Neutral Citation Number: [2024] EWHC 387 (Ch)

Case No: CR-2021-000718

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 February 2024

Before:

Mr Simon Gleeson

- -

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 LTD (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 incorproated under the laws of Singapore)** **(7) SIMON POWELL** **(8) SPRING MEDIA INVESTMENTS LIMITED**	**Respondents**

- -
- -

Edward Davies K.C. and Jack Rivett (instructed by **Stephenson Harwood LLP**) for the **Petitioner**
Richard Hill K.C., Lara Hassell-Hart and Honor Brocklebank-Fowler (instructed by **Joseph Hage Aaronson LLP**) for the **First Respondent**
(The other Respondents did not appear and were not represented)
Hearing dates: 10th-13th, 16th-20th and 23rd-26th October, 1st-2nd November 2023

- -

APPROVED JUDGMENT

Mr Simon Gleeson :

1. Introduction

1. Although it has involved a great deal of evidence, this is at heart a very simple case. An agreement (the Shareholders Agreement, or "SHA") was entered into between the Eighth Respondent, Spring Media Investments Limited ("the Company") and its shareholders (including the Petitioner and investment entities for the First Respondent) to the effect that they would work together in good faith towards a sale of the Company (an "Exit") by the end of calendar year 2019, and would give good faith consideration to any opportunities for a sale prior to that date. In the event that no Exit was achieved by that date, the SHA provided that the board of the Company should instruct an investment bank to "cause" an Exit. No such Exit was achieved, and, four years after that deadline, the Company remains unsold.

2. The Petitioner's case, in a nutshell, is that the Company did not in fact work in good faith towards such an Exit, and that when the 2019 deadline passed, they did not engage an investment bank to "cause" an Exit. The essence of the First Respondent's case is that, on a true construction of the SHA, the Company's actions did not breach it, and both he and the Company did in fact do everything that the clause required. In particular, he says that he caused an investment bank, Jefferies, to be retained by the Company, and that everything that happened thereafter was done on the advice of that investment bank. He also argues that, even if this had not been the case, the board did not consider that a sale executed on the timetable specified in the SHA would maximise value for shareholders, and that a decision in these circumstances not to proceed with the sale did not

constitute a breach of the agreement, and therefore did not constitute any sort of unfair prejudice to the Petitioner.

3. The basis of the Petitioner's case is that Mr Costa has caused the Company to be in breach of the SHA. However, this action is not a claim for breach of that contract. It is a petition under s.994(1) of the Companies Act 2006 to the effect that the failure to perform the obligations contained in the SHA constituted conduct which resulted in unfair prejudice to the Petitioner, and that that failure was caused by the First Respondent.

4. As is common with 994 petitions, the issues between the parties are complex and emotional, and have deep roots. A very great deal of evidence was presented, and the principals were extensively cross-examined over multiple days. I regret to say that not all of the evidence or cross-examination seemed to me to have been entirely germane to the issues which I am required to determine, and quite a lot of it seemed to me to be an attempt to attack the character of the other party, with each accusing the other of a degree of dishonesty. I have considered all of this evidence in detail, although for the sake of brevity I have not addressed it in detail in this judgment. However, it may be helpful to set out here that I do not consider that either of the principals involved in this dispute have behaved dishonestly. Mr Costa is clearly a passionate man, and at several important junctures seems to have allowed his passions to overrule his judgement. Mr Loy, by contrast, seems to have put the worst possible construction on Mr Costa's conduct, seeing conspiracy where in fact there was none. Although each clearly believed it of the other, neither was in fact engaged in a nefarious scheme to promote his own interests over those of

the Company or the other investors. The conflict which emerged between them is one which could and should have been avoided. Sadly, it was not.

5. Finally, as an introductory point, I should note that I did not hear any evidence as to the valuation of the Company, and any such determination must be made at a further hearing.

2. The Claim

6. The statement of claim proceeds as follows:-

(1) The Company has acted in breach of clause 6.2 of the Shareholders' Agreement.

(2) Mr Costa's conduct in relation to the purported Exit process involved breaches of the duties which he owes to the Company as a director.

(3) As a result of Mr Costa's conduct, the affairs of the Company have been conducted in a manner which is unfairly prejudicial to the interests of Saxon Woods as a member of the Company within the meaning of section 994(1) of the Act.

(4) Mr Costa was therefore responsible for, and/or was at least sufficiently connected to, that unfairly prejudicial conduct.

(5) Mr Costa should therefore be required to purchase the Petitioner's shares in the Company on the grounds that Mr Costa is responsible for the unfairly prejudicial conduct and/or he and/or his actions are so connected to the unfairly prejudicial conduct that it would be just to grant a remedy against him.

7. No relief is sought against the Company or any other shareholder. In the absence of any claim for damages against the Company for breach of the SHA, the allegations in respect of breach of duty are simply a foundation for the unfair prejudice claim, which in substance is the only cause of action.

8. There is a further issue regarding the Company's payment of Mr Costa's legal expenses of this action which will be dealt with separately.

9. None of the shareholders, other than Saxon Woods, have taken any part in the proceedings, save (in the case of HDO, Bay Capital and Khattar Holdings) to confirm that they do not intend to do so. The sole active respondent to the Petition is Mr Costa who is the chairman of the Company and the holder of a substantial economic interest in the Company.

3. The Shareholders' Agreement

10. The relevant provisions of the Shareholders' Agreement are Clauses 6.2 and 6.3. Clause 6.2 provides:

> "6.2. Investment Period. The Company and each of the Investors agree to work together in good faith towards an Exit no later than 31 December 2019 (the "Investment Period"). In addition, the Company and each of the Investors agree to give good faith consideration to any opportunities for an Exit during the course of the Investment Period. In the event that an Exit has not occurred upon the expiry of the Investment Period, in addition to any rights provided by Clause 3.5(d) and Article V, the Board of Directors shall engage an investment bank to cause an Exit during the Investment Period at a valuation devised by such investment bank and on such terms as shall be consented to by the Board of Directors, which consent shall not be unreasonably withheld."

Clause 6.3 provides:

> "6.3. Exit Process. If an Exit is proposed in accordance with the terms of this Agreement, each of the Investors shall: (i) give such co-operation and assistance as is reasonably required in connection with the proposed Exit, which shall include co-operation and assistance in the preparation of any information memorandum/"teaser" and the giving of presentations to potential purchasers, investors, financiers and their advisers, as well as assisting on any due diligence exercise conducted in relation to an Exit; and (ii) procure (insofar as it lawfully can) that such Exit is achieved in accordance with such proposal."

11. An "Exit" for this purpose is defined as:

> "the sale of all or substantially all of: (i) the issued equity share capital of the Company; or (ii) the business or assets of the Company (whether through the shares of a Subsidiary or otherwise), in each case on arm's length terms as part of a single transaction or a series of transactions".

12. As a preliminary point, there is a manifest error in the drafting of Clause 6.2. The wording of the clause defines the period up to the end of 2019 as the "Investment Period", but provides that if an Exit has not been secured within this period, the board shall engage an investment bank to cause an Exit "during the Investment Period". Both parties accepted that this was clearly a drafting error, and that what was intended was that if an Exit was not secured within the Investment Period, an investment bank should be instructed to cause an Exit thereafter.

13. Finally, it is relevant to some of what follows that the SHA contains "drag and tag" provisions in the ordinary form – indeed, it would be surprising if it had not contained such provisions. The relevance of these provisions in this case is the "drag" element. This has the effect that if a majority of shareholders decides to sell their shares to a third party, the minority holders can be compelled to sell their shares to that buyer for the same price.

4. The Facts

14. There are two streams of factual narrative which have to be considered – one relating to the financial position of the Company, and the other to the developments as regards the Exit. It is necessary to deal with these separately.

4.1 The Company's Financial Position

15. The Company is the holding company for a group of companies which provides creative services to existing brands in the fashion, beauty and luxury brand sectors (the "Spring Studios Group"). It has four divisions: an advertising agency, a content production business, photography studios and an events business. The business operates from three locations (London, New York and Milan) and has acted for a number of high-profile clients.

16. The Spring Studios Group includes the following trading entities, all of which operate under the 'Spring' brand:

    i) Spring Studios Limited ("SSL"), an English company and wholly owned subsidiary of the Company;

    ii) Spring Studios New York LLC ("SSNY"), a U.S. company, which is 100% owned by Spring America Inc., which is in turn a wholly owned subsidiary of the Company; and

    iii) Spring Studios S.r.l, an Italian company which is 90% owned by SSL.

17. The business operated by the Spring Studios Group was founded in 1996 by Mr Loy and two other individuals as Spring Studios Limited (SSL). By 1998 those two individuals had left, and Mr Loy was the sole owner of SSL and the driving

force behind it. SSL grew rapidly, and by 2012 it had a turnover of £23m and a pre-tax profit of £1.5m. However, at this point Mr Loy perceived that its opportunities for growth were constrained by its current premises, and some expansion was necessary. He therefore hit upon the idea of expanding into New York. This project involved a very significant increase in the size of SSL, and necessitated raising external investment. The New York real estate developer with whom Mr Loy was in discussions (a Mr Cajrati) therefore introduced him to Mr Costa as a potential investor. Mr Costa was already an investor in Mr Cajrati's company. It was not intended that Mr Costa should be the sole investor, but that he would bring other investors in alongside him.

18. The result of these discussions was the appointment of Mr Costa to the board of SSL as chairman. Mr Costa appointed Mr Uberoi to the board in 2013, and Ms Kurzman and Mr Flammini in 2014.

19. An equity financing of SSL was agreed in March 2013, which seems to have resulted in an inflow of £4m or so. The agreement provided for further financing up to a total of £15m, and was documented in a master agreement dated November 2013. The investment was made through an investment vehicle (Grosvenor Investment Project Ltd ("GIP"), the Third Respondent), the investors in which included Mr Costa, Mr Costa's investment vehicle Greencage SA, Mr Cajrati, Mr Uberoi and others. This resulted in GIP acquiring 20% of the equity of SSL. At this point, a further £1m was raised in the form of loan notes subscribed for by the Second Defendant, Far East Media Holdings. Along with the financing agreement, the parties entered into a separate shareholders agreement dated February 2013 (the "2013 SHA").

20. The 2013 SHA contained provisions to the effect that there would be an Exit through a sale of SSL by 31 December 2018. Mr Loy's evidence is that this provision was critical to his entry into the agreement, and that he would not have entered into it had it not been there. His explanation for this was that the objective of the US expansion was to increase the value of the business in order to facilitate his own exit.

21. The provisions to this effect contained in the 2013 agreement were more or less identical to those in the SHA.

22. There followed financial restructuring and further rounds of financing. By April 2014 Mr Loy's stake had been reduced to 50%, and £17m of new financing had been raised – including £8m in the form of equity and loans from Mr Flammini. It was at this point that Mr Loy transferred his shares to the Petitioner. The shares were transferred to Butterfield Trust (Bahamas) Limited as trustees of the Logan 2011 Capital Trust (a trust settled by Mr Loy), which in turn transferred the shares to Saxon Woods as the nominee of the Logan 2011 Capital Trust. Mr Loy was Saxon Woods' nominee director of the Company until his resignation on 18 June 2020.

23. The New York property opened for business in 2015 and began to generate revenue.

24. In 2016 a revised round of financing was conducted. This was desperately needed – the Company made a loss of nearly £5m in calendar year 2016. The governance arrangements ensuing from the recapitalisation were documented in a revised shareholders agreement executed in May 2016, and this is the SHA which is the subject of these proceedings. The SHA was entered into in respect

of the Company, which had been incorporated on 29th December 2015 and in which the then shareholders of SSL acquired shares in return for their shares in SSL, resulting in SSL becoming a wholly owned subsidiary of the Company. This round of financing introduced as new investors HDO Holding, Khattar Holdings and Bay Capital. Its effect was that the Petitioner ceased to be the majority owner of the Company, and it ended up owning a stake of around 22%. Mr Loy ceased to be CEO in 2017, and a Mr Yaffa (introduced by Ms Kurzman) was appointed to the role. Mr Loy remained with the Company as "founder president".

25. At around this time, a new venture was established under the "Spring" brand, this being "Spring Place". Spring Place was a member's club based in the Spring Studios premises in New York. It was owned by Mr Costa and a number of other investors, but Mr Loy was not involved. It paid to Spring Studios a one-off royalty of $7m in order to licence the Spring name, and co-tenanted with Spring Studios in its building.

26. At this point Mr Costa had investments in three relevant businesses – Spring Studios, Spring Place and the real estate entity which owned the New York premises in which those two entities were based. Mr Loy's interest was only in Spring Studios.

27. Most of the facts subsequent to this point are hotly disputed by the parties. Mr Loy's position is that the expansion into the US was initially a disaster due to inordinate overruns on the cost of the premises – he suggests in his evidence that the total cost overrun was in the region of $17m. However, when the US premises came on line the business began to right itself, and by mid-2017 was

performing strongly. Mr Costa's position is that the financial underperformance in 2015 and 2016 was due to the ineptitude of Mr Loy, whose ability to originate business was – in his view – coupled with an inability to control or manage costs. At the request of the other investors (including Mr Costa), Mr Loy ceased to be CEO at the end of 2016, and it was the work of his successor – Mr Yaffa – which resulted in the restoration of the firm to profitability.

28. In July 2017 Mr Loy decided that he needed to move on from Spring to start a new business, and commenced negotiations with Mr Costa to sell his shares to him. A price seems to have been agreed by November 2017, valuing the Company at around $120m and Mr Loy's shares, discounted for a minority stake, at $23m. Draft heads of terms were drawn up by Mr Thomas Thesing of Sidley Austin, who at this point seems to have been representing Mr Costa. It is clear that the buyer for the shares was intended to be Mr Costa's vehicle, Greencage. There was some debate as to whether Mr Loy believed at this time that Mr Costa himself was to be the buyer of the shares. Mr Costa resiled from this proposal in early 2018, and no sale was ever effected.

29. The Company does not appear to have prospered immediately after Mr Loy's departure, and, in his mind, that is no coincidence. Mr Loy's successor, Mr Yaffa, does not appear to have been regarded as a success, and his services were dispensed with in 2018. Part of the problem appears to have been an unfortunate recruitment policy - on at least three occasions the company appears to have recruited apparently high-profile individuals on large salaries, but then to have discovered that it did not have (or did not wish to commit) the necessary resources to fund the projects which these individuals sought to conduct. This

includes Mr Starker, Mr Laubscher and Mr Punch. It was only with the recruitment of Mr Ringel and Mr Armbruster in 2019 that the Company seems to have had a leadership team and a strategy with which all investors were satisfied.

30. By the middle of 2018 the turnover of the business was growing and it appeared to be performing well – the business had a turnover of nearly $57m, and the September 2018 board update projected a full year EBITDA of $6.2m. Jefferies provided a document at this point which indicated a valuation on this basis of $122m, and EY were mandated to prepare a Seller Information Document (the "SID").

31. In the second half of 2018 there was a significant dispute about the strategy of the firm. Mr Loy and Mr Flammini made a presentation to the board which urged that the firm focus on profitability and cost-cutting. The idea seems to have been that Mr Costa would step down, Mr Loy would redouble his efforts to get in new business, and Mr Flammini would focus on cutting costs, with the aim being to create a stable, profitable business. This proposal ran sharply counter to that put forward by Mr Yaffa at the same meeting – his presentation contained an exhortation to the board that "focussing on "profitability" too early can undermine value". He therefore urged expansion, the hire of Messrs Punch and Laubscher, and the establishment of the Media Division. Mr Flammini and Mr Loy seem to have been particularly incensed by the fact that the new hires had increased the staff costs by more than $3m, and that this was unsustainable. It is important in this context to appreciate that Messrs Loy and Flammini were not proposing to shrink the Company – the debate was as to whether new areas

of growth outside its core business should be explored. Their presentation claimed that their programme could result in EBITDA increasing by $4m, which would take projected EBITDA for 2019 to $9m, which they claimed would enable the Company to be sold for a good price on the timetable set out in the SHA. The board decided to back the senior management in its expansion plans and rejected the Loy/Flammini proposal.

32. The Board also decided to set up an OpCo, consisting of Mr Flammini, Mr Loy, Mr Uberoi and Ms Kurtzman. Ms Kurtzman set out what she believed the purpose of the committee was to be in an e-mail to Mr Costa: “Hank and I need to get both of them to a place where they understand that a CEO has to come in and be given the reigns and allow them to inform the scope for the position”. This was not a recipe for agreement, and no agreement was achieved. The result was that Mr Loy and Mr Flammini presented to the board a paper setting out what they thought should be done, and Mr Uberoi and Ms Kurtzman presented a separate paper in effect arguing that the role of the board was not to engage in the detailed management of the Company, and that nothing should be done until the new CEO was appointed. It is unsurprising that Mr Uberoi and Ms. Kurtzman’s document should focus on governance processes (in which they had expertise), whilst Mr Loy and Mr Flammini’s document focussed on the operational management of the company (which was their particular field of expertise).

33. The SID was finalised in February 2019, and reflected EBITDA estimates for 2019 of between $6.7m on a base case to $9.2m on a high case, against a figure of $5.6m for 2018. This level of net revenue generation appears to have been

reasonably stable. The actual EBITDA figure for 2019 was $6.0m. When Jefferies produced their advice on valuation in April 2020, they assumed that the impact of the Covid lockdowns would reduce EBITDA to $2.7m in that year, but that thereafter the group would bounce back to a figure of $5.7m. The forecast presented to the board in July 2020 suggested that the management of Spring expected it to produce EBITDA of $5.9m in 2021 and $11.1m in 2022. Of course, nothing of the kind was achieved – the second and third lockdowns having a devastating impact on the Company's business. However, in 2022, the first full year after lockdown (although affected by post-lockdown drag), EBITDA was $3.1m, $2m of which as earned in the second half of the year, and EBITDA for 2023 was forecast to be $7.1m.

4.2 The Board and the Exit Process

34. As a preliminary point, Mr Costa had been engaged since 2014 in seeking to raise external investment in the Company simply as part of its periodic recapitalisations. As part of this process, he had developed a relationship with Jefferies, a US Investment Bank. He therefore introduced Jefferies to the Company and Jefferies thereafter acted as advisor to the company as regards the Exit.

35. A great deal of what follows turns on what Jefferies may or may not have done or been instructed to do. However, it is important to emphasise that Jefferies is not a party to this litigation, and no evidence from Jefferies was sought by either side. More importantly, both sides confirmed that they made no allegation that Jefferies had acted other than entirely properly throughout.

