Neutral Citation Number: [2023] EWHC 2877 (Comm)

Claim No. LM-2020-000017

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

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

Date: 17/11/2023

Before :

John Kimbell KC
(sitting as a Deputy High Court Judge)

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Between :

(1) THE WITZ COMPANY LLC **(2) RICHARD HURWITZ**	**Claimants**
- and -	
EDMUND TRUELL	**Defendant**

- -
- -

Gabriel Buttimore (instructed by **Hill Dickinson LLP**) for the **Claimants**
Andrew Maguire (instructed by **Moore Barlow LLP**) for the **Defendant**

Hearing date: 17 - 18 October 2023

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APPROVED JUDGMENT

This judgment was handed down remotely and circulated to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be Friday 17 November 2023 at 10:30 am

John Kimbell KC sitting as a Deputy High Court Judge:

Introduction

1. These proceedings concern a dispute between two men, Mr Truell and Mr Hurwitz. The subject of their dispute is a private investment in the form of a contract for difference.

2. The Defendant ('**Mr Truell**') is one of the founders of the Tungsten Corporation ('**Tungsten**'), a digital invoicing company. Until 2016, Mr Truell was the CEO of Tungsten.

3. The Second Claimant ('**Mr Hurwitz**') is a US citizen. He was the CEO of Tungsten's American operations. In that capacity, he reported to Mr Truell. When, in March 2016, Mr Truell stepped down from the board of Tungsten, he was replaced as CEO by Mr Hurwitz.

4. The First Claimant ('**TWC**') is an LLC incorporated in Delaware USA. TWC is used by Mr Hurwitz as a vehicle for private investments for himself and his family.

The contract for difference

5. In April 2015, while they were working harmoniously together at Tungsten, Mr Truell and Mr Hurwitz agreed to enter into a contract for difference ('**the CFD**'). Under the CFD, Mr Hurwitz agreed to transfer £150,000 to a Swiss bank account held by a company controlled by Mr Truell. In return, Mr Truell was personally obliged to grant to TWC certain rights which depended on the performance of a number of shares in a Guernsey-based cell company.

6. The dispute which emerged in 2019 is about the scope and content of Mr Truell's obligations under the CFD. Mr Truell had initially suggested that the CFD was not intended to give rise to any legally binding obligations. That defence was struck out at an earlier stage of the litigation. He now contends that on its true construction the CFD only requires Mr Truell to pay TWC £904. The correspondence I have seen suggests strongly that what really fuels the CFD dispute is a grievance that Mr Truell has about the circumstances in which he left Tungsten and Mr Hurwitz took his place there as CEO.

Judgment by consent

7. Following a successful summary judgment application by TWC, judgment was entered by consent in favour of TWC on 20 June 2022 ('**the June 2022 Consent Order'**). As a result of that application, it is no longer in dispute that in February 2019, TWC validly gave valid notice to terminate the CFD and that Mr Truell is obliged to make a payment to TWC under the CFD. The only remaining question therefore is how much is due.

This nature of this hearing

8. The consent order of 20 June 2022 ordered that there be a hearing to assess the sum due to TWC. Paragraph 1 of the June 2022 Consent Order leaves open the question of whether TWC's claim is for a fixed sum claimable as a debt under the CFD or whether TWC's claim is for damages for breach of the CFD.

9. The assessment hearing came before me on 17 – 18 October 2023. I heard evidence from Hurwitz and submissions from Mr Buttimore for TWC and Mr Maguire for Mr Truell. Mr Hurwitz gave his evidence and answered all the questions put to him in a straightforward and tempered manner. I accept his evidence. I did not hear any evidence from Mr Truell because he was debarred from giving evidence by an order made on 21 July 2023 by Mark Cawson KC, sitting as a High Court Judge. The debarring order was the result of an unexplained persistent failure by Mr Truell to comply with orders in relation to disclosure.

The nature of contracts for difference

10. Contracts for difference ('**CFDs**') are a type of commercial contract in which the parties agree to pay each other the difference between an opening and closing price of an asset. In a standard commercial CFD, the parties are usually referred to as the 'CFD provider' and the 'CFD holder' respectively. The provider will have to pay the holder if the closing price is higher at the end of the relevant period than the opening price. If, on the other hand, the price is lower, the holder will have to pay the provider the difference – see Smithton Limited (Formerly Hobart Capital Markets Ltd) v Guy Naggar & Others [2013] EWHC 1961 (Ch) at [10] and [2014] EWCA Civ 939 [14].

