law and is wrong as a matter of principle, but was in any event misapplied in the present case.

48. I do not think that this additional ground is any more than a restatement of the grounds already set out in the draft grounds of appeal against my order on the issue of injunctive relief. I have set out my reasons for refusing Mr Hill's application for permission to appeal against this order in paragraph 53 below, and there is nothing in this additional ground which in my view affects that conclusion.

(5) Costs of the Liability Trial

49. The First Respondent's position is that the appropriate order, at this stage, is that costs are reserved until after the second stage hearing. The Petitioner's position is that costs should be payable now, since it has won on the substantive issue being tried.

50. I think the problem here is that the question of whether the Petitioner is entitled to any substantive relief cannot be determined until the end of the Quantum Trial. The relevant authority here is *Ashdown v Griffin* [2018] EWCA Civ 1793, where unfairly prejudicial conduct was found at the first trial on liability, but at the quantum trial the shares were valued at nil. The trial judge ordered that the Respondents pay the Petitioners' costs. The Court of Appeal allowed an appeal against this order on the basis that as a matter of substance and reality the Respondents had won, since they had substantially denied the Petitioners the prize which they fought the action to win. Applying that test, it is simply too early in these proceedings to identify a winner. It was further argued in the same case that a distinction should be drawn between the liability trial and the valuation trial, and that the Petitioner should be considered the successful party in respect of the liability hearing. The Court of Appeal also rejected this position, on the basis that proceedings should be considered as a whole rather than in stages, and the words "successful party" mean "successful party in the litigation", not "successful party on any particular issue". […]" (citing Rix LJ in Kastor *Navigation Co Ltd v Axa Global Risks (UK) Ltd* [2004] EWCA Civ 277, [2004] 2 Lloyd's Rep 119. I think that conclusion applies in this case. Consequently, the only order that I can make as regards costs is that costs be reserved to the Judge who hears the Quantum Hearing.

(6) The application for injunctive relief

51. I held that the use of company funds to finance Mr Costa's conduct of this litigation was contrary to law (J. 268-9). Mr Costa had two grounds for seeking this finance – an indemnity clause in the SHA, and a similar but differently worded provision in the Articles of the Company. Both of these provisions were, however, clearly drafted so

as to commit the Company to make any such payment only "to the extent allowable under applicable law". Since a company is not permitted to make payments of this kind, no claim in fact arose under either provision, and the making of such payments would constitute misfeasance on the part of those directors who permitted it.

52. There is an unfortunate lacuna in my Judgment, in that although I explained the position as regards the indemnity provision within the SHA, I did not explicitly address the position under the Articles. I accept that I should have done, since the point was raised before me. However, the issue which arises as regards the claim under the Articles is identical to that which arises under the SHA – were the payments permissible by law – and having held that they were not, the decision on the claim under the Articles must necessarily be the same as the decision on the claim under the SHA.

53. Mr Hill seeks permission to appeal this decision. His argument is – I think – that the actual cause of action here was the breach by the Company of its contractual obligations, and this is a claim which, if it had been brought against the Company, the Company could have defended in its own name. He therefore argues that, contrary to my decision, the Company is in fact a "genuine protagonist" in this dispute (per Trower J in *Koza v Istelmeleri AS* [2021] EWHC 789 (Ch) at [66], set out in [J.268 and 269]. Here again, I do not think that this argument has any prospect of success. The fact is that this claim is not a contractual claim, but a petition under s.994. More importantly, the substance of the Petition rests entirely on the argument that Mr Costa acted in such a way as to cause unfair prejudice to the Petitioner by causing the Company to act in breach of its contractual obligations. The debate throughout the hearing turned on what Mr Costa had or had not done, and on whether the results of

his actions had been to cause unfair prejudice to the Petitioner. I do not think that these are issues on which the Company could have taken any position. Consequently, as I said in my Judgment [J 274-6], I think that this dispute is in substance as well as form a dispute between shareholders, and it is therefore not one where the Company should be permitted to finance the litigation of either side. Given that Mr Costa still appears to have de facto control of the Company, I therefore agree that an injunction should be granted against the Company restraining any such payments.

54. I think that this is an entirely separate issue between the parties, with no obvious crossover to the liability issue. It is clear that the Petitioner has won on this issue, and it should have it costs of this issue in any event. I understand that there have been some preliminary skirmishes on this specific issue, and that it should be possible for the parties to agree a rough figure of costs actually incurred on this particular point.

(7) The form of the order

55. Unusually, the parties were unable to agree the form of the order before the consequential hearing. The primary issue was what was described to me as a "cart and horse" problem. The Court is, at this stage, unable to finally determine whether relief should be granted, and this question will have to be determined at the Quantum Trial. Mr Davies submitted that this should be reflected in the form of an immediately effective buy-out order, subject to defeasance if the outcome of the Quantum Trial implied that no exit would in fact have been achieved. Mr Hill, by contrast, submits that the Petitioner's entire case on causation and loss was that an Exit would have occurred but for the unfair prejudice: unless the Petitioner can show that it would have exited the Company, the Court is not permitted to make a buy-out order – hence the order that the court should make is simply an order for a further trial, with a condition

that if the outcome of that further trial implies that an exit would have occurred, an order should subsequently be made directing the buy-out.

56. I have concluded that the Petitioner has suffered unfair treatment, but I do not know whether he has in fact suffered any material prejudice or not In these circumstances I think it would be rather odd to make an order that started off by assuming that prejudice had been found and granting a buy-out remedy consistent with that finding. So I do not think the appropriate order, even at this stage, is, as Mr Davies suggests, a simple buy-out order subject to a contingency. Consequently, the order will have to be in the form of a direction to the trial judge for the Quantum Trial to make a buy-out order if the conditions for making it turn out to have been satisfied.

57. At the date of the hand down of this Judgment the parties have yet to agree a form of order, but they inform me that they will be able to do so imminently. I will therefore allow a little more time for the order to be agreed.

- - - - - - - - - - -

Digital Transcription by Marten Walsh Cherer Ltd
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP
Telephone No: 020 7067 2900 DX: 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com