36. The starting point for this narrative is the board meeting of November 2018. However, in order to understand the board dynamics, it is necessary to appreciate that by this time relations between Mr Loy and Mr Costa had broken down. Mr Loy was removed as CEO in 2017, disagreed profoundly with the way in which his successor, Mr Yaffa, ran the business, and perceived Mr Costa as having interfered in the operational running of the Company. Mr Loy said in his witness statement that "by late 2017 Mr Costa and I were really going at each other", and in early 2018 a letter was written to Mr Loy on behalf of the Company making serious allegations of wrongdoing (later withdrawn). I would note at this point that the most violent disagreement within the Company seems to have been between Mr Costa and Mr Flammini, but Mr Loy made common cause with Mr Flammini as to what he perceived to be the best interests of the Company and was therefore perceived by Mr Costa as hostile.

37. It is against this background that Jefferies prepared a document entitled "Transaction Overview and Update", which was circulated at the board meeting in November 2018. At this point the deadline under the SHA was a little over 12 months away, and the experts agree that at that point there would have been no particular hurry to launch a sale process in order to hit that deadline. Jefferies' overview and update read that they proposed to "lead a transaction with two key objectives; provide liquidity to existing shareholders and provide new primary capital to support further growth in the business". This does seem to have been a proposal for either a capital raise or a full sale depending on investor appetite.

38. Jefferies estimated that a transaction should take 10 weeks from launch to closing, an estimate which is agreed to be in line with market practice. At this meeting Mr Yaffa delivered a presentation as to the state of the business which estimated that EBITDA would be between $3.5m and $5m for the year. The board also discussed the fact that Mr Yaffa would leave at the end of December, and that it would be necessary to recruit a new CEO. It seems that it was expected that the process would take 6 months, but this should not have impacted the timetable (although Mr Flammini expressed very prescient concerns about leaving such a long gap without a CEO in London). Importantly, the board also approved the appointment of Jefferies, on the basis that "The Chairman reported they have spoken with several Investment Banks. Jefferies … is the one most interested in working with Spring". The board appointed an "Exit" sub-committee, which consisted of Mr Aspinall, Mr Oberoi, Mr Uberoi and Mr Loy.

39. Mr Costa promptly e-mailed Mr Mineard of Jefferies "Board approved mandate to Jeffereis [sic] let's start the process". Two employees of the Company – Mr Starker and Mr Di Capua – promptly began preparing an investor deck and a financial model, both of which were sent to Jefferies by 9 January 2019. The investor deck referenced the idea of a "Spring ecosystem", in which the Company co-operated with Spring Place and the real estate investment entity. However, the bulk of the deck clearly related only to the Company.

40. Korn Ferry, the recruitment consultants, were formally instructed on the 10 January 2019 to find a new CEO.

41. The process of negotiating the Jefferies retainer letter was also commenced. This proceeded in a slightly strange way, in that it was negotiated between Jefferies on the one hand, and Mr Costa alone on the other, supported by Mr Puri, an employee of Mr Oberoi. This draft was also commented on by Mr Thesing of Sidley Austin. I am not entirely clear whether Mr Thesing was at this point representing Mr Costa or the Company, but the answer seems to have been both.

42. A final draft of the EY SID was produced on the 24 January, and Spring gave a letter of reliance on that date. Jefferies also provided to Mr Costa, Mr Di Capua and Mr Starker a document entitled “Timeline and Potential Investors”. The “timeline” element suggested that the placing could be completed by the end of April. The “potential investors” section was a broad list of potential bidders, ranging from strategic corporate acquirers to family offices. Interestingly, it also included a number of mid-market buyout funds whose business model is broadly the same as that of Metric (an entity we will encounter later). It seems reasonably clear from this document that Jefferies were thinking about capital raising in the most general terms possible. It is notable that this list is entirely compatible with the mandate which was set out in their presentation of November 2018. It is not, however, easily capable of being explained as compatible with a mandate solely to secure an “Exit” as defined in the SHA.

43. By this time Mr Loy’s mind was clearly made up – he said in an e-mail to Mr Aspinall of the 27 January 2019, “FC has stated the next BoD will be end of February. This is clearly a delay tactic and all my recent information points to FC zero desire to sell Spring.”. Mr Loy therefore tried to organise a meeting of

the Exit committee – an endeavour in which he was unsuccessful. Separately, Mr Mehta, who at this point was keen to realise his investment, asked Mr Costa to arrange for Jefferies to come and give the board an update on the sale process. Mr Costa refused, on the basis that he "did not want to sit Jefferies in front of Mark [Loy] and Maurizio [Flammini]". However, he offered to arrange a separate meeting between Jefferies and Mr Mehta. On 19 February 19 Mr Costa arranged for Mr Thesing of Sidley Austin to speak directly to Mr Mineard to discuss the sale and the Jefferies retainer letter.

44. The next board meeting was on the 28 February 2019, and again Jefferies delivered a "Timeline and Potential Investors" document. This now suggested a closing date of the end of May. The list of target investors had changed somewhat, with the most notable feature being that it was now divided into only three groups – strategic acquirers, family offices and Private Equity firms. This very strongly suggests that at this stage they were looking at all possibilities - 100% strategic acquisitions, a capital raise (the only area in which family offices would be relevant) or some sort of leveraged buy-out. This update was circulated to the board, but does not seem to have been discussed at the board meeting on the 28th February, presumably on the basis of Mr Costa's report that Jefferies were fully ready to begin marketing the company, and would commence doing so as soon as they received that board meeting's approval of the 2019 budget and the Q1 numbers. It is notable that Mr Flammini, in an e-mail sent shortly after the meeting, recorded his recollection that what had been agreed was that "Jefferies mandate is solely to offer to the market 100% of [the Company's] shares. Not less than that", but no discussion on this point is recorded in the minutes of the meeting. However, this may be because the

minutes of the meeting were the subject of some debate after the meeting, with Mr Costa expressing to Mr Chechile, who was compiling the minutes, the view that "no one has ever excluded a capital increase".

45. A week later, on the 5 March, EY delivered the final SID. This recorded adjusted EBITDA figures of minus $1m for 2016, $2.5m for 2017 and $5.6m for 2018. The adjustments were substantial – basically reallocating $2m of profit from 2017 to 2018 - but the pattern showed a strong positive trend. Forecast EBITDA was $7.2m for 2019 on a base case, with estimates $9.2m for 2019 and $15.5m for 2020 on a high case.

46. It seems that at this point the view of all concerned within the Company was that the sale process should be capable of being completed within the year, and that the sensible course of action was to wait for the new CEO to be appointed. However, Mr Flammini and Mr Loy were concerned – Mr Flammini about the length of time that the search was taking, and Mr Loy about Mr Costa's bona fides. Mr Loy was still trying and failing to arrange a meeting of the ExitCo, with other members apparently unavailable. His reasons for concern were set out in an e-mail of 14 March to Mr Aspinall, in which he said:

> "the radio silence from FC suggests to me he is not pressing Jefferies on the matter of the sale, but he/they and the management (who do his bidding) are working on his agenda. I think he is trying to utilise Jefferies not for a sale, but to attract an investor to buy-out the shareholders at a low price via a drag and tag. This is why we need to see the mandate letter, the terms of appointment, see the valuation, avoid the drag and tag at a low ball offer by setting a minimum price, and importantly, understand how the sales process is being managed."

47. The fact that he held this view clearly explains why Mr Loy had consistently pressed in board meetings for a high minimum value to be attributed to the

Company. It is also clear that at this point Mr Loy decided that it was necessary for him to seek buyers independently of Mr Costa – as he said in an e-mail to Mr Flammini of the 15 March, "I need the Jefferies mandate and valuation - I cant talk to any buyers until I get it!". He therefore continued to press for a meeting of the ExitCo at which he expected this information to be presented. Mr Costa agreed to a meeting of the ExitCo on 26 March, but when Mr Loy sent him an e-mail on the day before the meeting asking for this information, Mr Costa refused to provide it. At the subsequent meeting, of which Mr Loy made a recording, there was an extended discussion about potential acquirers and price. Mr Costa agreed to send the requested information to Mr Loy and to arrange a meeting between him and Jefferies (although no such meeting ever happened). Mr Loy pressed for the setting of a minimum price for the sale – a strategy with which Mr Costa strongly disagreed.

48. By the end of March Mr Loy was working on originating other offers and had drafted a memorandum describing the Company aimed at private equity investors. The basic model to be proposed was that he and Mr Flammini would contribute the equity piece, and a private equity house would provide debt to finance the purchase of the other shareholders.

49. There then seems to have been an extended hiatus. The process of negotiating the Jefferies engagement letter seems to have continued, and on 10 April a draft was circulated to the board. Mr Loy took the view that this confirmed his worst fears. The letter provided that;

> "Jefferies will provide the Company with financial advice and assistance in connection with a possible sale, disposition or other business transaction or series of transactions involving all or a

> material portion of the equity or assets of one or more entities comprising the Company, whether directly or indirectly and through any form of transaction".

50. He responded by e-mail suggesting that the letter be redrafted to constitute only a mandate to assist with the sale of the entire group, a suggestion to which Mr Costa responded badly. Mr Costa's particular concern seems to have been a suggestion by Mr Loy that he (Mr Loy) communicate directly with Jefferies – a suggestion to which Mr Costa responded: "Unless authorised to do so by the board, you should take no steps to negotiate or communicate with Jefferies. Any unilateral steps taken by you without the appropriate authorisation will not be tolerated and will be treated with the utmost seriousness". Unsurprisingly, this response seems to have confirmed to Mr Loy the idea that what Mr Costa was discussing with Jefferies was something other than a sale of the Company.

51. Nothing further as regards the Exit seems to have happened by the time of the next board meeting, held on the 17 May. At that meeting Mr Costa explained that the Jefferies retainer letter had not been signed because of the dispute over Mr Loy's requirements for it to be changed. Mr Loy therefore agreed to drop his proposed amendments "in order to give sufficient time for the Exit to be achieved in accordance with Clause 6.2 timeframe". However, the retainer letter seems to have remained unsigned, and consequently the sale process remained uncommenced. This may have been a result of the fact that at the same time a transaction between Mr de Mevius and Bay Capital seems to have been being negotiated. The breadth of the definition of "transaction" in the Jefferies engagement letter could have led to their being due remuneration in respect of that transaction, and Mr Thesing (who was now clearly acting for the Company) was therefore requested by Mr Di Capua to amend the definition in order to

ensure that any such transaction would not trigger any entitlement by Jefferies to remuneration.

52. On 3 June, Mr Loy's solicitors, Mishcon de Reya, wrote to the board of Spring to the effect that Mr Loy understood that Mr Costa had been in discussions with a number of prospective purchasers of the Company, that he too wished to seek prospective investors in the Company, that he wished to provide the EY document to such purchasers, and asking for a copy of the NDA that Mr Costa had used in order for Mr Loy to be able to ensure that any such information was provided on terms of equivalent confidentiality. This letter was not responded to.

53. The Jefferies engagement letter, with the amendments relating to the Bay transaction, was thought to be finalised on 10 June, but was finally executed on 18 June after some further amendment. Mr Loy was by this time in contact with Metric Capital in respect of an acquisition of the Company.

54. On 15 June, Mr Uberoi and Ms Kurtzman reported that they had identified Mr Ringel as a potential CEO and were about to make an offer to him. A board meeting was convened for the 20 June, with several directors pressing for an update on the sale process. At this meeting, Mr Loy and Mr Flammini expressed their concerns that the delay in recruiting the CEO would negatively impact the sale process, questioned the need for the appointment (and the size of the package to be offered) and questioned the necessity of the appointment given the imminence of the sale. However, they were outvoted by the other directors, who resolved to continue with the hire. However, this board meeting was largely taken up by the process of putting pressure on Mr Loy to deal with a legacy tax

issue and to freeze his salary on the grounds of non-performance. It appears that the only discussion of the sale process was a report by Mr Costa that the mandate letter was signed and the process was now running.

55. On 2 July Mr Flammini sent an e-mail to Mr Costa pointing out that he was yet to share the mandate letter with Jefferies or to provide any substantive information as to the process. Mr Costa replied on the 8 July. Both letters can be described as intemperate. However, one element of Mr Costa's reply is notable. In response to Mr Flammini's criticism of the lack of progress on the deal he said:

> "You cannot be the only one who didn't understand that Jefferies, as well as other serious merchant banks, would never have accepted to be engaged on the basis of last years' results and financial performance. On this topic they were very clear with me and with our CEO and CFO and in turn I was very clear about this with the BoD members and shareholders.
>
> Let me remind you that in order to have any chance to successfully pursue the exit process, "the Board agreed that the Company should (i) improve its results, (ii) complete a Vendor due diligence process and (iii) hire a talented CEO responsible to prepare a business plan that is a key factor to pursue the exit process.".

56. The references in this document to what the board had been told, and what it had agreed, seem to me to be simply incorrect – or, at least, to run contrary to the records of the board's deliberations. However the key point is that it is clear that in Mr Costa's mind there were now a significant set of preconditions to the commencement of any marketing process, some of which would take some time to satisfy.

57. Mr Loy had, as he indicated, been seeking investors, and believed he had found one in a Private Equity fund called Metric Capital. By 15 July Mr Loy and Mr

Balfour of Metric had constructed a high level term sheet for an offer for the Company. This valued it at $100m, which seems to have been a discount to the value which Jefferies were reported to have placed on it at the time of $125-150m. On the 8 August the fact that Metric wished to make an offer was communicated to Mr Mineard of Jefferies. Mr Mineard initially played for time, suggesting that they get in contact in September, but Mr Balfour replied explaining that Metric "would be keen to move forward ahead of September". Mr Mineard forward this to Mr Costa, who responded: "Ridiculous. I would tell them that there are many parties interested and there will be a competitive bid". Mr Mineard responded: "And we're not ready (new CEO, etc.) I will call him. Always better than over e-mail".

58. This is a slightly troubling exchange, in that Mr Costa's observation to Mr Mineard was – to both of their knowledges – untrue. However, it is notable that Mr Mineard seems to have sought to construct a better and more truthful reason for delay.

59. Mr Mineard and Mr Balfour spoke on 16 August, and Mr Balfour promptly relayed a report of the conversation to Mr Loy. Interestingly, Mr Balfour seems to have asked Mr Mineard what his mandate was, and Mr Mineard responded that his mandate was "open" – that is, that he was instructed to secure interest generally rather than to effect any particular transaction. There are, of course, good commercial reasons for Mr Mineard to have given that response in a conversation of that kind, regardless of the true position. However, what he certainly did say – as Mr Balfour recorded in an e-mail to Mr Loy – was that Jefferies were not prepared to entertain any offer at this stage. As Mr Balfour

said in the same e-mail, "it is a bit bizarre to hear from an advisor that preparing an offer would not be a good use of time".

60. Meanwhile Mr Aspinall, another director who also wished to sell his shares in the Company, was seeking information from Mr Costa as to the progress of the sale. Mr Costa declined to provide any such information, on the somewhat surprising ground that "I have nothing to show or to demonstrate to anyone". At this point it is clear that in Mr Costa's mind the conduct of any process for the sale of the Company was a matter for him and him alone, and he saw no reason to discuss it with any other board member.

61. In early September there were requests from some investors for information packs as regards the Company. However, the main action seems to have been between Metric and Jefferies. After receiving Mr Mineard's call, Mr Balfour sent a follow-up e-mail asking a number of further questions. Mr Mineard responded to Mr Balfour that "I circled up with the Spring team earlier today. As I suspected, no interest in a debt-based capital raise at this time". Mr Balfour pointed out in reply that that was not what he had proposed and submitted on 13 September a formal non-binding expression of interest, valuing the Company at $110m net of debt. Jefferies does not seem to have responded to this. Mr Loy, through Saxon Woods, therefore sent a letter to all board members and shareholders of the Company on the 24 September informing them of the fact of the Metric offer. This produced an e-mail from Mr Mineard to Mr Balfour which read in its entirety: "Copying Francesco and Hank who are pleased to follow up. Francesco will take the lead since he is in London".

62. Mr Costa agreed to meet with Metric. However, Saxon Woods sent another letter to directors and shareholders informing them of the meeting and suggesting that they should join it. Mr Costa responded by cancelling the meeting and sending an e-mail to the addressees of the Saxon Woods e-mail setting out his reason for doing so. He suggested that the proposal that other shareholders or directors should be involved in the transaction process was an attempt by "certain shareholders" to "interfere with a fair and sound process, potentially destroying value and disrupting a sensitive process by pursuing personal interest". It is notable here that what Mr Costa seemed most focussed on in his response is the preservation of his own exclusive role as negotiator and conductor of the sale process. Mr Loy's lawyers, Mishcon de Reya, then wrote to Sidley Austin, who now seemed firmly in place as the Company's solicitors, asking them to confirm that the Company was acting in accordance with the SHA, and asking for particularisation of the allegations made against Mr Loy.

63. Mr Ringel arrived as the new CEO on the 6 September. On the 7th October he met with Mr Costa and presented his "first 30 days" analysis. As with most incoming CEOs, Mr Ringel had identified a set of issues within the Company which he considered required urgent action. He concluded that he "would need to spend at least 70% of his time in the next 6-9 months on fixing underlying business issues rather than focus on new business opportunities.".

64. On 30 October Mr Mineard sent an e-mail to Mr Costa to the effect that Soho House, a business which was generally perceived to have a similar business model to Spring Place, had raised capital at an attractive multiple, and saying "lets try to accelerate what we are doing. There is so much opportunity and a

ton of capital available. But it won't be around forever…". This seems to indicate that even Mr Mineard seems to have thought that Mr Costa was not actively pursuing the transaction as enthusiastically as he might have.

65. Metric wanted to pursue the deal but were rapidly becoming disillusioned with the lack of progress - Mr Balfour e-mailed Mr Loy on the 26 October to the effect that he was losing credibility internally within Metric. Mr Balfour therefore agreed to the only meeting he could get – with Mr Costa and Mr Uberoi alone. This meeting, which took place on the 5 November, appears to have been used by Mr Uberoi and Mr Costa to probe Metric as to their relations with Mr Loy, and no further information was provided about the Company. Mr Costa also raised concerns about Metric doing any due diligence at all on the Company, suggesting that this would cause disruption to the Company.

66. Mr Balfour took a minute of the meeting and circulated it. After seeing this draft, Mr Uberoi voiced a concern about the description of the sale process which he was recorded as having given, in particular that it recorded him as having said that "the process was put on hold once the decision had been taken to install the new CEO". His concern was that the description attributed to him could indicate that he and Mr Costa "had not been seriously following the sale process", and that, if these minutes were circulated, that message could be communicated to other shareholders. However, it was eventually decided not to forward these comments to Metric. Mr Costa queried whether the production of the minutes might be a good enough excuse to decline to deal further with Metric, but the suggestion was not pursued.