11. CFDs enable parties to speculate on whether the market in a particular asset will go up or down and to profit from the price difference without either of them owning the underlying asset. The subject of the contract is often defined by reference to the price movements on an exchange or commodity index. A spread bet is an example of a CFD as is an interest rate swap: see Robert Day v Forex Capital Markets Limited [2023] EWHC 1349 (Comm) [13] – [15] and Spreadex Limited v Dr Vijay Ram Battu [2005] EWCA Civ 855 [2].

12. The closing price for a CFD is ascertained when the agreed original term of the CFD expires or when the CFD is brought to an end by service of a notice by the holder or provider. Notices to terminate CFDs are commonly called notices to strike.

The CFD in this case

13. The CFD in issue in this case was drafted by Mr Truell (possibly with the assistance of the solicitors whose name appears on the first page, Moore Blatch). Mr Hurwitz had never entered into a CFD before.

14. It was originally intended to be a CFD between Mr Truell and Mr Hurwitz personally. However, before it was signed by both parties (as appears from the face of the signed version) TWC was substituted for Mr Hurwitz. In the body of the CFD, Mr Truell is referred to as 'EGIFT' and TWC as 'RH'.

15. Clause 1 contained the following definitions:

> "CFD: Contract for Difference
> CFD Shares: The Shares in DCFIL referred to in Schedule 1
> Contractual Term: a term of years ending on, and including 31 December 2025.
> DCFIL: Disruptive Capital Finance Investments Ltd
> Premium: £150,000"

16. Clause 2 was headed "Grant of contract for Difference" and provided:

> "2.1 EGIFT will grant to RH a CFD for the Contractual Term
> 2.2 The grant is made in consideration of RH paying immediately to EGIFT the Premium."

17. Clause 3 which was at the heart of the hearing is headed "The Rights". It provided as follows:

> "3.1 EGIFT grants RH the following rights under the CFD
> 3.2.1 All payments received from DCFIL whether capital or income in nature in respect of the CFD Shares received after the date of the Agreement
> 3.2.2 A sum equal to the Net Asset Value attributable to the CFD Shares calculated on the last day of the month before notice is given by RH to EGIFT of his intention to strike the CFD; or in the absence of such notice, on the last day of the Contractual Term,
> and paid 30 days later.
> 3.2 In the event of dispute, the Net Asset Value shall be calculated by the independent directors of DCFIL in conjunction with the auditors of DCFIL"

18. Schedule 1 headed "The CFD Shares" in the executed version appeared as follows:

> "6.0549 A shares in DCFIL and 6.0549 B shares in DCIFL, taken as a unit
> BEING
> The Premium Divided by the NAV of £ calculated as at 28.2.2015"

19. The CFD also contained an entire agreement clause in standard terms, a governing law clause stipulating that it is governed by English law and a jurisdiction clause which selected the courts of England and Wales for dispute resolution.

20. The CFD in this case was thus not a classic CFD in that whilst Mr Truell was obliged to pay TWC the value of the defined shares in DCFIL at the end date, TWC was not obliged to pay Mr Truell anything if the value on closing was less than the opening price of the shares. The CFD is also non-standard in that Mr Hurwitz could wait to see what happened to the value of the shares in the course of a month and if it fell dramatically he could avoid that loss by giving notice to strike before the month end.

Rectification of the CFD

21. By paragraph 8 of the June 2022 Consent Order the CFD was rectified to replace DCFIL with "Zedra PCC (no. 1) Disruptive Capital Protected Cell Company" ('**Zedra**'). Zedra has had a number of different names since December 2014. It was then called the Rockhopper Cell but has remained at all times the same legal entity, namely a protected cell company ('**PCC**') under section 3 of the Companies (Guernsey) Law 2008.

Protected cell companies

22. Like any other company under Guernsey or English law, PCCs have a board of directors, share capital, articles and a memorandum. However, a PCC consists of a core and separate cells. The assets and liabilities of each cell are segregated and protected from

those of other cells. For that reason, cell companies lend themselves well to being vehicles for investment funds.

23. Zedra is an investment vehicle owned by Barclays Wealth. Its assets consist of various shareholdings and other investments. A company called Ice Floe Limited of Guernsey, acted as the investment adviser to Zedra.

DCFIL

24. DCFIL is a company based in London. It was the sub-adviser to Zedra. Both Ice Floe and DCFIL are owned and controlled by Mr Truell.