67. On 15 November Mr Ringel provided a financial update for the first 10 months of the year. This showed that, whilst turnover continued to increase ahead of budget, EBITDA was well below budget, resulting in a total of $3.3m for the year to date against a budget of $5.1m. This must have made clear to all concerned that the $7.2m figure contained in the EY SID base case would not be achieved. Meanwhile Metric, on the 19th November, submitted a further and more detailed non-binding offer, valuing the company at $110m. This offer explained that the figure had been arrived at by applying what they regarded as the relevant market multiple of 12x EBITDA to the $9.2m figure given in the EY SID. It also set out a proposal to conduct a two-stage diligence process in order to avoid disruption.

68. Mr Uberoi immediately pointed out to Mr Costa that this approach, if applied to the projected $6m EBITDA, would result in a value for the Company of $72m. Mr Costa's response was that by "saying that they mix preferred and common they are admitting that they back Loy".

69. Mr Uberoi then contacted Mr Thesing. His message was, in effect, that more than half of the shareholders did not want to sell at the valuation they felt they were likely to get, and that this decision needed to be "formalised in the best way from a legal perspective".

70. Meanwhile, there was a telling exchange of e-mails between Mr Costa and Ms Gerami. Ms Gerami had, through a mutual contact – a Mr Shekofti - discovered that The Hut Group (THG) were potentially interested in the Company, and had sought to put them in contact with Mr Costa. Mr Costa's reply is striking.

> "Leili maybe is not clear the situation we are facing, Mark Loy misrepresented the real situation of the company, destroyed 50 mln of cash we injected, paid his social security with company money and now he is creating disturbing actions to be bought out.
>
> I have no intentions to speak or engage any conversation with whoever is in touch with him."

71. Mr Costa was accustomed to expressing himself strongly in e-mails. However, on this occasion, he seems to have articulated exactly his position – that he was not prepared to negotiate an Exit with a buyer who was in any way connected with Mr Loy. Mr Costa therefore began making arrangements for the THG approach to be dealt with by him, Mr Uberoi and Mr Mineard without involving anyone else from the Company – indeed he expressly requested that Mr Ringel not be informed of the approach. Mr Shekofti contacted Mr Mineard to arrange a meeting with THG, Mr Mineard reported this to Mr Costa, and Mr Costa replied "another aggressive idiot", suggesting delaying the meeting.

72. Mr Balfour of Metric sought to progress matters by sending an e-mail to the board and shareholders of the Company attaching the Metric offer letter of the 19 November. Mr Uberoi proposed to Mr Costa that they respond by explaining that, although the offer was expressed to be for $110m, based on the current numbers Metric's approach would lead to a valuation of below $75m". However, Mr Costa observed that it would be important to prepare for a board discussion, and to that extent Mr Mineard was asked to provide a formal update on the process to the board. The proposed text of this update was communicated in an e-mail of the 26 November to Messrs Costa and Uberoi, and was presented to the board as a one-slide update. I regard this e-mail as being of significance, and will return to it.

73. It is notable that this is the only substantive e-mail from Mr Mineard which has been disclosed, and that it repeats the points which Mr Uberoi made in his initial e-mail responding to the circulation of the Metric offer. However, the core of the message is contained in the "current status" section. This reads:

> "In light of historical financial performance (which was below expectations) and the CEO change we are keeping parties warm until we are ready to engage in a second phase of our process to include sharing of detailed data and access to the management team
>
> While we are keen to do this ASAP we need to be sure that we are ready and have everything we need in hand to get to the finish line with one or more parties
>
> Timing of this next phase will be governed by (a) allowing Tim Ringel sufficient time to impact the business; and (b) availability of data that supports an improvement in financial performance with sustainability going forwards."

74. This does make clear that Jefferies had no intention of conducting a sale by the end of 2019 and did not envisage doing so in early 2020 either. I think the form of this update would be incomprehensible if Jefferies were aware that the Company was supposed to be trying to originate offers by the end of 2019, and that it was mandated to "cause" a sale immediately thereafter. I regard this fact as evidence that they were not so aware.

75. As regards Jefferies' mandate, it is important to understand that every previous update which they had provided was focussed on finding investors in general terms. I think that Mr Mineard's description of his mandate to Mr Balfour as being "Open" was entirely accurate – he believed that what he had been instructed to do was to "see what the market says about the business". The size, nature and intent of that interest was something which could be discussed at a later stage. I think he was also entirely correct in his assessment that the

Company could reasonably have been expected to be sold for a better price towards the end of 2020, when Mr Ringel had had the opportunity to build a stronger track record, and that the best way of doing this would be to hold, at that point, a competitive auction. Mr Mineard's assessment of current status was therefore almost certainly an accurate assessment of the position viewed from his perspective.

76. What is, however, equally clear, is that Mr Mineard was not in any way instructed to meet any particular timetable. Both experts agreed that it was relatively unusual for an investment bank to be instructed to conduct a sale by a particular date, and that in such a case it would be usual for the investment bank to require something to this effect to be inserted in writing into their mandate letter. No such provision was included in the Jefferies mandate letter, or appears to have been discussed with them.

77. A subsidiary issue in this regard arose in relation to the question of whether Jefferies were aware of the contents of Clauses 6.2 and 6.3 of the SHA. There are actually two questions here. One is as to whether they were aware of the precise terms of these clauses. It seems clear that they were not. The other, however, is as to whether they were aware in general terms of the Company's obligations. I do not think that it matters whether they were or not. Jefferies would have acted on the instructions of their client, and those instructions were communicated to them by Mr Costa. I think they would – entirely reasonably – have taken the view that the Company's compliance with its legal obligations in respect of the SHA was a matter for the Company and its lawyers, and not a matter for them. I think that they were fully entitled to assume that the

instructions which they received from Mr Costa were the result of a full and proper consideration by the Company of its own obligations, and if the issue was not raised with them, they were under no obligation to raise it with him. There is no suggestion that they did so, and they cannot be faulted in any way for not having done so.

78. A board meeting of the Company was held on the 3 December. This was largely taken up with a presentation by Mr Ringel as to his plans for the development of the business and the improvement of profitability. As regards the Exit process, the board agreed – correctly – that the issue of the Metric offer was a matter for shareholders, and should be put to a shareholders meeting, and that the shareholders were not obliged under the SHA to accept an offer which they regarded as too low. However Mr Loy made the point that there was in fact no Metric offer to put to shareholders because the Company had refused to engage in the process which would have been necessary for Metric to move from a non-binding to a binding offer.

79. It is also notable that Mr Uberoi and Mr Costa throughout presented the position as a dichotomy between engaging with Metric and proceeding with Jefferies' competitive auction approach – indeed Mr Costa described the choice for shareholders as "whether or not to proceed with Jefferies".

80. Mr Uberoi seems to have been adamant throughout the meeting that the true value of the Metric bid was not the $110m which they had in fact offered. He seems to have come to this conclusion by assuming that Metric would price their final offer exclusively by reference to the actually achieved EBITDA figure for calendar year 2019. This is a bizarrely oversimplistic approach to have

been applied by a person who held themselves out as a serious and sophisticated investment banker. I have absolutely no doubt that Mr Uberoi was well aware that Metric would have looked at a number of different variables in this regard (as indeed Metric confirmed to Mr Loy that they had done in an e-mail of the 4 December). More importantly, since he believed that they had been talking to Mr Loy, he must have known that they would have undertaken their own projections as to the potential earnings capacity of the business once it had been restructured. In short, Mr Uberoi must have known that his assertions that the "true" value of the Metric bid was below $75m were no more than guesswork, and that some serious engagement with Metric would be necessary in order to ascertain their actual position.

81. At this point THG began to reach out to Mr Mineard. On the 6 December Mr Mineard confirmed to Mr Costa that they seemed to be serious buyers, and Mr Costa agreed to meet them in early January. Meanwhile, with the December deadline approaching, Mishcon de Reya sent a long letter to the directors suggesting that they had failed to comply with the requirements of the SHA, and that as a result there were potential actions both against them personally for breach of duty and for a petition under s.994. Saxon Woods copied this to the other shareholders.

82. Possibly as a response to this, Mr Costa sent an e-mail to Mr Balfour suggesting that they meet to discuss valuation, and shortly after this a response to the letter from Mishcon de Reya was sent by Sidley Austin, which referenced the prospect of this meeting as evidence that the Company was progressing the transaction. Sidley Austin also sent a memorandum to the board of the Company. This

memorandum is a critical part of Mr Costa's defence to this petition and requires detailed consideration.

83. The essence of the argument put forward in Sidley Austin's letter was that the Company was acting on the advice of Jefferies as regards the conduct of the sale, and that Jefferies had advised them that a better price would be achieved if the sale was delayed. This did not, however, deal with the question of whether following this advice would comply with the requirements of the Shareholders' Agreement. This is the point which the Sidley memorandum addressed.

84. As regards directors' duties, the memorandum correctly advised the directors that they had no personal duties in respect of the SHA, but they did have a duty to cause the company to comply with its contractual obligations under the shareholders' agreement.

85. The essence of Sidley's advice is in the following paragraph. They said:

> "On the basis of the information provided to date, we believe that the Company has complied with these obligations and continues to do so, including by engaging Jefferies as the Company's financial advisor to explore potential exit possibilities."

86. This is, I am afraid, a prime example of weasel wording – you have informed us that your actions comply with the requirements of the agreement, and on the basis of that information we advise you that you have complied with those requirements. This advice might have been of some use if it had been accompanied by a copy of the instructions to Sidley setting out what they had in fact been told, but no such document has been disclosed, and there is no reason to believe that it ever existed. I do not doubt that Sidley were fully

informed of the terms of Clause 6.2. However, they chose not to engage with its substance.

87. It is also unfortunate that the note of advice incorrectly summarised the requirements of clause 6.2 after 2019. The actual provisions of the SHA are to the effect that the board of directors "shall engage an investment bank to cause an Exit during the Investment Period at a valuation devised by such investment bank and on such terms as shall be consented to by the Board of Directors, which consent shall not be unreasonably withheld." This was summarised as a requirement that the Company engage an investment bank "to assist with the process" of sale. If this had in fact been the requirement to which the Company was subject, it is clear that, as Sidley concluded, it would have been satisfied by the retention of Jefferies which had already occurred. However, it is entirely clear from the mandate letter that Jefferies were not engaged on the terms provided for in clause 6.2.

88. The board did not investigate with Mr Costa the basis on which the Sidley's advice had been given, but took the memorandum as advice that they were acting in compliance with the SHA by following Jefferies' advice to defer the process of gathering bids for the Company.

89. On 21 January 2020, Mishcon de Reya wrote directly to Jefferies informing them of the existence and terms of the SHA, in particular Clause 6.2. This letter produced a response from Jefferies' lawyers, Herbert Smith Freehills, on the 27th, which confirmed that Jefferies had never seen the SHA, had always operated exclusively through Mr Costa, were not aware of the existence of the Exit committee, and pointed out that intermediating disputes between

shareholders and/or ensuring that agreements like the SHA were adhered to fell entirely outside their remit.

90. It does, however, appear that this may have catalysed a response, with Mr Uberoi now pressing to get the offering deck finished and out to investors, and a series of investor meetings being attended by him and by Mr Costa.

91. On the 23 January Metric produced a third offer, this time valuing the company at $125m. This offer explained that it was not based simply on historic EBITDA, but was based on an assessment of the Company's market position, and in particular a "strategic premium on account of future revenue potential under Metric ownership". This offer was again copied to all shareholders, who were invited to a proposed forthcoming meeting with Mr Costa. However, Mr Costa declined a meeting, explaining in an e-mail that he did not believe that Metric's interest was genuine or that its offer was being made in good faith, and that he believed that Metric were acting in association with Mr Loy. Meanwhile Mr Uberoi had had a meeting with THG on the 26 January in which he provided no information about the Company and gave no indication of when it might be able to engage in serious discussions. However, he and Mr Mineard agreed that he should send a follow-up e-mail, which he did.

92. Mr Costa and Mr Mineard seem at this moment to have switched into high gear as regards finding other investors. The concerns which prevented them from sharing information with Metric and THG do not appear to have applied to these other investors – Mr Costa was quite happy to agree to a possible bidder, Hanson Lux, having access to the data room which had been established some time ago to support the transaction.

93. On 3 February, Mr Ringel e-mailed Mr Uberoi to the effect that he was ready to take on "any investor conversations".

94. By 4 February Mr Balfour was clearly becoming frustrated, and sent an e-mail to Mr Mineard asking "why Metric was being blocked". Mr Mineard's response was that "You're not being blocked. The data room isn't finalised. No other party has access to it". This last statement is puzzling, given that Mr Mineard himself had suggested a few days earlier that another bidder, Hanson Lux, be given access to it. However, it does seem that the purpose of Mr Mineard's e-mail was more a brush-off than a serious communication, given that his observation to Mr Costa in his separate e-mail was "can't win with this guy. I try to put him at ease that he's not being excluded." Mr Balfour had, however, raised a serious question. Mr Mineard had observed to him that the Jefferies' plan was to begin an auction "when the company had completed 2019 actuals and 2020 projections". As Mr Balfour pointed out, that meant that the auction could not commence until April, with completion probably not before September.

95. Meanwhile, THG tried to set up a meeting with Mr Ringel. Although Mr Ringel was initially keen, Mr Costa decided that the meeting should not happen, and that follow-up should be via Jefferies.

96. On 12 March Mr Ringel shared the final (unaudited) figures for 2019 with the board. Revenues were $87.5m, ahead of budget, and EBITDA was $6m.

97. However, by this time the business had been overtaken by events. Lockdowns were established in Italy on 23 February, the US declared a nationwide emergency on 13 March and the UK announced lockdowns on 25 March. The

impact of the lockdowns was devastating for the business of the Company. Jefferies tried to keep the Exit process going, but it was clearly challenging – on April 16th they presented a valuation (which may have been pursuant to the obligation in clause 6.2 – again, there are no records of the instructions given to them), but this suggested a value between $16.3m and $149.3m, which cannot be described as helpful. What this valuation does demonstrate, however, is that in valuing the company two very different types of answer can be obtained depending on whether the approach chosen is primarily turnover-based or primarily EBITDA based. The turnover of the business had continued to grow strongly, and the higher of these two values was obtained by simply applying a 2x multiple to budgeted turnover. Conversely, because of the relatively low profitability of the group, even high (12x) multiples of EBITDA, when applied to budgeted EBITDA, produced a valuation of less than half that - $68m. Even lower valuations were produced by applying these multiples to the covid-affected actual EBITDA.

98. In the early part of 2020 there remained the possibility that the impact of Covid might be confined to the winter of that year, with things returning to normal within months. However, the decision to implement further hospitality restrictions in New York and lockdowns in the UK in the autumn of that year rendered the future of the business almost unknowable, and all of the possible bidders fell away.

4.3 Shareholdings and control of the Company

99. The ownership structure of the Company has a somewhat baroque feel. The reason is partly because it was the result of a series of capital raisings, with

different investors coming in at different times, and partly because Mr Costa was an investor who liked to operate in association with other investors.

100. Mr Costa's main investment vehicle was a Luxembourg incorporated entity, Greencage S.A. Greencage is a Luxembourg securitisation vehicle (*société de titrisation*). This means that it exists to hold assets on behalf of those who hold notes issued by it. Vehicles of this kind were, for the whole of the relevant time, prohibited from engaging in any active management role in respect of their assets – they are necessarily purely passive entities. Mr Costa seems to have been the person charged with acting on behalf of Greencage, and as a result could in some respects be said to control the shares owned by it.

101. This explains the discrepancy between the positions of the two parties as regards the ownership and control of the Company. A traditional application of company law to the resulting ownership diagram would result in the conclusion which the Petitioners reach that Mr Costa controls around 56% of the shares in the Company, and therefore has de facto control. Mr Costa, by contrast, argues that his actual economic interest in the Company is only around 30%, since that is the only economic exposure he has to the performance of the company. Both of these positions are correct, but taken together they do result in a difficult question as to what is meant in this case by "control".

102. The truth of the matter is that the investors who Mr Costa introduced to the Company – who, by the time the events complained of occurred, owned around 78% of the Company – were (apart from Mr Flammini) broadly content to leave decisions relating to the company to Mr Costa. Their interests were absolutely aligned with his – they were all financial investors, they were all looking for a

return on their investments within a relatively short period, and the thing which is likely to have been most significant to them is the likely Exit price. None of them (apart from Mr Flammini) seem to have had any great desire to be closely involved in the affairs of the company, and the logic for that position would seem to have been the knowledge that Mr Costa was closely involved in his capacity as chairman and – at some points at least – shadow CEO. At no point does there ever seem to have been any dissension within this investor group as to the wisdom of allowing Mr Costa to determine and act in their collective interests, and to that extent the question of whether Mr Costa could, in the event of such dissention, have imposed his will, does not arise.

5. The Evidence

5.1 The Petitioner's Witnesses

103. The Petitioner produced only two witnesses of fact – Mr Loy and Mr Barley – and one expert – Mr Meade.

Mr Loy

104. Mr Loy was anxious to explain his side of his dispute with Mr Costa, and to explain how he felt the Company was being ruined by incompetent management. However, his evidence was of limited use as regards the issues before the court. Unlike many petitions, there is no doubt as to the terms of the agreement between the shareholders. As regards the conduct of the Company during the period complained of, since the essence of Mr Loy's case was that he had been deliberately excluded from access to any information about what decisions were being taken and why, he was unable to help much beyond

expressing – at some length – his unhappiness with that situation. Mr Hill put to him repeatedly the point that it had been a breach of his duties as a director to the Company to provide information about it to potential bidders. His response was that he believed that Mr Costa was making the same sort of information available to other investors (for purposes other than an Exit), and he was therefore justified in doing the same. It was clear that Mr Loy sincerely believed that Mr Costa was not acting in accordance with the agreement which he believed had been made between them.

Mr Barley

105. Mr Barley is the Managing Director of Butterfield, which is the registered holder of the shares in Saxon Woods and holds them as trustee of the Logan 2011 Capital Trust. He is also President of Montague East Ltd. and Sterling East Ltd., the nominee companies which act as directors for Saxon Woods. His evidence did not add anything of significance.

5.2 The First Respondent's Witnesses

106. The Respondent produced 5 witnesses of fact, all of whom were directors of the Company at the relevant time. Mr Oberoi and Mr Khattar were directors by reason of being investors in the Company; whilst Mr Uberoi and Ms Kurzman had been appointed by Mr Costa by reason of their skills and backgrounds.

Navin Khattar

107. Mr Khattar works in the UK business of his family investment office, Khattar Holdings Private Limited (the Sixth Respondent) which is a shareholder of the Company. Mr Khattar was appointed a director of the Company on 14 August

2018. At the time of his appointment, he was a director of 12 other UK companies, as well as 2-3 US companies and one Indian company. As he acknowledged, he is a busy man. Mr Khattar was also candid about the fact that Khattar Holdings has invested in a number of investments in which Mr Costa (and other directors, including Mr Oberoi) are involved, including Spring Place, Billionaire Club and Sambazon.

108. Mr Khattar was clearly an honest witness. However, he had little involvement in the principal matters in dispute in these proceedings. To the contrary, as he fairly accepted, his knowledge of the Exit process was derived from what he was told at board meetings and conversations with Mr Costa.

Alok Oberoi

109. Mr Oberoi has known Mr Costa for over 10 years, and described him as his "business partner". Like Mr Khattar, he has multiple different roles and offices - he is on the board of 10-12 other companies, sits on the advisory council of a business college at Cornell University and has a charitable foundation. He accepted that the Company is a small part of his affairs, albeit that he still invested quite a lot of his personal money.

110. In his dealings with the Company, Mr Oberoi clearly relied on the fact that he knew and trusted Mr Costa, and that their economic interests as investors were aligned. In particular, he trusted Mr Costa to give correct instructions to Jefferies and to ensure that the Exit provisions of the SHA were complied with.

111. Mr Oberoi's evidence was frequently vague – for example he was unable to recall why one of his employees was involved in helping Mr Costa negotiate the

Jefferies engagement letter, why Jefferies was involved in discussions about the restructuring of the Company, or the mechanics of a transaction negotiated in 2019 in which it was proposed that his vehicle should acquire the Bay Capital stake jointly with Mr Costa. However, it seemed to me that the issue was simply that Mr Oberoi was not particularly involved in the issues surrounding the Company, and was relying on Mr Costa's stewardship.

Cecilia Kurzman

112. Ms. Kurzman had a successful career in the media and entertainment industry, and was brought on board by Mr Costa as a director in 2014. Her primary focus at the Company appears to have been the identification and recruitment of senior talent. She was a combative witness who appeared to have taken a strong dislike to Mr Loy. Her desire to support Mr Costa's position seems at times to have led her beyond the ordinary bounds of witness discipline – for example, her account in her witness statement of the debate which took place at the June 2019 board meeting was somewhat undermined by the fact the minutes recorded that she had not been present at it. However, here again, Ms. Kurzman had limited involvement in the principal matters under scrutiny in these proceedings. Her knowledge of the Exit process was based principally on what she was told at board meetings and conversations with Mr Costa.

Hank Uberoi

113. Mr Uberoi was in a very different position from the other witnesses as regards the Exit process. He is a former investment banker, having spent 14 years at Goldman Sachs. He has known Mr Costa for 15 years, and was brought in as a non-executive director by him in 2013, at which time his primary role was as

CEO of Earthport. However, he gave up his role at Earthport in 2017, and thereafter appears to have worked closely with Mr Costa on the corporate finance transactions of the Company.

114. There is an issue with Mr Uberoi's co-operation with the court which requires to be addressed. However, before considering that issue, I turn to his oral evidence.

115. Mr Uberoi made clear in his witness statement that he was not particularly concerned with the terms of the SHA. His explanation of clause 6.2 was that:

> "In my experience, these clauses are usually designed to trigger a discussion around the date specified in the agreement, and then people work in good faith to figure out what should happen next – if it doesn't make sense at that point in time, you don't sell."

He clearly expresses his view that he agreed with the strategy of waiting for mid-2020 before beginning an auction, but at no point does he suggest that he considered whether this strategy was in line with the terms of the SHA. In particular, he does not seem to have even asked himself whether the other parties to the SHA – in particular Mr Loy and Mr Flammini – might have legitimate concerns that it was not being complied with.

116. It was clear from Mr Uberoi's witness statement that he regarded Mr Loy and Mr Flammini as a nuisance, in that they loudly and vociferously disagreed with his and Mr Costa's strategy for selling the Company. He clearly felt that the appropriate response to their interventions was an increasingly forceful assertion that he was right, they were wrong, and the best approach was to exclude them as far as possible from any involvement in the Company or its sale. As an approach to corporate governance, this falls some way short of ideal,

no matter how convinced Mr Uberoi may have been about the correctness of his strategy.

Mr Costa

117. Mr Costa is the chairman of the Company's board of directors (in which position he is entrenched under the 2016 SHA) but also a substantial indirect investor. He is the principal protagonist in these proceedings and the only substantive respondent.

118. There was an interesting contrast in Mr Costa's evidence between the way that he dealt with conversations of which there was some documentary record, which was meticulous, and those of which there was not, where he was only too happy to provide broad assurances that conversations had indeed taken place, and had contained exactly the material which helped his case. A point which Mr Davies highlighted was in respect of the process by which Jefferies were appointed. Mr Costa told the Board that he had spoken to other investment banks before recommending Jefferies, and explained the absence of any record of any such communication because his meetings with the other banks had been "all in-person conversations". In his witness statement he claimed to have approached Merrill Lynch, Goldman Sachs and JP Morgan – an implausible choice of advisers for a deal of this size. However, in his meeting with Mr Loy, he gave an entirely different list of names of firms that he had approached. In much the same vein, Mr Costa's verbal evidence was that he had told Matt Starker in a call on the 26 November 2018 that the fundraising on which he thought he was working "was basically dead and the decision of the board was to move forward with the sale of the company". However, this is unlikely –

some time after that call, Mr Starker was still talking about the "SS raise" in communications with Mr Costa.

119. This is particularly important as regards the question of what instructions were given to Jefferies, and here again the documentary record is at variance with Mr Costa's evidence. Mr Costa said that "[Jefferies'] mandate was very clear; to sell the company, from me and from the company". However, on 30 May 2019 Mr di Capua (the Company's CFO and an appointee and confidant of Mr Costa's) emailed the Company's solicitor, Mr Thesing, to discuss, inter alia, "[f]inaliz[ing] the mandate to Jefferies for the fundraise process".

120. I think that Mr Costa's evidence was reliable as regards matters which are documented – for example, events in board meetings. However, I do not feel that I can place any great evidential weight on his accounts of undocumented conversations.

5.3 The Documentary Evidence

121. This case has – unsurprisingly - involved a very large amount of documentation. However, one of the strangest evidential features is the almost complete absence of any written correspondence between Jefferies and its client. It seems to me to be highly implausible that there was no such correspondence. Mr Meade, the expert for the Petitioners, explained in his oral evidence that during a pre-sale period of the kind which is said to have occupied most of 2019, he would expect to see fortnightly or monthly written updates from an investment bank to its client, along with weekly or fortnightly phone calls, and that this would be likely to increase to daily briefings during the auction phase. Mr Hill, the expert for the Respondent, did not dissent in broad terms from this position, although he

thought that there might have been rather more communication by telephone than in writing in the earlier stages of the marketing process.

122. It is accepted that the primary channel for such communication would have been between Jefferies on the one hand and Mr Costa and Mr Uberoi on the other. Mr Costa's practice as regards share transactions appears to have been to involve himself in the initial presentation and pricing discussions but to leave the written discussion of details to others - as, for example, he did with Mr Waldman and Mr Finkielsztain as regards the aborted purchase from Mr Loy and with Mr Puri as regards the aborted purchase by Mr de Mevius of the Bay shares. I therefore entirely accept that Mr Costa may have left this channel of communication to Mr Uberoi. I am less confident that he was not copied on any of these communications.

123. I therefore cannot disregard the fact that Mr Uberoi has chosen not to co-operate with the Company as regards disclosure, and has not given full disclosure of relevant correspondence. Mr Uberoi has provided an explanation for his non-co-operation, that being that he uses only a single e-mail account, that that e-mail account is very large, that he is engaged in a number of confidential matters where duties of confidence are owed to different people, and that the result of this is that he can neither conduct a search for relevant e-mails himself nor grant any third party access to his e-mail account for the purposes of conducting such a search. This refusal caused some consternation to the Company, who had been ordered to give disclosure of documents in the custodianship of Mr Uberoi using the specified disclosure search parameters, and the Company's solicitors wrote to me at the pre-trial stage pointing out that although the Company had been

ordered to disclose these documents, there was nothing that they could do in the face of Mr Uberoi's non-compliance, and – in effect - pre-emptively applying for relief from sanctions.

124. Mr Uberoi did give some disclosure of some documents, but it is not suggested that this disclosure was either complete or in accordance with the parameters.

125. Mr Hill submitted that Mr Uberoi had done his best in difficult circumstances and that I should draw no inferences from his non-compliance. However, that is a difficult thing to do on the facts. If the experts are correct – and I can hardly conclude that both of them are wrong – there must be some trail of communications between Jefferies and Mr Uberoi. It has not been disclosed. However, one of the core planks of the defence to the petition is that in declining to progress the sale, the Company was acting on advice from Jefferies. It is, I think, impossible to believe that Mr Costa and Mr Uberoi have in their possession documentation which demonstrates that this was in fact the advice given, but have unaccountably failed to disclose it. I am therefore forced to the conclusion that this is not in fact what the correspondence said.

126. There is another point as regards disclosure which I think needs to be addressed. As Mr Davies perfectly correctly submitted, advice from an advisor must be construed by reference to the instructions which that advisor was given. The materials that we have from Jefferies, which are mostly in the form of presentations by Jefferies to the board, must have been the product of some preliminary discussion between Jefferies, Mr Uberoi and Mr Costa as to what was required. The absence of any written communications of any kind between Mr Costa and Mr Uberoi specifying the parameters within which the Company

was required to act is itself equally notable. In this regard, I note that even though Mr Mineard of Jefferies expressed a preference at one point for keeping discussions on certain points verbal rather than written, investment banks generally seek to obtain reasonable clarity on the parameters within which they are required to advise before advising, and such instructions are generally – for good reasons – sought in writing. Here again, the absence of any such instructions means that their contents, to the extent that they can be known at all, must be inferred from the communications made by Jefferies that we do have. These do not give any suggestion of any awareness of the obligations of the Company under clause 6.2.

5.4 The role of Jefferies

127. For reasons which will become apparent, the critical factual issue in this hearing is the actions of Jefferies. However, these fall to be inferred. It is therefore helpful to set out the undisputed facts about what they did do.

128. Discussions between Mr Costa and Jefferies appear to have started in late 2017. These initial discussions related principally to Jefferies being invited to provide a $45 million convertible loan note to fund the Exit of certain shareholders and to conduct a search for new investors into the Company.

129. In January 2018, Jefferies produced a long list of potential investors. This work was attributed a project name: "Project Style". The identity of some of the names on the list – which included high net worth individuals and family offices as well as corporates - makes clear that the list was not intended to be a list of potential purchasers for the Company as a whole. A teaser and a draft investor

presentation dated 27 January 2018 depicting the vision of the wider "Spring Ecosystem" (Studios/Place and Real Estate) was also produced.

130. In February 2018, another "investor presentation" was produced which, in a slide headed "Valuation and upside potential" suggested that the valuation of the Company, based on comparable quoted companies, was in the range of approximately $130 to $260 million and that "new shareholders would be buying at a significant discount relative to relevant comparables". The presentation then detailed a proposed $20 million loan to Greencage S.A. for the purpose of Greencage acquiring shares from "3 shareholders" in the Company "at an implied Company valuation range of $110 to 135 million". It was further noted that "Spring Media is currently working with an investment bank for a secondary transaction with an implied Company valuation range between $175-$225 million".

131. In April 2018, Jefferies produced a valuation analysis together with a contact log which categorised investors by their status as to whether they had been contacted or were yet to be contacted and amongst those contacted whether they were "evaluating" or had passed. This list appears to be centred around identifying parties that could potentially invest "$5m a piece". The logs indicate that there were some thirteen parties who had been contacted and were evaluating the opportunity and seven that had passed on the opportunity and a further long list yet to be approached.

132. By mid-2018, the project was still a work-in-progress with the plan for "all fundraising materials" to be "ready by the end of August so we can begin to seriously talk with potential investors right after Labor Day, the first/second

week September". Financial information including a 2018 re-forecast and a long range (three to five year) strategy plan for Spring Studios was also discussed as being required.

133. Jefferies produced an updated Contact Log on 14 September which indicated that there were, at that stage, 27 parties contacted of which 18 names were evaluating and nine names had passed. From this list it appears that Jefferies were still seeking participants in a capital injection rather than seeking a purchaser for all or substantially all of the Company.

134. On 2 November 2018, Jefferies produced a document entitled "Transaction Overview and Update" in which they stated that their work over the past eleven months had been largely "preparatory" and that they looked forward to "launching the formal process". The transaction overview stated that they were seeking to "provide liquidity to certain existing shareholders" and to "provide new primary capital to support further growth in the business." The document set out a nine to twelve-week timetable to close and referenced "negotiate investor term sheets". The document also set out Jefferies' engagement terms being "6% of the aggregate primary and secondary capital raised, subject to a minimum of $3m".

135. In November 2018, an updated draft investor presentation deck dated 26 November was circulated internally suggesting the formal process had not yet begun.

136. On 24 January 2019, Jefferies produced a document entitled "Timeline and Potential Investors". This document essentially repeated the nine to twelve-week timelines in the document of 2 November 2018 but pushed the expected

close of the transaction to April 2019. The document still contemplated a placing of shares, not the sale of the Company as envisaged by the SHA.

137. On 25 February 2019, Jefferies produced an updated/amended document also entitled "Timeline and Potential Investors". This document essentially repeated the nine to twelve-week timelines in the documents of 2 November 2018 and 24 January 2019, but pushed the expected close of the transaction to end of May 2019. It did not refer to the need for a new CEO to be appointed or improved financial performance. The document is somewhat ambiguous as to whether Jefferies was seeking investors in the Company or purchasers of the whole, or substantially all, of the Company's shares with references to investor lists and investor term sheets but also the EY SID and the SHA.

138. By the time of the Board meeting of the Company held on 28 February 2019, "Project Style" is being described as an "Exit process".

<u>The Jefferies engagement letter</u>

139. The work to be carried out by Jefferies was to be documented in the engagement letter discussed in draft at the board meeting on 28 February 2019 and finally signed in June. This stated that the work of Jefferies was:

> "to advise and assist with a possible sale, disposition or other business transaction or series of transactions involving all or a material portion of the equity or assets of one or more entities comprising the Company, whether directly or indirectly and through any form of third party transaction, including, without limitation, merger, reverse merger, liquidation, stock sale, asset sale, asset swap, recapitalization, reorganization, consolidation, amalgamation, spin-off, split-off, joint venture, strategic partnership or other transaction (any of the foregoing, a "Transaction")".

This definition of "Transaction" was drafted widely, as is typical of such investment bank engagements.

140. The engagement letter did not make reference, explicitly or implicitly, to the Company's obligations under the SHA as regards the timing of the transaction.

141. This definition of "Transaction" was subsequently amended by the insertion of a carve out as follows: "any such transaction in which the acquiring party is, as of the date hereof, i) a current shareholder of Spring Media Investments Ltd. (either directly or through an intermediate company) and/or ii) a current shareholder of Spring Place One Ltd. (either directly or through an intermediate company) owning an interest higher than 2% of the share capital of such company (the shareholders under i) and ii) above hereinafter referred to the "Current Shareholders") or an affiliate of any such Current Shareholders." This carve out appears to have been made at the request of the Company on 5 June 2019 by Marco di Capua (the Company's CFO) in an email to Craig Mineard at Jefferies dated 6 June 2019.

142. The fees agreed to be paid to Jefferies, set out in paragraph 4 of the engagement letter, were:

> (a) "At the closing of a Transaction, 4.0% of Transaction Value";
>
> (b) "subject in all cases to a minimum fee of $2.5 million payable";
>
> (c) "provided, however, that the total Transaction Fees payable hereunder shall not exceed $4.0 million".

"Transaction Value" was widely defined to include any debt assumed by the buyer and included any equity roll over. The fee cap of $4.0m means that

Jefferies were incentivised to obtain a valuation of at least $100m, but were not incentivised to achieve anything higher than that figure.

143. Mr Hill's expert evidence was that sometimes M&A mandates are signed (usually at the request of the investment bank) by all the shareholders / major shareholders as well as by the client company which will be the subject of the transaction. The Jefferies engagement letter provided a place for it to be signed by "participating securityholders" and the letter committed such shareholders to agree to pay Jefferies their share of the Transaction Fee at the closing of the transaction. However, the letter is clear that Jefferies' advice was solely for the benefit of the Company and not for the benefit of the securityholders.

144. The Jefferies engagement letter does not appear to have been revised after 31 December 2019, at which point, according to clause 6.2 of the SHA, the mandate ought to have changed.

5.5 The Experts

145. Two experts produced reports – Mr Meade for the Petitioner, and Mr Hill for the First Respondent. Both of these experts were impressive professionals, and both provided considered and fair responses to the questions put to them in cross-examination.

146. Their initial reports, however, seem to have proceeded from different bases. Mr Hill considered whether the Company was ready for sale in 2019, and explained that in his opinion it was not, and that an investment bank with a free hand would unquestionably have recommended that the Company do what it in fact did – to wait for the new CEO to get settled in, for the track record to be improved and

for profitability to increase before conducting a competitive auction. I think that this is all correct, and Mr Meade did not really dissent from it. However, Mr Hill then went on to pose what seemed to me to be an entirely unrealistic dichotomy – that if the sale were not deferred, the only alternative would have been a "distressed sale" in which the selling shareholders would have received little or no consideration. Mr Meade did not accept this dichotomy, and neither do I – if only because the fact that at least one substantial offer was received in the period concerned would seem to demonstrate that the Company was not in fact valueless at that time.

147. The other – to my mind - significant point of difference between the experts was as to the use of a competitive auction process. Both experts said that, ordinarily, this would be the process best calculated to maximise the sale value of the Company. However, Mr Hill's report seemed to proceed on the assumption that any sale conducted in any other way would necessarily realise a lower sale price than a competitive auction. Mr Meade, by contrast, took the view that a competitive auction was only one way of maximising value, and that an investment bank seller should maintain flexibility and openness to all kinds of approaches, regarding the holding of a competitive auction as only one amongst a number of possible marketing tools. On this point, again, I agree with Mr Meade – the role of an investment bank in these circumstances would not be to stick rigidly to one strategy, but to seek to assess any and all possible approaches with the overall aim of maximising value.

Mr Meade

148. Mr Meade has over 30 years' experience in investment banking. His opinion on the matters about which he was cross-examined reflected the depth of his experience and knowledge. Thus, when questioned about whether a rollover could constitute a sale of a company, he correctly emphasised the importance of looking carefully at the capital structure of the newco:

> "So you could still have control in say, for example, the sweet equity, but have lost many aspects of control to the providers of finance who may have – you know, may have a shareholder agreement that gives them these powers. It could be in the share structure; the preference shares sitting ahead of your sweet equity. So that where you have a newco introduced into the transactional structure, it becomes more opaque as to whether you've simply found investors to help you buy the 48% or whether you've restructured it so fundamentally that you've reached the point where I think would say there's been an offer for the whole company and there's been a rollover".