Legal principles for interpretation of the CFD

25. The applicable principles were not in dispute. The principles to be derived from Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896; Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101; Re Sigma Finance Corp [2010] 1 All ER 571; Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900; Arnold v Britton [2015] AC 1619; and Wood v Capita Insurance Services Ltd [2017] AC 1173 were helpfully distilled into a single paragraph by Popplewell J (as then was) in The Ocean Neptune [2018] EWHC 163 (Comm) at [8]. This one paragraph summary is reproduced by the editors of *Chitty on Contracts* (34th edition, 2022) at paragraph 15-053:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

26. As to the role of "commercial common sense" in interpretating contracts under English law, there are three key points which emerge from the case law:

a. If there are two possible constructions, the court is entitled to prefer the construction which is more consistent with business common sense and to reject the other – see BNP at [100] citing Lord Clarke in Rainy Sky SA v Kookmin Bank [2011] UKSC 50 and Adaptive Spectrum and Signal Alignment Inc v British Telecommunications Plc [2023] EWCA Civ 451 (26 April 2023) at [19] per Birss LJ and at [50] per Nugee LJ.

b. Commercial common sense should not be invoked retrospectively, or to rewrite a contract in an attempt to assist an unwise party, or to penalise an astute party see BNP at [101] citing Lord Neuberger in Arnold v Britton [2015] UKSC 36.

c. There is no class or type of contract for which commercial common sense is irrelevant. Evidence of commercial context and commercial consequences are both part of the iterative process of interpretation under English law: "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements" per Lord Hodge in Wood v Capita [2017] UKSC 24 at [13].

27. The contemporaneous email exchanges between Mr Truell and Mr Hurwitz starting in September 2014 and ending in April 2015 (when the CFD was signed), in my judgment, contain admissible "background knowledge" within the meaning of the passage from Chitty cited above or, as it is sometimes called, 'factual matrix' material which the Court may have regard to when interpreting the CFD. The information exchanged in these emails may be summarised as follows:

a. In September 2014, Mr Hurwitz had £150,000 which he wished to invest. Mr Truell informed him that an opportunity existed to invest in a Barclays Wealth cell. Mr Truell informed Mr Hurwitz that the net asset value ('**NAV**') of each share in the cell (then called the Rockhopper Cell) was £31,124.

b. Mr Hurwitz filled in the necessary application form to invest £150,000 in the Rockhopper Cell and sent the money to the relevant bank account.

c. In October 2014, Barclays returned the money to Mr Hurwitz because US citizens are prevented from purchasing shares in the Rockhopper Cell.

d. On 20 November 2014, Mr Truell wrote to Mr Hurwitz in the following terms:

> "Dear Rick,
> I am most unhappy that the situation did not unfold in the relatively simple way that we agreed due to the obduracy of Barclays in terms of your US status…
> Instead I propose that we adopt the following route:

> 1. You acquire a funded 'Contract for Difference' on the Rockhopper shares from me… The CFD can be exercised at any time with payment up to 21 days later.
> When you choose to exercise the CFD, the payment to you will be based on the latest month-end NAV of the PCC… I will personally guarantee the payment which will come out of my personal funds and be paid to you"

e. Mr Hurwitz agreed with this proposal and expressed his gratitude in November 2014 for the chance, as he put it, "to be alongside with you again both inside of Tungsten and out". I interpret this comment to mean that Mr Hurwitz saw the Rockhopper Cell investment as being outside of Tungsten.

f. In January 2015, Mr Truell sent a draft of the CFD which defined the relevant shareholding in as being 5.24952 A and B shares based on a NAV per share of £28,574 (as at 31.12.2014).

g. Mr Hurwitz transferred the £150,000 premium to a bank account in Switzerland as requested by Mr Truell.

h. Mr Truell sent back the final executed version of the CFD in the terms described above with the relevant shareholding inserted by manuscript as 6.0549 A and B shares in Zedra.

28. In light of the contemporaneous exchanges set out in the above paragraph, I have no hesitation in accepting Mr Buttimore's submissions that:

a. The agreed purpose of the CFD was to mirror a direct investment by Mr Hurwitz in Zedra. In other words, the CFD was to act as an indirect route or conduit to achieve the same financial result as he originally planned direct purchase of £150,000 worth of shares in Zedra in his own name.

b. This intended purpose and function of the CFD forms part of the admissible factual matrix against which its terms are to be interpreted.

29. Mr Truell's pleaded case was that CFD was not intended to mimic or mirror a direct shareholding. Rather, it was said that:

> "The CFD was mechanism to enable the Claimant to provide consideration for the shares that the claimant wished to acquire in Tungsten Corporation, as an alternative to the UK Employee Share Ownership Plan. Disruptive PCC was a major holder in Tungsten Corporation and wished to incentivise the management and staff of Tungsten."