149. Mr Meade's experience was also reflected in the practical advice which he would have expected an independent investment bank to give, e.g. about the importance of flexibility in a sales process and when to move from an auction process into bilateral discussions with a prospective purchaser.

<u>Mr Hill</u>

150. Mr Hill was also an experienced investment banker.

151. The only point where I felt Mr Hill's evidence was possibly unreliable was as regards the question of whether a sale to Metric would have constituted a disposal. In oral evidence on this point, Mr Hill argued that a sale to an acquisition vehicle partially financed by the selling shareholders would not constitute a disposal, since:

> "…the original shareholders still end up owning the same business and assets; the same, you know, stake in the company's

> business and assets. They haven't sold it… I wouldn't describe them as having sold their assets -- the business and assets of the company. They may have exchanged their shares in the original company for another company."

It seemed to me that this would be true if the shares in the new company were on the same economic terms as the shares in the old company, but that was absolutely not the nature of the transaction which was being put to Mr Hill.

152. However, in general Mr Hill sought to give measured and fair responses to the questions which were put to him.

6. Mr Costa's Alleged Scheme

153. Mr Davies, for the Petitioner, put forward a case to the effect that Mr Costa was never serious about selling the Company because he had an alternative plan which involved consolidating the company into a larger group including Spring Place and the real estate entity. His basic argument was that a sale of the Company to a third party would have disrupted this plan, and that Mr Costa was only pretending to be engaged in a sale of the Company, when his real objective was to raise new capital from outside sufficient to enable him to implement this scheme – what Mr Davies calls his "alternative plan".

154. I have severe reservations about Mr Davies' case about the "alternative plan". Mr Costa put forward in his evidence a reasonably clear case as to why this would not have worked, which seemed to me to have some plausibility. However, I think that the position was at once more complicated and less structured than this.

155. Mr Costa was clear in his evidence that his investment in the Company was a purely financial investment – what he wanted to do was to make a profit out of

it. It is probable that he would have been reasonably indifferent to the nature or identity of any buyer if he felt that the proposed price was sufficiently attractive. Indeed, during the negotiations with Mr Loy in 2017, he was clear in his witness statement that his aim was to purchase the shares of Mr Loy, Mr Flammini and Bay Capital in order to resell them to new investors at a higher price. Consequently, I think it is entirely plausible the actual instructions which he gave to Jefferies were exactly what Mr Mineard represented them to be – to find investor interest of any kind in the Company.

156. Mr Davies argues that this cannot be the case, since otherwise he would not have rejected the Metric bid out of hand. The Metric bid was not per se implausible – indeed Mr Ringel, when he first found out about it, said in an internal e-mail to Mr Armbruster that the offer appeared serious, and asked "Where does [Mr Costa] see the danger here except that it makes the rest of Spring unsaleable to other investors or that they might not want your ecosystem SP and building". This observation became the fulcrum of Mr Davies case – in essence he argued that because a sale of the Company would potentially damage the ecosystem, such a sale would potentially damage Mr Costa's economic position, and that therefore he cannot have been pursuing it.

157. Mr Davies also placed great emphasis on a transaction which appears to have been originated by Mr Costa under which Bay Capital's interest in the Company would have been sold to DLF and another purchaser. Mr de Mevius, the chairman of DLF, was under the impression that Mr Costa would be the other purchaser, but Mr Costa's evidence was that he had made clear at all times that this was not the case. This clarity does not seem to have been manifest to Mr de

Mevius, who wrote on the 14 July 2019 to Mr Costa recording the terms of his part of the transaction. Contemporary e-mails suggest that the proposed purchaser for the other half of the stake was intended to be Mr Oberoi's and Mr Costa's vehicles - e-mails suggest that the purchaser would be "FC & Zedan", which Mr Oberoi accepted was a reference to his investment vehicle, Zedan Limited, and Francesco Costa.

158. The problem which this proposed transaction creates is that it is extremely difficult to square it with a good faith attempt to sell the entire company by the end of 2019. Mr Uberoi confirmed in his oral evidence that as late as November 2019 DLF did not know that the Company was due to be sold by the end of the year. More importantly, the proposed terms of the deal with DLF anticipated that the second tranche of the purchase price for Bay Capital's shares would not be paid until the end of May 2020, with a long-stop date of September. As Mr Oberoi confirmed, as described in Mr Puri's email of 10 September 2019, the first payment under the transaction was a deposit, with the result that the interest in the shares would not be transferred until May 2020 at the earliest. This would of course have been impossible if an Exit had in fact been agreed by the end of 2019.

159. It is of course possible that Mr Costa was pursuing a multi-track strategy, in which he was both pursuing an Exit in good faith by the end of 2019 and at the same time pursuing alternative transactions. However, this does seem unlikely. If Mr de Mevius had completed the transaction as proposed only to discover that he was obliged by the drag-along rights in the shareholders agreement to sell a few weeks later for whatever price the other shareholders had agreed, it

seems unlikely that he would have been happy. This is especially the case since Mr de Mevius' explicit aim in the transaction was to equalise his stakes in Spring Place and the Company on the basis of an expectation that these two stakes would merge into a single stake in a "Spring newco" if such a newco were to be formed. Clearly the sale of the Company to a third party purchaser would have made a nonsense of this strategy. Finally, Mr Costa regarded Mr de Mevius as a person of some importance – as he said in his oral evidence, "Mr de Mevius, for me, would have been a fantastic shareholder because he belongs to one of the richest families in Europe…so he was a very prestigious person and to have him involved would have been something very, very positive." So it seems unlikely that Mr Costa would have casually set out to deceive him. When this was put to Mr Costa as a witness, his answer – that Mr de Mevius would have been pleased, because "it would have been easy money" - did not carry conviction, since Mr Costa also said that he believed that "in my opinion, the price being asked by Bay was a very high price" (it valued the Company at $90m). I would also note that, as regards this transaction, Mr Costa's evidence that he was only peripherally involved, and was merely copied on e-mails, stretches plausibility. It is clear that the bulk of the work arranging this transaction was done by Mr Oberoi and his office, and in particular Mr Puri, who worked for Mr Oberoi's firm. However Mr Costa received an e-mail addressed to him, suggesting that he and Mr Oberoi between them pay $5.3m to acquire part of the Bay Holding, and ending: "please confirm that you are fine with these terms so we can proceed forward". This is not really compatible with the idea of his non-involvement. The conclusion which Mr Davies seeks to draw from this is that Mr Costa expected Mr de Mevius to be presented with

an attractive sale opportunity within 12-18 months, and therefore never intended to sell the company. More importantly, since the opportunity was presented to Mr de Mevius as an opportunity to invest in both Spring Place and Spring Studios, he argued that it was intended either to merge the two or to keep them operating in tandem.

160. Another plank of Mr Davies' case is the question of what was said to Mr Ringel during and immediately after his recruitment. Mr Ringel was clearly aware that there was something going on – before he joined the company, Mr di Capua sent him a request for a photo and CV to add to the Company deck, described as being "prepared for the fundraise process". It is also notable that Mr Ringel's compensation package did not contain any element of incentivisation to procure a sale. In my view, the options package which Mr Ringel was granted is of a type which – as Mr Uberoi said in evidence - was "a fairly standard clause". Mr Hill pointed out in his submissions that its effect was that Mr Ringel would have received some financial upside in the event of a sale. However, I think it is simply wrong to say that Mr Ringel's initial package was in any way an incentive scheme – this package was not set up until November 2021, when Mr Costa, in a letter to shareholders, said that the Company was proposing – by implication for the first time - "The establishment of an incentive plan for the company's top management in the event of a sale of the company, with a view to aligning their interest with the shareholders in relation to a sale". Finally, Mr Uberoi was clear in his evidence that Mr Ringel was not told about the proposed sale at any point during the recruitment process, and that he only found out about it after he joined the company.

161. Mr Hill disputed this, arguing that the Korn Ferry Position Specification had the effect of informing Mr Ringel of the fact that a sale was imminent. It did not. It contained two observations: one to the effect that the incoming CEO would be expected to "manage a potential investor exit", and the other to the effect that he would be required to "build and grow the company with an eye towards a potential sale".

162. An interesting sidelight on this is that Korn Ferry had reported to the Company that some of the candidates who they had interviewed seemed to think that the Company was for sale. Mr Uberoi challenged this. In cross-examination Mr Uberoi explained that he regarded it as perfectly proper for candidates for the role of CEO not to be told about a proposed sale of the Company, even where the preparations for such sale were at a developed stage and the Company was committed to proceeding with it, and that it was equally proper for him to lie to Korn Ferry about the true position. I must say, I struggle with this. It is not often that a Judge disbelieves a witness who testifies that he was lying, but on this occasion I think Mr Uberoi was telling the truth as he saw it – that the Company was not for sale, would not be sold in the short term, and therefore required a CEO who would put significant effort into getting it ready for sale over a period of many months or possibly years.

163. One of the things which appears clearly from this recital of the facts is that Mr Costa, at all times during the disposal process, seems to have taken the view that, as regards the disposal process, he was the Company. His primary focus at all times appears to have been to ensure that no director or shareholder (other than Mr Uberoi) had any knowledge of or involvement in the Exit process. It is

fair to note that this appears to have been largely unchallenged by most of the other directors, but when Mr Aspinall and Mr Loy tried to acquire any information as to the conduct of the process they were aggressively rebuffed. The core issue seems to have been that the other directors were satisfied with Mr Costa's assurances that he was doing everything in accordance with the advice of Jefferies, and their view seems to have been that acting on high-quality advice must necessarily have been the best thing for the Company.

164. Mr Davies draws all these threads together to support his theory that Mr Costa never intended to sell the Company. I go with him as far as the conclusion that Mr Costa had formed the view that he did not want to sell the Company until he was confident that he could get a good price for it, and that he did not expect this to happen until 2020 at the earliest. However, it is a substantial leap from that conclusion to the conclusion that he never intended to sell the Company at all, and there I cannot follow him.

165. Mr Costa's position is entirely clear from his own evidence. He was a financial investor seeking a financial return, and he believed that, if the sale was deferred until an EBITDA figure could be got to $9m, the sale value of the Company as a whole could have been got to $150m. However, he knew that other investors wanted to sell – Mr Loy had been prepared to sell at a valuation of $100m, and Mr Mehta at a valuation of $90m. He also knew that Mr Flammini wanted out at any respectable price. Between them, these holders controlled 57.75% of the Company. If they agreed to sell for $90m, the effect of the drag-along provisions of the SHA would have compelled him to offer his shares at the same price to the purchaser. Before any such sale, the selling shareholders would have had to

offer the shares to him (and the other shareholders), but Mr Costa was clear that he did not wish to invest any more of his own money in the Company. Consequently, the only way in which he could avoid being compelled to sell at what he regarded as an undervalue would have been either to find a lender to finance him to purchase the shares (this appears to have been the purpose of the $45m loan which he sought to obtain from Jefferies in 2017-18) or to find a potential investor prepared to purchase these shares and to come in with him as a long-term holder. For Mr Costa's perspective, almost the worst possible outcome would have been a firm offer in late 2019 to purchase the Company for $100m capable of being accepted by the shareholders.

166. Consequently, I think that Mr Costa's delaying tactics were no more than that.

7. Mr Loy's alleged scheme

167. Mr Hill equally put forward an argument to the effect that Mr Loy was pursuing a scheme of his own – in this case a "sectional agenda", on the basis that he wished to buy back control of the Company at an undervalue to its true worth. Mr Loy's evidence – which I accept – is that his primary desire from 2017 onwards was to be free of his involvement with Mr Costa, and it was to that end that he sought to sell his shares to Mr Costa. When that transaction fell through, it seems to me reasonable that he would have begun to hope for an external bidder who would buy them both out. When he formed the view that Mr Costa was not seeking to progress the sale, it is entirely unsurprising that he would have begun to look for such a purchaser himself.

168. The basis of Mr Hill's case, however, is that Mr Loy was not just seeking an external investor, but was actively seeking to procure that that investor could

buy the Company at a discount to its true worth. This is somewhat mysterious. Mr Loy's first steps towards attracting new investors involved a short memorandum which he had prepared, setting out some information about the Company and explaining that his proposal was that the Company should be acquired for $100m. Mr Hill's expert, however, concluded in his report that the Company was in such a poor financial state in 2019 that "it would not have been possible to launch a credible formal auction process before March/April 2020", and the presentation given by Jefferies in April 2020 suggested that the best possible EBITDA-based valuation for the Company would be $68m. These facts formed the basis of his submissions that any sale attempted in 2019 would have been, as he described it, a "distressed sale" which could only realise a very low value. There is a degree of implausibility about an argument that Mr Loy's attempt to attract bidders at the $100m level for a Company which, on Mr Hill's own case, was at that time worth less than $68m, could constitute an attempt to acquire it at an undervalue.

169. In support of his argument that Mr Loy was seeking to acquire the Company at less than fair value, Mr Hill points to a version of the document prepared by Mr Loy in which Mr Loy says that his proposal "seeks to take back control of the business at a price which is at a discount to a likely auction price". However, this does not seem to be anything more than puffery by Mr Loy – it is certainly not borne out by the valuation figure contained in that version of the note, which is $60-100m. It certainly is true that Mr Loy regularly referred to the possibility that an offer made now would "pre-empt the sales process". However, it absolutely does not follow that an attempt to pre-empt an auction process is necessarily an attempt to acquire that asset at a discount. The process of seeking

to pre-empt an auction process is an entirely legitimate commercial move, offering the seller jam today rather than an indeterminate but possibly larger amount of jam tomorrow. There is nothing in the idea that Mr Loy was seeking to pre-empt the auction process which, of itself, demonstrates that he was seeking to purchase the assets concerned at an undervalue.

170. What is particularly significant in this regard is that it was suggested by Mr Uberoi in particular that the valuations of $110m contained in the various Metric offers were part of a "bait and switch" strategy, in that Metric cannot possibly have intended to bid the amount they specified, and would lower their bid substantially once they had conducted due diligence. However, it is perfectly clear from Mr Loy's memorandum that that was never any part of the strategy which he suggested to them. His pitch to Metric was in many respects the same as the pitch he had made to the board – continue rapid revenue growth whilst controlling staff and consultancy costs. The Board did not accept that this was a viable strategy, or that he was the right person to implement it, but, to an external investor who did, the $100m valuation made perfect sense – and promised a substantial return after a 2-3 year implementation period. It is entirely clear that Mr Loy was not trying somehow to acquire the Company at a discount to its true value.

8. The relevant legal principles

171. The facts are very straightforward – the shareholders and the Company are alleged to have entered into a contract, properly documented and executed, to the effect that the Company would seek to sell itself on or shortly after a particular date. That did not happen. The obvious remedy for the disappointed

party would therefore seem to be an action in contract. That is not this action. The contract records a common understanding between the parties, and the breach of an understanding of this kind can give rise to a petition under s.994 on the basis of unfair prejudice. That is the ground on which this action is based.

172. This choice seems to me to be legitimate. What Mr Loy and Mr Costa both seek is to be free of their involvement with each other, and the proper vehicle for achieving this is the making of an order that one party should buy out the other. The s.994 process is well adapted to considering the rights and wrongs of the making of such an order.

173. Section 994(1) of the Act provides as follows:

> "A member of a company may apply to the court by petition for an order under this Part on the ground-
>
> (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
>
> (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."

174. In order to obtain relief in relation to a complaint under s. 994, a petitioner must establish at trial that:

i) The petitioner is a member of the Company;

ii) There has been conduct of the affairs of the Company by the respondent or an actual or proposed "act or omission of the company (including an act or omission on its behalf)";

iii) That conduct or act was prejudicial to the interests of the members generally or of some part of its members (including at least himself);

iv) That conduct or act was also unfair; and

v) That in all the circumstances the Court should exercise its discretion under s. 996(1) to make an order in favour of the petitioner.

175. I also note that this is not a case of the kind discussed by Lord Wilberforce in *Re Westbourne Galleries Ltd* [1973] AC 360 at 379, where "quasi-partnership" equitable considerations apply. The Company sought and obtained financing from various of the defendants on the explicit basis that they were providing commercial funding for a commercial venture. I do not think that there has ever been any common understanding between the respondents, or indeed between them and the Petitioner, that their involvement was other than as financial investors.

176. This is an unusual application, in that the primary Respondent against whom the buyout relief is sought is only an indirect shareholder in the Company. No relief is sought against any of the shareholders, despite the relevant obligations under the SHA being on both the Company and the shareholders. The consequence of this approach is that the Petitioner must (a) show that Mr Costa is directly responsible for the unfairness which it has suffered, and (b) justify the relief it seeks against Mr Costa.

9. Issues to be decided

9.1 The Construction of Clause 6.2

177. In order to decide whether the Company did in fact breach its obligations under the SHA, there are four construction points which must be decided. One is as to whether, as Mr Hill argues, the directors are released from their obligations under clause 6.2 because it should be read as being subject to an implicit carve – out that the directors are not obliged to comply with it at all if by doing so they would be acting in breach of their director's duties. The second is as to whether the references to "reasonableness" should be extended to the directors' determination as to what was commercially reasonable – thus, in effect, if the directors are satisfied that seeking to sell the Company at the specified time will not raise the best price, is a decision not to do so at all "reasonable" within the ambit of Clause 6.2. The third is as to what is meant by the term "Exit" in this context, and what characteristics an offer would have to have before it could be regarded as giving rise to an "Exit". The fourth is as to whether and to what extent the clause requires things to be done on any particular timetable.

Is there an implied director's duties override?

178. It is clearly true that where a fiduciary enters into a contract to act in a particular way, that contract will be void if it requires the person to act in a way which is contrary to his fiduciary duties – thus, to take a well-known example, where a person is appointed by a shareholder to a board to represent that Shareholders' interests, his mandate must reflect that in the event of a conflict between his fiduciary duties and his obligations to his appointor, his fiduciary duty must triumph. A contract to any other effect is void on grounds of public policy

(*Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 at 626-627 per Lord Denning M.R.), and, as Vinelott J suggested in *John Crowther Group plc v Carpets International plc and Ors* [1990] BCLC 460, a covenant of this kind "is to be read as subject to anything which the directors properly consider they should do in the interests of the company".

179. In order to make anything of this, however, Mr Hill must show that it would have been a breach of the fiduciary duties of the directors to have proceeded in accordance with the requirements of the SHA. In order to establish his proposition, he relies on *Heron International Ltd v Lord Grade* [1983] BCLC 244. This case is the leading authority for the obligations of directors in a case where they are faced with competing bids for the shares in their company, and decides that, in such a position, the interests of the company are the interests of the shareholders. In a nutshell, if directors are faced with two competing bids at different prices, they prima facie breach their fiduciary duties if they act so as to ensure that shareholders receive the lower rather than the higher offer. As Sir Terence Etherington said in *Arbuthnott v Bonnyman* [2015] EWCA Civ 536: "The primary role of the directors is to ensure that the offer and any competing offers are put to the members so that they can decide for themselves whether to accept or reject the best bid available".