30. This pleaded case as to the purpose of the CFD is not entirely easy to follow. It was not put by Mr Maguire to Mr Hurwitz. However, in my judgment, it is in any event not inconsistent with Mr Buttimore's case. What seems to being suggested is that instead of participating in the Tungsten's UK employee share ownership plan Mr Hurwitz wished to invest indirectly in Tungsten by investing in Disruptive PCC (i.e. Zedra). However, whether Mr Hurwitz wished to invest £150,000 in Zedra as a simple private investment

for private gain (outside of anything to do with Tungsten) or as an alternative to investing in a Tungsten pension scheme is, in my judgment, irrelevant. It is equally irrelevant if Mr Truell's motivation in making the investment in Zedra available to Mr Hurwitz in the first place was to incentivise him. Whatever the private subjective intentions were, they lead to same CFD and it is only what Mr Truell and Mr Hurwitz communicated to each about how it was intended to function (as set out in paragraph 27 above) which is admissible on the issue of construction.

31. Even if Mr Truell's pleaded case is correct, Mr Hurwitz was still thwarted in acquiring a direct shareholding and it is that which led to the two men agreeing to use the CFD as an alternative route to achieve the same end financial result, regardless of the whether it was an alternative to investing in a Tungsten pension scheme or not.

32. Interpreted as a matter of ordinary language and in light of the shared common purpose of mirroring an actual shareholding, the two parts of Clause 3.1, in my judgment, have a clear and complementary function:

    a. If Zedra made any "payments" (whether in the nature of capital or income) to shareholders by virtue of their shareholding during the lifetime of the CFD, Mr Truell would be obliged to make or "grant" the same financial benefit to TWC (clause 3.2.1)

    b. On termination of the CFD, TWC was entitled to receive the value "attributable to" the shareholding referred to in Schedule 1 of the CFD as it stood on the last day of the month before notice was given (clause 3.2.2).

The stake or premium

33. There is no evidence what happened to the £150,000 transferred by Mr Hurwitz to the company nominated by Mr Truell which represented the investment stake or premium under the CFD. One obvious possibility was for Mr Truell to use the money to buy a further 6.0549 A and B shares in Zedra. Had he done so, he would have created a simple hedge against any liability to pay any increase in the value of the shares. In a document quoted by Mr Truell as part of his pleaded case, which is said to be from 2015, Mr Truell is recorded as holding 1,163 shares out of a total of just over 3,800 class A issued shares. In the same document, TWC is shown as holding 6.0549 shares and a footnote refers to the CFD. However, what Mr Truell did or did not do with Mr Hurwitz's stake cannot impact on the correct interpretation of the CFD.

The Bonus Share issue

34. On 24 April 2015, Barclays Wealth announced that of 59 class A bonus shares would be issued in respect of each existing class A share held. The bonus issue was automatic and made for nil consideration. The date on which the issue officially took place was 22 May 2015. All shareholders were given a contract notice of their "revised holdings".

35. In EIC Services v Phipps [2005] 1 WLR 1377, the nature and effect of a bonus issue under English law was described as follows:

> Its essence is … that profits and other available reserves are capitalised and applied in paying up unissued shares or debentures, which are issued to the existing shareholders in proportion to their entitlement to dividends. The effect is that, in contrast to a dividend which reduces the assets of a company, a bonus issue does not reduce those assets since the assets and liabilities side of the balance sheet remains unchanged but the capital and reserves side of the balance sheet is rearranged with a reduction in the amount of the profits or other relevant reserves and an equal increase in the amount of the paid up share capital reflecting the increase in the issued share capital (see Hill v Permanent Trustee Company of New South Wales Ltd. [1930] AC 720 at pp. 731 - 732 per Lord Russell).

36. Bonus shares are treated as a matter of English law as being a capital benefit for the recipient rather than income – see *Palmer's Company Law* 9.856 9. That is consistent with the legal nature of all shares in a company as being transferable personal property – see section 541 of the Companies Act 2006. Under section 275 of the Companies (Guernsey) law 2008, the legal nature of shares in a company is said to be "personal estate".

The issue between the parties in relation to the bonus shares

37. The issue between the parties is what, if any, account ought to be taken under the CFD for the fact that bonus shares were issued in May 2015 to Zedra shareholders.

38. TWC's case is that it should be given full credit for the bonus shares either because the allocation of shares in May 2015 is as a "payment" within the clause 3.2.1 or because the value "attributable" to the CFD Shares as defined in Schedule 1 must take account of the fact that the bonus shares were issued to actual shareholders.