180. The question here is as to how far this principle can be applied to the situation where directors have a choice between pursuing a transaction today and a possible but uncertain better one tomorrow. The argument for which Mr Hill contends is that directors in such a position who pursued a deal today rather than

waiting for a better deal tomorrow would potentially be in breach of their fiduciary duties. I think that this is simply wrong. It is true in general terms that in the context of a sale of a company, the directors of that company are in general obliged to seek the best price for shareholders. But the suggestion that it is somehow a breach of their fiduciary duty to elect for jam today over jam tomorrow – or vice versa – is I think unsupportable. Decisions of this kind are commercial decisions, but no more. It is only where there are contemporaneous competing offers, between which the shareholders can choose, that the principle in *Heron* has any application.

181. In support of his argument, Mr Hill sought to present the directors as being confronted with a binary choice between what he called a "distressed" sale, which could be conducted in 2019, and a sale for a higher value which could be conducted at some later stage. I am not sure why he uses the term "distressed", but I am prepared to assume with him that board members could have firmly believed that the proceeds of a sale conducted in late 2019 would be less than the proceeds of a sale conducted in – say – early 2021. What I absolutely do not accept, however, is that board members in this position who elected to sell in 2019 rather than in 2021 would have been in breach of their fiduciary duties to the company. A great deal of the expert evidence put forward by Mr Costa was intended to show that the company was in such a bad way in late 2019 that any offer sought would necessarily have been low. However, even had all of this material been fully believed by the directors at that time, I do not believe that they could be said to be in breach of their fiduciary duties merely by seeking an offer at that time.

182. I therefore do not think that the directors would have been in breach of their fiduciary duties if they had pursued a sale, and the question of whether, if they had been, they would have been excused from their duty to comply with the clause does not arise.

Is there a commercial reasonableness override?

183. Mr Hill also advances the submission that the Company's obligation to work in good faith towards an Exit by the end of 2019 was satisfied by the fact that it engaged in preparations for such an Exit before that date. The idea that an obligation to do something by a particular date is satisfied by making preparations before that date to do the thing after that date is an odd one. The Company's obligation was to work in good faith towards an Exit by a specified date. Deciding not to take any steps to market the Company prior to that date cannot possibly constitute a reasonable attempt to fulfil that obligation. The same, I think, is true of a decision to take preliminary steps, but not to perform that obligation until an unspecified time in the future. The point here is that I think it is true that the Company was pursuing an Exit, and if the obligation which the SHA had placed on it had simply been to pursue an Exit in good faith at a time that the directors considered reasonable, there would be little or nothing for the Petitioner to complain of. However, the good faith requirement applied only to the sales process – the specified date was, and was intended to be, fixed.

184. I therefore do not think that a director's determination that it would be commercially reasonable to defer the sale beyond the end of 2019 would be permitted by the terms of the clause.

What is an Exit?

185. Mr Hill argued that a sale of the kind pitched by Metric would not have constituted an "Exit" within the meaning of the SHA, and the directors were therefore under no obligation to entertain it. An "Exit" under the SHA was defined as a "sale of all or substantially all of: (i) the issued equity share capital of the Company; or (ii) the business or assets of the Company (whether through the shares of a Subsidiary or otherwise), in each case, on arm's length terms as part of a single transaction or a series of related transactions". I think it is uncontroversial that a sale to Metric (or any of the other Private Equity houses which existed on Jefferies lists of potential investors) would have been effected through the purchase of 100% of the shares of the Company by an SPV established for the purpose. It would also have been highly likely to have been agreed with the relevant buyer that some of the sellers would "stay in" – that is, reinvest some or all of the consideration received for the sale of their shares in equity of the SPV.

186. Mr Hill's argument is that if 50% of the selling shareholders become equity investors in the new company, then the result is not a disposal of all or substantially all of the Company.

187. The term "sale" in a legal contract should always be read as a prima facie reference to a sale in the way that the law understands the term – a transfer of ownership from one person to another in exchange for consideration. There is no question that that was going to happen in the Metric bid. However, Mr Hill's argument, I think, is that as a matter of interpretation the term "sale" should be read as referring to the economic substance of the transaction, and that even

though the legal nature of the transaction was a sale of 100% of the Company to a newly formed purchase vehicle, there are certain types of transaction whose economic structure would be such that they would not fall within what the parties would have intended by the term a "sale" for this purpose – a substance over form argument.

188. The original proposal that Mr Loy made (and Metric accepted) was that he, Mr Aspinall and Ms Gerami would be prepared to roll over between 50% and 100% of their shareholdings, and Mr Flammini would be prepared to roll 60% of his. That would have resulted in between 28% and 42% of the equity of the Company being rolled over. I am not sure where Mr Hill would place his marker for the purpose of interpreting the term "substantially all". I will therefore consider in general the argument that the term "Exit" should be considered on a substance over form basis, and that a transaction which involved a number of investors reinvesting their proceeds of sale into the acquisition vehicle does not satisfy this requirement.

189. As a starting point, if the position were that a sale transaction simply replaced one shareholder with another, such that the rolling-over shareholders were both in a majority of the equity-holders of the acquisition vehicle, and were in exactly the same economic position as they were before the transaction, I would agree that the transaction did not constitute a sale of "substantially all" of the Company. Thus, if 60% of the shareholders agreed to sell to an SPV, where a new investor was prepared to equity finance the purchase of the drag-along holdings, the result would simply be a change in the ownership of 40% of the Company, with the other shareholders left economically unaffected. In such a

case, I think it is entirely clear that the result would not be a disposal of the majority of the Company. The position is entirely different, however, where the purchase is made by a vehicle whose capital structure is entirely different from that of the target company. In such a case, it is misleading to speak of shareholders "rolling over" – what they are doing is selling an investment with one particular set of characteristics, and acquiring another investment with a very different set of characteristics. In this case, the rolling over shareholders would not simply have reacquired the interest which they previously had. They would have become the owners of a relatively highly-leveraged newco whose economics were entirely different, and their claim to the profits of the Company would have been subordinated to several levels of new debt introduced by the sponsor. The risk/reward profile of the position that the rolling over shareholders would have had under the Metric deal was entirely different from that which they would have had prior to the deal.

190. This point is brought into focus by Mr Hill's submission that "the substance of the deal with Metric was that Saxon Woods would retain its shares in the Company, not sell them." This is simply wrong. Saxon Woods would have given up its shares in the Company and acquired shares in an entirely different entity with an entirely different economic structure. It is the fact of this substantial change in economic structure which demonstrates that the proposed transaction was a disposal to a new entity and not a retention of an existing investment.

191. I also note that this conclusion is exactly the conclusion which the board of the Company seem to have come to themselves. The lists of potential purchasers

that Jefferies produced included a number of Private Equity houses, and it would be relatively standard practice for acquirers of this kind to look for some of the existing shareholders to remain invested in the Company. They must therefore have considered that such a transaction could constitute an "Exit".

192. Mr Hill also sought to suggest that a transaction to any buyer who was operating in association with Mr Loy was not "at arm's length" because of the involvement of Mr Loy (or for that matter any rolling over shareholder), and would therefore not constitute an "Exit" for that reason. I think this is hopeless. The ordinary meaning of the term "at arm's length" in this context is at a price determined between a willing buyer and a willing seller on open market terms. The idea that any communication between one or more directors and any particular bidder renders that bidder ineligible as not being "at arm's length" is not a construction which I think would ever occur to any reasonable reader of the clause.

Does the clause impose a timetable on the process?

193. Mr Hill also argues that the construction of Clause 6.2 does not imply any particular timetable. His argument is that although the first phase is expressed to be complete by the end of 2019, there is no similar stipulation for the second phase. Thus, he says, the second phase can be drawn out for as long as the Directors consider proper. Mr Davies, by contrast, argues that there was an implied term that "the Exit must take place as soon as reasonably practicable and/or within a reasonable time after 31st December 2019". Mr Hill says that such a term should not be implied on the basis that (1) the contract makes sense without it, (2) the proposed term is unclear, and (3) the process of hiring an

investment bank and consideration of terms by the board is incompatible with a strict obligation on the Company and Investors that the Exit must take place at a specific time.

194. On this point I accept the arguments of Mr Davies. As a matter of ordinary common sense and logic, where an agreement is made between parties to the effect that "we agree that X should be done by D date, but, if it isn't, these are the measures we will put in place to get it done", it is self-evidently true that time is of the essence of the entire arrangement – not just the bit prior to date D. The purpose of the entire clause is to achieve a particular transaction by a particular date - to seek to construe it so that once that date is passed there is no further urgency is, in the absence of relevant facts, entirely counter-intuitive. I am also confident that if we apply a sort of reverse officious bystander test and imagine that, whilst the clause was being negotiated, the bystander had suggested that once the 2019 deadline was passed there was no further urgency, he would have been greeted with incredulity on all sides. It is perfectly correct that Mr Davies' proposed term is imprecise, but so is the rest of the clause, and for the same reason - neither the Company nor the shareholders can agree to procure a specific outcome by a specific date. Mr Davies' proposal reflects precisely the fact that the business of hiring an investment bank and negotiating terms could not have a precise timetable set for it, and therefore does not propose that there should be one.

9.2 Was there a Breach of Clause 6.2?

195. The clause mandates two things. One is to work in good faith towards an Exit; the other is to give good faith consideration to offers received during the investment period. I consider these separately below.

Working towards Exit

196. It is quite clear that the clause does not mandate a sale by any particular date (or at all). Thus the mere fact that the Company was not sold in accordance with the envisaged timetable is not of itself evidence of any breach of the requirements of the clause. What the parties agreed was that the Company and the investors would work together in good faith towards an Exit by a specific date. Mr Hill submits that this is not a binding obligation on the Company or the investors to sell for whatever can be got, however little, and he is of course entirely correct in that contention. However, the point seems to go wide of the mark. A great deal of his case, and of the evidence of his expert, Mr Hill, was based on the idea that the Company was not ready for sale by the specified date and would have realised a low price if sold on that date. That is, with respect, entirely beside the point. The question is as to whether the Company and the directors, and in particular Mr Costa, did in fact work towards an Exit on that date, and give good faith consideration to any opportunities for Exit which arose at that time. Even if Mr Costa personally sincerely believed that no offer at an acceptable price could be secured at that time, that belief would not of itself release him from the obligation to seek such an acceptable offer. There is also – clearly – no issue of detriment to shareholders. The board was not, in this phase, empowered to bind the shareholders to a sale, but merely to present to them such offers as it had solicited or received.

197. As regards the provisions of the SHA relating to the period after the investment period, it is accepted that Jefferies' instructions were not amended when the investment period ended. There is a slightly mysterious e-mail from Mr Thesing at this point to the effect that this was dealt with by providing a copy of the text of Clause 6.2 to Jefferies, and receiving confirmation from them that they were happy to continue under the terms of their current engagement letter, subject to including the valuation as part of the engagement. This is possibly partly explained by the fact that it would have been useless for Mr Thesing to have advised that the Company should have acted differently several months previously by instructing Jefferies to prepare a valuation then, and the best that could now be done was to instruct them to do so now – which seems to have been done. Possibly more importantly, Mr Thesing had previously been informed by Mr Costa that Jefferies had already been instructed to obtain offers for the Company in accordance with clause 6.2, and, if he believed that Jefferies had already been given such instructions by Mr Costa, he may have concluded there was no need to repeat those instructions.

Good faith consideration of offers received

198. The Board's obligations were to give good faith consideration to any opportunities for an Exit which arose during the investment period. It is not entirely clear what is meant by the term "opportunities for Exit" as used in the clause, but it is clear that it cannot be read as confined only to unconditional offers. I think each of the Metric offers received prior to the end of 2019 was an "opportunity" for this purpose, and the question is whether they were given good faith consideration. It seems to me that they were not, on the basis that Mr

Costa had by that point already decided that he was not prepared to deal with any bidder who was in any way associated with Mr Loy. This cannot in any sense of the word be construed as giving good faith consideration of such offers. It should also be noted that as regards the second Metric offer, Mr Uberoi's dismissal of it as being in fact an offer for below $75m could have been corrected by a single phone call to Mr Balfour. It seems, again, that the reason no such call was made was simply that Mr Costa did not wish to deal with anyone associated with Mr Loy.

199. Mr Hill argued at some length that the Metric proposal did not constitute an "Exit" within the meaning of the SHA. I address this above at paragraphs 185 to 192. However, as a preliminary point, the question for me is simply whether or not the Company, in the form of Mr Costa, performed its obligation to give good faith consideration to it as an opportunity for an Exit. It would have been open to the Company to refuse to deal with Metric if it had been clear on the face of their offer that what they proposed was not in reality an Exit. However, that was absolutely not the case. Mr Hill's argument that the Metric deal was not an Exit rested on the idea that one possible outcome of the transaction would have been that some of the shareholders of the Company retained a degree of economic ownership of the Company. That was not the form of the proposal that Metric presented. It is of course clear that the Company, had it given good faith consideration to the initial approach, could have ceased that consideration as soon as they came to the conclusion that what was proposed was not an Exit. However, prior to that point the issue does not arise.

9.3 Was the Breach the result of the acts of Mr Costa?

200. As I have found, the reason that the Company breached its obligations under the SHA was that it entrusted the conduct of the sale process exclusively to Mr Costa, and Mr Costa did not conduct that process in accordance with the obligations of the Company. Throughout the process Mr Loy made repeated complaints to Mr Costa that he was not acting in accordance with those obligations, and Mr Costa responded by treating Mr Loy as "disruptive", declining to engage with him, and refusing to engage with potential bidders who he believed to be associated with him. Mr Loy unquestionably was disruptive, but this was because he strongly felt that promises which had been made to him and formalised in an agreement were being deliberately broken. As a result of all this, Mr Costa pursued on behalf of the Company a strategy which he knew or should have known was contrary to the obligations of the Company, and in particular contrary to its commitments to Mr Loy. I think it is clear that as a result of this the Company was in breach of its obligations.

201. One of the more important planks of Mr Costa's defence is his argument that it was the board, and not him alone, who made the decisions in relation to the sale. This argument requires some analysis.

202. Aside from the updates on the process presented to the board, it does not seem that any board members other than Mr Costa and Mr Uberoi, and possibly Ms Kurtzman, had any interaction with Jefferies. Consequently, the only information that the board had as to what Jefferies were in fact recommending was what they were told by Mr Costa. Critically, however, no board member (other than Mr Uberoi) seems to have had any idea what it was that Jefferies had actually been instructed to do. Mr Costa's determination to maintain his

control of the sale process was so strong that he responded with threats to suggestions from other directors that they might even speak to Jefferies. The result of this is that the information which the board had as to what advice the Company was receiving was filtered through Mr Costa. As regards the terms of the specific obligation, the directors, had they asked themselves whether the Company was performing its obligations under clause 6.2, would presumably have said that the Company was obliged to act in good faith towards securing an Exit, that Mr Costa had assured them that he had appointed Jefferies to do exactly that, and the Company was therefore clearly performing its obligations. This argument would have worked for most directors apart from the two – Mr Uberoi and Mr Costa – who were in actual contact with Jefferies. I am in no doubt that Jefferies were clearly aware of Mr Costa's desire to maximise the profit on his shareholding, and I am equally clear that it would have been entirely reasonable for them to advise that this might best be achieved by waiting until late 2020 to begin marketing. Mr Costa and Mr Uberoi were therefore the only people in a position to know both about the scope of Jefferies' mandate, and about the Company's obligations under 6.2, and therefore to realise that what Jefferies were engaged in was absolutely not "working in good faith towards an Exit no later than 31 December 2019". In giving their fellow directors a different impression, they misled the board. Mr Costa therefore cannot rely on the argument that it was the board 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.

9.4 Did Mr Costa breach his duties as a director?

203. I turn now to the allegations against Mr Costa in respect of breach of director's duties.

204. These allegations appear to be purely ancillary to the s.994 petition. In *Re Tobian Properties Ltd* [2013] 2 BCLC 567 (CA), at [22], Arden LJ explained that any breach of the directors' duties set out in ss. 171 to 177 of the Companies Act 2006 will generally indicate that unfair prejudice has occurred; see also *Re Coroin Ltd* (No. 2) [2013] 2 BCLC 583 (CA) at [17]. Consequently, the aim of these allegations seems to be to support the case on unfairness.

205. As a preliminary point, I regard the question of whether Mr Costa was in breach of his fiduciary duties as entirely separate from the question of whether he had caused the Company to breach its contract or its understanding with the Petitioner. If Mr Costa was under the impression that what he was doing was in the best interests of the Company, then the fact that it potentially exposed the Company to litigation is not probative of a breach of duty. Put simply, if a director sincerely believes that a particular course of action is in the best interests of his Company but will expose it to litigation, he is not automatically in breach of his fiduciary duties if he causes the Company to pursue that course of action. The issue of breach of fiduciary duty must be considered on its own terms.

206. Section 172(1) of the Companies Act 2006 provides that:

> "[a] director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to […] (f) the need to act fairly as between members of the company".

207. The duty is subjective. As Jonathan Parker J explained in *Regentcrest plc (in liquidation) v Cohen* [2001] 2 BCLC 80 at [120]:

> "The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind."

208. Mr Costa's position is that he reasonably believed that it was in the best interests of the Company's shareholders for it not to comply with the requirements of clause 6.2 on the timetable that it specified, on the basis that a considerably higher value might be obtained for them by delaying the process. He knew perfectly well that at least some of the shareholders disagreed with this, and felt that their interests would be best served by complying with the clause 6.2 timetable. He also perceived that his personal interests as a shareholder were best served by delay. More importantly, he ensured that it was him and him alone who controlled the Company's actions in this regard, such that he was not merely in a position to recommend a course of action, but to ensure that that course of action was in fact pursued. However, I do not believe that it was his intention by doing this actively to injure either the Company or any investor. I think his state of mind might be summarised as "they wouldn't like it now if they knew, but they will thank me in the long run". Put another way, I think Mr Costa did sincerely believe that he was acting in the best interest of the Company and its investors. Applying the test set out in *Regentcrest*, I therefore do not find that Mr Costa was in breach of his duties under s.172(1).

209. S. 174 of the Act provides as follows:

> "(1) A director of a company must exercise reasonable care, skill and diligence.
>
> (2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with-
>
> (a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and
>
> (b) the general knowledge, skill and experience that the director has."

210. Whether the director's reliance upon the advice was reasonable will depend upon all the circumstances, including:

   i) The scope of the advice sought, i.e. the instructions which were given;

   ii) Relatedly, whether advice was sought on the specific issue in question or more generally (see, e.g., *Re Bradcrown Ltd* [2001] 1 BCLC 547 at [58] per Lawrence Collins LJ);

   iii) Whether the advice was on a technical point on which the director could not reasonably have been expected to form any view personally (see, e.g., *Re D'Jan of London Ltd* [1994] 1 BCLC 561, at p. 563c-d per Hoffmann LJ); and

   iv) Whether the director asked all reasonable questions of the professional adviser (*Re Bradcrown Ltd* at [58] per Lawrence Collins LJ).

211. It should also be noted that a failure by a director to take professional advice when necessary or appropriate could itself constitute a breach of the duty under s. 174.

212. Finally, there are some issues on which a director does not need advice at all. For example, a director should not need a solicitor to tell him whether his actions are bona fide (*Manolete Partners Plc v Nag* [2022] EWHC 153 (Ch), at [62(ii)] per David Halpern QC).

213. Mr Costa relies in his defence on the proposition that the Company was advised at all material times by Sidley Austin and by Jefferies. In *Sharp v Blank* [2019] EWHC 3096 (Ch), Sir Alastair Norris said (at [629]):

> "In general, a director who takes and then acts upon expert evidence has gone a long way to performing his duties with reasonable skill and care. But the taking and acceptance of advice is not a substitute for the exercise of reasonable skill and care: it is only part of the discharge of that duty".

214. I do not think that Mr Costa can rely on either of these pieces of advice. I think it is clear that he knew what Jefferies were engaged to do, that their advice was addressed to that mandate, and that that mandate did not encompass any of the obligations imposed by clause 6.2. He therefore cannot say that he believed that Jefferies had advised him that what he was doing was in line with clause 6.2. The same is true of the advice from Sidley Austin - if Mr Costa had instructed them to advise on the basis that the Company was complying with its obligations under clause 6.2, he cannot invoke that advice as supporting his belief that that was the case.

215. I think the issue here is simply one as to whether it was negligent for Mr Costa not to ensure that the Company fulfilled its obligations under the SHA. I do not think it was. Mr Costa sincerely believed that he was engaging in a course of action which would ultimately be for the benefit of the Company and its shareholders, and applied himself energetically to pursuing this course of action.

He took the view that the Company's breach of its obligation was a price worth paying in order to achieve this aim. I cannot see how this can be described as negligence in the way the term is described in s.174. As a result, I do not think that Mr Costa failed to exercise the appropriate levels of skill, care or diligence.

216. Section 175(1) of the Companies Act 2006 states that "[a] director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company".

217. The test of whether there is a breach of the s. 175 duty is objective and does not depend on whether the director is aware that what he is doing is a breach of his duty (*Richmond Pharmacology Ltd v Chester Overseas Ltd and others* [2014] Bus LR 1110 at [72] per Stephen Jourdan QC).

218. This section might have been called into play if I had accepted Mr Davies' submissions about Mr Costa's alternative scheme pursuing a separate agenda involving other companies in which he was interested. However I do not find that that was the case, and therefore I do not think that there is any action of Mr Costa's to which this section could apply.

<u>The allegations of negligence</u>

219. It is also alleged that Mr Costa's conduct of the Exit process was negligent. This was weakly presented at trial, and barely mentioned in written closing submissions.

220. The bases of the allegations in negligence are that Mr Costa failed to progress the Exit process, failed to keep other directors and shareholders properly informed, failed to involve the Exit committee in his activities, failed to instruct

Jefferies on a basis which was consistent with the Company's obligations, and that he effectively delayed the Exit by delegating it to Mr Armbruster and Mr Ringel, who were already fully employed and would therefore be unable to progress it properly.

221. I do not think that here is any negligence here. What Mr Costa did, and the reasons why he did it, are entirely clear. His commercial judgement may be called into question, but there was no neglect in his pursuit of his objectives.

9.5 The appropriateness of ordering the remedy against Mr Costa alone

222. Where unfair prejudice has occurred, the Court has wide powers to fashion appropriate relief under s. 996 of the Act. A common order is for the purchase of the petitioner's shares by the respondent to a petition, which effects a divorce of the parties' interests in the company. Such an order can be made against both members of the company and non-members (such as directors) (see *Re Sunrise Radio Ltd* [2010] 1 BCLC 367, at [277]-[278] per HHJ Purle QC (where an order was made against a director); and *Re Fi Call Ltd* [2014] BCC 286, at [125] per Vos J).

223. The test for determining whether relief should be ordered against a respondent was set out by Sales J in *F&C v Barthelemy (No 2)* [2012] Ch 613, at [1096]:

> "In my judgment, the test is whether the defendant in a section 994 claim is so connected to the unfairly prejudicial conduct in question that it would be just, in the context of the statutory regime contained in sections 994 to 996, to grant a remedy against the defendant in relation to that conduct. The standard of justice to be applied reflects the requirements of fair commercial dealing inherent in the statutory regime. This is to state the test at a high level of abstraction. In practice, everything will depend upon the facts of a particular case and the court's assessment whether what was done involved unfairness in which the

> relevant defendant was sufficiently implicated to warrant relief being granted against him."

224. The point here is that the Court does not need to find that Mr Costa acted in breach of his duties to the Company, or that the Company was actually in breach of the contract made, in order to grant this relief. Conversely, it would be entirely permissible to find that Mr Costa was in breach of his duties, and the Company was in breach of the contract, but that the threshold for relief under s.996 had not been reached. It is Saxon Woods' case that Mr Costa did act in breach of duty, but the question of whether he did in fact breach that duty is not per se determinative of the petitioner's entitlement to relief.

225. Mr Hill made great play of the fact that Mr Costa did not in fact own a majority of the voting shares, and was not in a position to give formal instructions to other board members to take an action as director or to vote in any particular way. I accept all of this – if Mr Costa had been a company, he would not have been required to consolidate the Company in his accounts. However, the issue here is not as to whether Mr Costa had such formal control – it is as to whether it was his actions which had the effect of causing the Company to do what it did. In this regard, it is clear that that is the case. Mr Costa had sole control of the process relating to the Company's compliance with its obligations under clause 6.2, and appears to have consistently reported to the Board that these obligations were in fact being complied with, when he knew that they were not. In this regard, it is significant that his most strenuous efforts were directed towards ensuring that no other director had any information at all about the process other than what Mr Costa chose to provide. I am therefore in no doubt that the Company's failure to comply with its obligations was a direct result of

the actions of Mr Costa. Mr Uberoi clearly assisted him in his design, but Mr Uberoi had no particular axe to grind in this regard and was simply assisting Mr Costa in pursuing his objective of maximising the value he hoped to realise for his investment.

10 Was there prejudice, and was it unfair?

226. The real question here is as to whether, if the Company did breach its obligations under the SHA and therefore the commitments made to the Petitioner, that resulted in unfair prejudice to it.

227. Under s. 994 CA 2006, an aggrieved shareholder must demonstrate that: (i) the affairs of the company in question have been conducted in a manner which is prejudicial to its interests as a shareholder; and (ii) that prejudice is unfair. Both limbs of the test must be satisfied: see the often quoted words of Neill LJ in Re *Saul D Harrison & Sons plc* [1994] BCC 475 at 499G to the effect that in order to ground a petition of this kind:

> "The conduct must be both prejudicial (in the sense of causing prejudice or harm to the relevant interest) and also unfairly so: conduct may be unfair without being prejudicial or prejudicial without being unfair, and it is not sufficient if the conduct satisfies only one of these tests."

228. Moreover, there must be a causal link between the conduct complained of and the unfair prejudice alleged to have been suffered by the shareholder: *Re Southern Counties Fresh Food Limited* [2008] EWHC 2810 (Ch) at [47]. It is fatal for a petition if the petitioner is no worse off as a result of the allegedly prejudicial conduct: see *Rock (Nominees) Ltd v RCO (Holdings) Plc (In Members Voluntary Liquidation)* [2004] BCC 466.

229. Mr Davies's position on this is that "it is self-evident that a shareholder who has been deprived of the Exit that they bargained for is prejudiced". Mr Hill correctly observes that this cannot be correct as stated – there must be a causal link between the breach and the prejudice suffered.

10.1 Was there prejudice?

230. Prejudice for the purposes of s. 994 includes, but is not limited to, damage to the financial position of the member. A disregard of the rights of a member as such, without any financial consequences, may also amount to prejudice falling within the section (*Re Coroin Ltd* (No. 2) [2013] 2 BCLC 583 (1st instance) at [630] per David Richards J). Indeed, disregard of a member's rights will be prejudicial where it is serious and likely to continue in the absence of relief under s. 996 and has a significant impact on the value of the member's shares (*Re Last Lion Holdings Limited* [2018] EWHC 2347 (Ch.) at [109], per Murray Rosen QC). This will be the case where a minority shareholder is unable to realise the value of its shares in breach of its rights unless relief is granted (ibid at [180]). That is an accurate characterisation of the position here.

231. Mr Hill's case, supported by his expert, is that if the Company had been offered for sale in 2019, it would have been impossible to raise an offer at any reasonable level. If that turns out to be correct, then it would be true that Mr Loy would have suffered no prejudice from the failure to market the Company. Mr Davies' case, however, supported by his expert, is that if a sincere attempt had been made to market the company in 2019, it is likely that bids at the level of at least $100m would have been realised. If that turns out to be correct, then Mr Loy has suffered serious prejudice, in that he has been locked into a Company

from which he sought to Exit for good reasons. I do not have sufficient material before me to reach a final decision as to what the position would have been, and this will have to be the subject of a further hearing.

232. Mr Hill also argues that Saxon Woods cannot have been prejudiced since the Metric deal, had it gone through, would have resulted in Saxon Woods continuing to be invested in the Company whilst Mr Costa was bought out. He therefore says that it is perverse that Mr Costa should be forced to buy out Saxon Woods.

233. The problem with this argument is that Mr Loy only sought to originate the Metric transaction because he believed that Mr Costa and Jefferies were making no attempt to find buyers themselves. I accept his evidence that his preference would have been to exit the Company altogether, and that for him the Metric deal was very much a second best option. The question to be determined is whether another offer, had it been sought, would have been made. If it would have been made at a level that Mr Loy would have accepted, then that is the measure of the detriment which he has suffered.

10.2 Was there unfairness?

234. In *O'Neill v. Phillips* [1999] 1 WLR 1092, HL, Lord Hoffmann held (at p. 1098D) that fairness was the criterion by which the Court had to determine whether it had jurisdiction to grant relief under s. 994. 'Unfairness' for this purpose includes a breach of the terms on which it had been agreed that a company's affairs would be conducted, e.g. a breach of the articles of association or shareholders' agreement or the expectation that the directors

would act in accordance with their duties to the Company. However, as Lord Hoffman also said in *O'Neill* (at 1101G), the test is

> "what the parties, by words or conduct, have actually agreed…. it [is not] necessary that such promises should be independently enforceable as a matter of contract".

235. Mr Loy's evidence was that from the moment he first agreed to accept external investment in order to finance the expansion of the Company, he was looking to Exit within a specified timeframe, and that this is why Exit language was included in the 2013 SHA. He also made the point that by the time the current SHA was entered into his shareholding was only 22%, and that as a minority shareholder this protection had become more valuable to him. He therefore argued that the commitment to use good faith efforts to sell the Company by the specified time was the basis of his involvement with the company thereafter. It is clear that he was serious about his desire to exit the company, as is evidenced by his attempt to sell his shares to Mr Costa in 2018, and it is equally clear that he tried as best he could to push the Board to fulfil this obligation. I think it is clear that the Company undertook to Mr Loy to conduct such a process, and that it did not perform that undertaking, despite his insistent efforts to induce it to do so. I think that that constitutes unfairness.

10.3 The "Clean hands" defence

236. The other core element of Mr Hill's case is his argument that, even if the Company had broken its obligation to the Petitioner, the Petitioner is simply a vehicle for Mr Loy, and Mr Loy's conduct had been so heinous that he should be denied relief on the grounds of fairness.

237. The fact that the action is an unfair prejudice petition does bring into the equation the conduct of the Petitioner. Whereas in an ordinary action for breach of contract, a person who can show a breach is entitled to damages regardless of the commercial morality of their own conduct, the fact that the jurisdiction in respect of petitions is broadly equitable brings in considerations similar to those which are applied in the equitable doctrine of clean hands. The approach to this issue in the context of petitions was set out by Lloyd LJ in *Richardson v Blackmore* [2006] BCC 276 (CA) at [53]:

> "Nourse J. in *Re London School of Electronics Ltd* (1985) 1 B.C.C. 99,394 at pp.99,399–99,400 [said that] there is no requirement that the petitioner under s.459 should come to the court with clean hands. [However] conduct which in another context might be used to invoke the clean hands doctrine can be relevant on a s.459 petition in that it "may nevertheless affect the relief which the court thinks fit to grant": see p.99,400; 222B–C. Nourse J. did not say so in terms, but it seems to me clear that, depending on the seriousness of the matter and the degree of its relevance, such conduct would be capable of leading a court to deny the petitioner any relief at all, even though the conditions under s.459 are made out."

238. The judge considered *J Willis & Son v Willis* [1986] 1 E.G.L.R. 62, *Gonthier v Orange Contract Scaffolding Ltd* [2003] EWCA Civ 873 and *Moody v Cox* [1917] 2 Ch. 71. He continued:

> "55. ...Scrutton L.J. said, in *Moody v Cox* at pp.87–88, that "equity will not apply the principle about clean hands unless the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for."
>
> 56. That is entirely consistent with *Willis* and *Gonthier*, where the misconduct lay in fabricating evidence in support of the claim itself. I deplore the petitioner's conduct as much as the judge did. However, considering the point first on the same material as the judge took into account, it seems to me that, on his finding (see para.116) that it had no bearing on the matters directly in issue, a finding which he was plainly entitled to make, he was right to disregard the forgery, and the petitioner's use of the forged letter, when deciding whether the conditions under

> s.459 were made out. He was also right to disregard it in relation to the question whether to exercise his discretion to make any, and if so what, order under s.461. The forgery itself had no immediate or necessary relation to the circumstances upon which the petitioner's entitlement, or otherwise, to relief depended. At best it was an episode in the background history. Given the lack of impact it had on Mr Richardson and Mr Wheeler, the judge was entitled to treat it in the way in which he did."

239. A petitioner who has suffered unfair prejudice may therefore nonetheless be denied relief if his own conduct merits such a denial. Where a petitioner can be shown to have engaged in misconduct which has an immediate and necessary relation to the unfairly prejudicial conduct of which complaint is made, that may cause the court to conclude that the prejudice which he has suffered is not in fact unfair. In *Interactive Technology Corp v Ferster* [2016] EWHC 2896 (Ch) at [318], Morgan J. explained the position as follows:

> "It is established that wrongdoing on the part of a petitioner seeking relief under section 994 can be relevant in two ways. The first way is that the petitioner's wrongdoing may make the prejudicial conduct of the respondent not unfair. The second way is that the petitioner's wrongdoing may justify the court in refusing to grant relief to the petitioner or may influence the choice of any relief which is granted. These propositions are established by *Re London School of Electronics Ltd* [1986] Ch 211 at 222 B-C, *Richardson v Blackmore*[2006] BCC 276 and *Grace v Biagioli* [2006] BCC 85.

240. The basis of Mr Hill's argument on this ground is that during 2019 Mr Loy sought to find and introduce buyers for the Company separately from Mr Costa's efforts. Mr Hill presented his case that any and all communications between Mr Loy and potential buyers constituted "multiple serious breaches of duty on Mr Loy's part". It is certainly arguable that they may have been breaches of his duties. The question for me is as to whether they were serious. I think that the touchstone for this – as Mr Hill correctly submits - is as to whether

they constituted either acting against the best interests of the company, or prejudiced the interests of the company, or were unfair to one or more shareholders.

241. It was suggested that the fact that Mr Loy's discussions with Metric did not envisage an even equity rollover across all shareholders meant that the proposal was somehow unfair to some shareholders. This is incorrect. The basis of the Metric bid was that they believed in Mr Loy's ability to turn around the Company, and it would therefore have been important to them that Mr Loy remained involved. Mr Loy (I suspect correctly) assumed that this fact alone would ensure that Mr Costa would have no desire to remain invested in the Company, and he knew that Mr Mehta was keen to exit his investment. It was therefore entirely reasonable of him to assume that there was no prospect of Mr Costa or Mr Mehta wishing to remain invested in the company after that point. It was suggested to Mr Loy that his intention was actively to exclude Mr Costa from equity participation in the deal, but negotiations never progressed to a stage where this issue even arose. I therefore do not see any unfairness in the proposed Metric deal.

242. I am equally unable to see how the actions of Mr Loy can have prejudiced the interests of the Company or constituted acting against its best interests. His actions, in their entirety, can have resulted in nothing more than the making of an offer to the shareholders to purchase their shares, which they were free to accept or reject as they saw fit. Mr Hill suggested that by informing potential bidders that he Company was obliged to seek offers by the end of 2019 this somehow compromised the Company's bargaining position. This would have

been true had the Company been obliged to sell by a specified date. However, the Company's only obligation was to seek offers by that date, and it is hard to see how that information could have materially affected the negotiating position as between the offeror and the shareholders.

243. This brings us to another criticism of Mr Loy's conduct. Mr Loy brought the Metric proposal to the attention of both Jefferies and the board, but did not disclose to either that he had been heavily involved in its preparation. Mr Hill suggested that Mr Loy owed a duty to make such disclosure, and that by not doing so he had breached his duties as a director.

244. The basis of this allegation is the duty set out in s. 177(1) of the Companies Act 2006, which provides that "[i]f a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors".

245. Pursuant to s. 177(4), any declaration must be made before the company enters into the transaction or arrangement. Self-evidently, therefore, there must be a transaction or arrangement under consideration by the board for the duty to be engaged.

246. The first thing to say about this is that it is entirely clear why Mr Loy felt that he could not make any such disclosure at the time the proposal was initially presented, because he felt that if that fact of his association with Metric were known to Mr Costa, he would simply refuse to engage with them. It is also clear that Mr Loy would have had to disclose his involvement in the transaction well before the point at which the Board was asked to take a decision as to whether

or not to accept it. The question is simply one as to whether he owed such a duty at the time when he initially introduced the transaction. This is a question which could potentially become troublesome – even if the conclusion is that such a duty was not owed at the moment of initial introduction, the question of at what point in the negotiations it might arise would otherwise be a difficult one. Fortunately it does not arise here, since the proposal was not engaged with, but fobbed off. The issue therefore turns solely on the point at which the proposal was introduced to the board. There is no doubt that it would have been good practice for Mr Loy to give full disclosure at the moment of initial introduction. However, he felt that he had a good reason for not doing so, and he also felt that if the effect of his actions was to avoid obstruction by Mr Costa and bring the offer to the attention of shareholders generally he would be acting in the best interests of both the company and the shareholders. I do not need to decide on the rightness or wrongness of this position. However, I am clear that I do not regard Mr Loy's actions as being sufficiently blameworthy in this regard to debar him from relief if relief is otherwise due to be granted to him. This also deals with the criticism of Mr Loy's conduct which is oriented at his attempts to bring the offer to the attention of other shareholders. Mr Hill says that what Mr Loy was engaged in was "taking Metric's side against the company". The only way that this could be the case would be if the interests of Metric and the Company were in some way in conflict. At this stage, before even the commencement of substantive negotiations, they were not, although Metric's persistence was regarded by Mr Costa as hostile.

247. Quite a lot of the First Respondent's case involves continuing assertions that the reason that Mr Costa declined to respond to Metric was that Metric were seeking

a period of exclusivity before deciding whether to make an offer, and that this would somehow interfere with the "organised auction process" that Jefferies were said to be organising. This is simply incorrect. Jefferies were quite clear about the fact that they envisaged the auction starting after the CEO had been in place for some time, and once improved financial results had been established. It is therefore impossible to envisage such a sale process commencing much before the end of the first quarter of 2020. A grant to Metric of ten weeks' exclusivity (the time taken to update the EY SID, which Mr Meade suggested could take up to a month, plus the six weeks specified in the letter to begin from the date of receipt of that updated SID), which they requested on 19 November 2019, cannot possibly have interfered in any way with the subsequent conduct of an auction if it were decided not to proceed with the Metric transaction. The apposition suggested that pursuing the Metric transaction would have been in some way incompatible with the conduct of an auction by Jefferies on their timetable is untenable. Mr Uberoi did offer a partial justification for the approach, in that "Jefferies' advice was also that if Metric gained exclusive access to the Company's numbers, they would likely offer a very lowball valuation and … word would then be out in the market that the Company was a distressed seller." There is no record of Jefferies having said this, and I assume it is in fact Mr Uberoi's own view. It is also not a particularly good fit with the facts. If the idea was to wait until the company had stabilised and improved its historic track record before launching the auction, the fact that it had received a lower offer before that track record was established does not seem to be a particularly significant factor.

248. Once again, I note that the language used in the First Respondent's submissions that Mr Loy was trying to "force through" the Metric transaction does not accord with the facts. What the company was obliged to do was to work in good faith towards an Exit, and to give good faith consideration to any opportunity that might arise. That required it to discuss potential bids with bidders, and to present any viable bid to shareholders. There was not the slightest obligation on the shareholders to accept a bid presented by the Company (or an investment bank), and the mere fact that a bid was approved by the directors had no bearing on whether it was accepted by the shareholders. Mr Loy was not trying to force through the Metric transaction, he was trying to force the board – and in particular Mr Costa – to engage seriously with the Metric bid in accordance with the timetable set out in the SHA.

249. Meanwhile Mr Loy had also spoken to THG, to whom he presented much the same proposal as he had presented to Metric. If in fact Mr Loy had been trying to force the Metric bid on the Company, and if in fact that bid had been at a serious undervalue, then the introduction by him of a second bidder would be utterly incomprehensible.

250. It is also necessary to address the argument that Mr Loy's conduct during the period concerned was "disruptive". Mr Loy clearly was trying to disrupt the process which he believed that Mr Costa was trying to implement, since he had a strong belief that Mr Costa was not in fact trying to execute the obligations of the Company at all. However his early requirements seem to have been for nothing more than some transparency as to what had been agreed between the Company and Jefferies. These requests clearly caused huge annoyance to Mr

Costa, but they were not inherently disruptive. Since Mr Costa said that the Company must be complying with its obligations because it had instructed Jefferies, Mr Loy wanted to know what it was exactly that Jefferies had been instructed to do. Mr Costa's aggressive and determined efforts to ensure that he received no information on this point clearly fed Mr Loy's suspicions. This meant that Mr Loy, unlike the other directors, was not prepared to leave the Exit process to Mr Costa and repeatedly tried to obtain information about. In a different context, this might have been considered the healthy level of challenge of executive action which is expected of directors. However, it was accompanied by a series of communications from Mr Flammini which, in my view, went well beyond the level of the professional and verged towards the abusive – as did some of Mr Costa's responses. In this environment, more or less any disagreement with Mr Costa became explosive. The other directors, having collectively decided that Mr Loy was not the right man to lead the Company, and not having a CEO in place, were therefore placed in a position where they had little choice but to back Mr Costa in these disagreements.

251. There was a regular flow of solicitor's letters between Mr Loy's advisers and the Company's advisers, in which Mr Loy's solicitors regularly suggested that the Company was in breach of its obligations under the SHA. Mr Hill suggested that there was something improper about the sending of these letters. There was not. Mr Loy and Mr Flammini believed that they had no other avenues left to explore in their attempt – as they saw it – to require the Company to perform its obligations. In such circumstances, there is nothing even remotely improper about involving lawyers in respect of what is perceived to be a breach of a legal obligation. Mr Hill also suggests that Mr Loy and Mr Flammini should not have

involved lawyers without first disclosing their own involvement in the Metric bid. I cannot see how these issues are in any way connected.

252. The First Respondent also notes that formal responsibility for managing the Exit process was handed to Mr Ringel and Mr Armbruster in March 2020, and thereafter it would be difficult for the Petitioner to argue that the company was acting principally through Mr Costa. This is correct, and the Petitioner does not say otherwise.

11. Consequences

253. So where does all this leave us? The key point is that Mr Costa's gamble that the Company would significantly increase its value if its sale were deferred for twelve months or so spectacularly failed because of the onset of Covid and the restrictions imposed on social and business activity by governments in response. As Mr Hill fairly points out, Covid came out of nowhere and could not have been foreseen. However that dos not help Mr Costa's position in this case.

254. If the Company had performed its contractual obligation to consider all offers, it would have had at least one or two conditional offers on the table by the end of the Investment Period. If it had properly instructed Jefferies, it might well have had more. The extent of the loss suffered by the Petitioner as a result of the unfair prejudice which it has suffered is therefore, to my mind, simply a function of the value of the best offer which the Company would have received.

255. There will therefore have to be a further hearing (the "Quantum Trial") to determine the value of such a hypothetical offer.

256. It is clear that an initial non-binding offer from Metric was in fact received during the period. For the reasons set out above in paragraphs 185-191, I regard this as complying with the requirements of the SHA for an "Exit". However, the issue to be determined here is not about conditional offers, but about final binding offers. Both experts accepted that the offer process would have proceeded through a process of initial offers, followed by due diligence by the offerors, followed by final binding offers, which may well have been lower than the initial offers. The question to be determined at the Quantum Trial is, therefore, at what level an offeror who had done proper due diligence on the Company would have pitched their final binding offer.

257. It is quite clear that the existence of an offer is only one half of the story. In order for the Petitioner to be able to Exit the company, the offer would have had to have been at a level which would not have been rejected by the other shareholders. On the basis of the evidence before me, I am satisfied that that means an offer in excess of $75m net of debt.

258. My reasons for setting this level are as follows. First, Mr Uberoi, in his e-mail which I have referred to in paragraph 72 above, clearly assumed that an offer at this level would have been unacceptable to the board. Given the state of his knowledge of (a) the affairs of the Company and (b) the desires of the members of the board at that time, I think that this is good evidence that an offer at this level would indeed have been rejected, and I find that that would in fact have been the case. This was certainly also the view of Mr Loy, who accepted in cross-examination that "none of the shareholders would have been interested in a price of $72m at that point in time". I do not believe that the distinction

between $72m and $75m is material here, so I find that Mr Uberoi was correct in his assessment that an offer at the $75m level would have been rejected by the other shareholders.

259. As regards the parameters of the hypothetical to be established, I think the key points are these;-

i) The company was not obliged to change its strategy, or alter its behaviour in any way, in order to facilitate an Exit – it was simply required to solicit or consider offers. Consequently, the decisions to reject the Loy/Flammini strategy and to proceed with the attempt to hire a new CEO should be assumed to have taken place.

ii) 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.

iii) The Company should have instructed Jefferies that it was required to seek offers by the end of the period.

iv) The Company should have given due consideration to the offer from Metric, and should have progressed the contact with THG in a timely manner.

260. I regard the breach of the SHA in early 2020 as being of less importance. I agree that no matter what Jefferies had been instructed to do in early 2020, and no matter how quickly they had mobilised themselves to market the Company, the onset of the Covid lockdowns would have first delayed and then extinguished

any prospect of obtaining a reasonable offer for the Company in a reasonable time.

261. In the event that it is concluded that any offer received would have been below $75m net of debt, then I find that the Petitioner has suffered no loss caused by the unfair prejudice, and that, following *Rock (Nominees) Ltd v RCO (Holdings) Plc (In Members Voluntary Liquidation)* [2004] BCC 466, he is not entitled to relief. In the interests of clarity, I should emphasise that this does not imply that there was no prejudice, nor that it was not unfair – as I say, I accept that the Petitioner has suffered unfair prejudice. However, where it is clear that the unfair prejudice suffered by a petitioner has not in fact caused him any loss, then I do not think that the broad equitable principles which I am required to apply in considering a petition for relief permit the grant of any such relief.

262. It was suggested to me that even if an offer below the level acceptable to shareholders had been received, the Petitioner would nonetheless have suffered detriment. This argument is based on the provisions of Clause 6.2 as they applied upon the expiry of the Investment Period. This provision required that the Board of Directors (a) engage an investment bank, (b) require the investment bank to conduct a valuation, (c) require the investment bank to find buyers for the Company at that valuation, and (d) consent to the resulting transaction with one such buyer if they consider it reasonable. The shareholders are required to "procure that such Exit is achieved in accordance with such proposal". What seems to have been argued is that if this process had been followed – i.e. if an investment bank had been mandated, and had determined that the value of the Company was below $75m, had marketed it on that basis and had produced

unconditional offers at that lower level, then the Petitioner would have had a negotiating position. This argument in turn is based on the idea that neither the Board nor the shareholders would have had any option but to accept such a lower offer, that the only way in which they could have escaped their predicament would have been by amending the SHA, that such an amendment would have required unanimity, and that the petitioner would at that point have been able to impose his will on them as regards the running of the company in exchange for consenting to that amendment. The basis of this argument is that the effect of the section is that the board is compelled to approve, and the sellers to sell, at any valuation which the appointed investment bank produces. I do not think that this is correct for three reasons. One is that, as was accepted by both experts during the trial, no investment bank would have accepted a mandate to – in effect – guarantee a sale of a Company at a specific price. When Jefferies produced their valuation, it was, as I note above in paragraph 97, in a range of $16.3m to $149.3m. Thus the provisions of the section are simply – as they are set out – unworkable. More importantly, the idea of an investment bank presenting to the board of its client a specific value and saying "this is the price for which you must sell" is fantasy. In reality, the best that could be achieved would be that the Investment bank would present one or more offers along with a recommendation. The question of price would then be one of the terms of the offer. The Board is not in fact absolutely obliged to approve the terms of the offer– it can reject them provided that it is not acting "unreasonably". It seems to me that the rejection couched at a level which the board knew that the shareholders would reject would not constitute an unreasonable rejection. Third, I cannot see how the "negotiating position" hypothesised would have existed –

if the shareholders did not want to sell their shares, they would simply not have sold their shares. This would have given the Petitioner a right to bring an action which is roughly coterminous with the action currently before me – that he was unfairly prejudiced by their non-compliance with the terms of the SHA. Since at that point it was already his position that he had been unfairly prejudiced, I cannot see how the accrual of a right to claim on this basis could have added anything to the position which he already had.

263. My decision is therefore that 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.

264. As a final point, I must consider the fairness of the proposed buy-out order given the specific facts. Any remedy granted under s.994 must be proportionate to the prejudice suffered; it is not a punishment. A buy-out order may be disproportionate where the unfair prejudice is relatively modest, or where the financial circumstances of the business are unusual (see *Ferster* at [326] to [331]). It should also take into account the degree of responsibility that the respondent in question bears for the unfair prejudice suffered. See *Hawkes v Cuddy (No. 2)* [2008] BCC 390 at [243]-[252] and *Re Phoenix Office Supplies Limited* [2003] BCC 11 at [48]-[51] of the Court of Appeal's judgment. It is also open to the Court to decline to grant any remedy at all if it regards the position between shareholders as not justifying such a remedy (see, e.g., *Re Metropolis Motorcycles* [2007] 1 BCLC 520 at 561) or where a petitioner has engaged in wrongdoing: *Richardson v Blackmore* at [53], [57].

265. I have considered these points. It seems to me that in this case, the buy-out order which I have ordered is appropriate and proportionate. The injustice suffered by the Petitioner is precisely that the First Respondent, apparently having it in his power to arrange for the Petitioner (*inter alia*) to sell his shares, in breach of the Company's obligations to the Petitioner, intentionally decided not to comply with those obligations. As a result, the Petitioner was unable to sell his shares at the price which he would have received had not Covid intervened. I find it hard to think of a clearer set of circumstances justifying a buy-out order.

12. The Indemnity Claim

266. It is common ground that the Company agreed to indemnify Mr Costa for his legal fees and expenses in defending these proceedings and paid him £182,984.50 pursuant to that indemnity. That money was only returned by Mr Costa in settlement of Saxon Woods' application for an interim injunction. The Company and Mr Costa have given undertakings not to use Company money to fund Mr Costa's defence but only pending the outcome of this trial, and accordingly the question of whether the indemnity is lawful and enforceable still needs to be determined.

267. It is the position of Mr Costa and (it appears) the Company that the Company is obliged to indemnify Mr Costa for his legal costs pursuant to clause 3.8 of the 2016 SHA, which provides as follows:

> "3.8. Indemnification of Directors. To the extent allowable under applicable law, each member of the Board of Directors shall be indemnified and held harmless by the Company from any loss, cost, liability, or expense that may be imposed upon or reasonably incurred by such member in connection with or resulting from any claim, action, suit or proceeding to which he may be a party or in which he may be involved by reason of any

> action or failure to act and against and from any and all amounts paid by him or her in satisfaction of judgment in such action, suit, or proceeding against him or her provided that he gives the Company an opportunity, at its own expense, to handle and defend the same before he undertakes to handle and defend it on his or her own behalf. The foregoing right of indemnification shall not be exclusive of any other rights of indemnification to which such persons may be entitled under the Company Articles, as a matter of law, or otherwise, or any power that the Company may have to indemnify them or hold them harmless."

(The "Contractual Indemnity".)

This indemnity essentially reflects the substance of ss. 205 and 234 of the Companies Act 2006. I accept that there is nothing improper in an indemnity of this kind being given by a Company to a Director, and so the grant of the Indemnity is not a ground of unfair prejudice per se.

268. Mr Davies argues that it would be prejudicial for the Company to pay out under this Contractual Indemnity, since it cannot extend to the costs of defending a Petition. His starting point is that the law does not permit the use of company funds to defend a petition under section 994 of the Act. To the contrary, it is a misfeasance on the part of a company's directors to allow its money to be used in this way (see *Re a company (No 004502 of 1988) ex parte Johnson* [1992] BCLC 701, at pp. 704h-705a per Harman J). However, as Trower J said in *Koza v Istelmeleri AS* [2021] EWHC 789 (Ch) at [66],

> "whatever the procedural context in which the issue arises, the court is concerned to identify the true substance of the proceedings and that which constitutes the real contest. If the real contest is between parties other than the company itself, it will be a misfeasance for the company's directors to cause its funds to be expended on the legal costs of that contest."

269. He went on to say (at [76]):

> "In my view, what these cases show is that the issue for the court is whether the claim or counterclaim was brought bona fide in the independent interests of the company or whether it was advanced as a response to or as part and parcel of the shareholders' dispute. The relevant question to ask is: is the company a genuine protagonist in proceedings against one of its members, or is the true nature of the dispute one in which it is the object over which its shareholders are themselves in dispute? In answering that question, the court will always have regard to the substance of the dispute."

270. If this principle applies in this case, then the payment is clearly not "allowable under applicable law" within the meaning of the Contractual Indemnity, and the Company is under no obligation to make it.

271. Mr Davies also notes that in any event, the Company's obligation to indemnify a director is subject to the condition that the director "gives the Company an opportunity, at its own expense, to handle and defend the same before he undertakes to handle and defend it on his or her own behalf". That condition was not (and could not be) satisfied in the present case.

272. It is therefore argued that the use of Company money in this way constituted a misfeasance on the part of those directors who permitted it and itself constitutes unfair prejudice for the purposes of section 994(1).

273. Mr Costa is of the view that he personally has not committed any wrongdoing, because he excused himself (seemingly on the grounds of a conflict of interest) from the board's decision to indemnify him. Mr Davies says that this position is absurd: a director cannot demand that a company pay him money to which he is not entitled and avoid liability on the grounds that it was another director who procured the company to make the payment. In any event, Mr Costa was the beneficiary of the misfeasance, for which reason he is sufficiently connected to

the unfair prejudice as to justify relief being granted against him under section 996.

274. Mr Hill says that these proceedings are clearly brought against Mr Costa in his capacity as a director. The allegations boil down to (i) a claim that a director has caused the Company to breach its contractual obligations under the SHA, and (ii) a claim that he as a director has breached his duties to the Company. Neither claim is brought on behalf of the Company. He argues that there is no legal principle that prevents the Company from indemnifying Mr Costa on point (i). On point (ii), the Company is entitled to indemnify a director for any liability to a third party. It is also permitted to indemnify Mr Costa in any event (i.e. regardless of whether it is the Company claiming against him) if he is successful – and to do so pending judgment.

275. This is both true and false. It is entirely correct that the grounds for the petition are that Mr Costa's actions caused the Company to breach its obligations under Clause 6.2. However, the breach of Clause 6.2 is not the cause of action – this is not a breach of contract case. What is argued is that the facts which gave rise to the breach also caused unfair prejudice to the petitioner, and it is that unfair prejudice which is complained of. I do not think that it could possibly be argued that it is any part of the proper role of a director to cause unfair prejudice to one or more shareholders. Consequently, when a director acts in a way which has the effect of causing such prejudice, his actions in that regard cannot be regarded as being pursuant to his position as director.

276. Mr Hill's point, however, could be rephrased as an assertion that what is in reality a complaint about Mr Costa's performance as director has been recast as

an unfair prejudice petition. It is certainly true that Mr Costa used his position as a director to cause the Company to act in a way which caused unfair prejudice to the Petitioner as a shareholder. However, I think that in this case the Company is not, as Trower J said, a "genuine protagonist".

277. I think that this may be the root of the point made by Mr Davies about the language in the clause to the effect that it is a condition of indemnification that the director concerned "gives the Company an opportunity, at its own expense, to handle and defend the same before he undertakes to handle and defend it on his or her own behalf.". 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. In this case, the Company could not have stepped in to conduct the litigation, since the issues raised were not issues in respect of which it could have taken a position.