39. Mr Truell's case was that:

    a. The bonus share issue is irrelevant to TWC because TWC it was not a shareholder.

    b. The CFD does not contain any provision which deals with the effect of a restructuring of Zedra cell company including by means of the issue of bonus shares.

    c. Mr Truell is only obliged to pay TWC whatever happens to be the value of 6.0549792 shares in Zedra on 31 January 2019 without any adjustment for the fact that bonus shares were issued.

    d. 'Payment' in clause 3.2.1 must mean a payment of money only.

    e. As no money has paid or distributed by Zedra to any of the shareholders at any time during the life of the CFD, no money is due from Mr Truell to TWC.

40. I have no doubt in preferring the submissions made on behalf of the TWC on this point of construction of the CFD for the following reasons:

a. The purpose and function of the CFD is to put TWC as far as possible in the same position as if it had an actual shareholding in Zedra. It is clear that if Mr Hurwitz had become an actual shareholder in Zedra, he would have received 59 bonus new class A shares for each class A share held - automatically and for nil consideration - with effect from 22 May 2015. A holder of 6.0549792 class A shares in April 2015 became the holder of 362.298752 class A shares on 22 May 2015 albeit that each share at the moment of issue was worth 1/60 of the old value.

b. In my judgment, there is nothing strained or artificial about describing the allocation of the new class A bonus shares to existing shareholders as being a "payment" to them. I reject Mr Maguire's submission that "payment" can only mean a direct payment of money. A "payment" can, in my judgment, just as easily be a "payment in kind" involving the transfer of personal or real property – see White v Elmdene Estates ltd [1960] 1 QB at p. 16 (per Lord Evershed M.R.).

c. The new class A shares were as a matter of law a species of personal property (or personal estate). They were a thing with a value. They also came with a right to receive future dividends which was not a right which had previously been present. The new shares thus had both an intrinsic value and a contingent right to receive future financial benefit.

d. To construe 'payment' narrowly as Mr Maguire contends I should, would mean not only that the CFD would not mimic or mirror a direct shareholding (as it as intended to) but would mean that the value of Mr Hurwitz's stake in Zedra was reduced by a factor of 60 overnight on 22 May 2015. To exclude the issue of bonus shares from the category of payments to shareholders in clause 3.2.1 would in my judgment be a highly uncommercial way to interpret clause 3.2.1.

e. The clause refers to payment of two types: income and capital. The allocation of bonus shares to existing shareholders is probably best described as an allocation of capital to existing shareholders, assuming that Guernsey law is the same as English Company law.

f. For those reasons I conclude that the allocation of bonus shares fell within clause 3.1.2 as a "payment" received from Zedra which was "of capital or income in nature" and that it was received "in respect of" the CFD shares. In short, the issue of bonus shares was one of the financial benefits of an actual shareholding which the CFD was clearly intended to mirror and pass on to TWC.

41. I also accept Mr Buttimore's alternative argument that it is necessary to read clause 3.2.1 and 3.2.2. together and to interpret "CFD shares" in clause 3.2.2. and 1.1 as including any replacement shares or bonus shares issued by Zedra. This it seems to me follows naturally from the fact as I have found that the CFD was intended to mirror a hypothetical direct shareholding by Mr Hurwitz.

42. Given that the aim of the CFD was to mimic as far as possible an actual shareholding, there is no difficulty in my judgment in interpretating Schedule 1 of CFD such that

"6.0549 A shares in Zedra" becomes "363.294 new A shares in Zedra". Such a reading of the CFD would put Mr Hurwitz/TWC in exactly the same position if Mr Hurwitz or TWC had acquired 6.0549 A shares directly.

43. Although it is not necessary for me to do so I would also have held that the test for an implied term is satisfied as pleaded by TWC in paragraph 7 b of the Amended Reply. If Mr Hurwitz had asked Mr Truell at the time the CFD was signed 'What happens if there is a bonus share issue?' I have no doubt whatsoever that Mr Truell would have said at: 'Of course you would get credit for that under the CFD.'

44. Although it is not relevant to the issue of construction or the implication of a term to the same effect, it is noteworthy that when Mr Hurwitz asked for a valuation of the shares in July 2018, a senior colleague of Mr Truell's (Mr McGill, the Financial Controller of DCIL) automatically took account of the bonus share issue by applying a relevant multiplier when he calculated the difference in value between the value of the class A shares referred to in the CFD on 28.02.15 and their value on 30.06.18.

45. Later that same year, in October 2018, another manager at DCIL, Mr Hugh Wolley took the trouble to double check the terms of the CFD and also applied a multiplier to take into account of the issue of the bonus shares.

46. For all those reasons, I conclude that TWC is entitled under the CFD to the net asset value of 362.298752 (i.e. 60 x 6.0549) class A shares in Zedra on the agreed valuation date of 31 January 2019.

The valuation evidence

47. It was common ground that it was for the Claimant to prove the amount of its loss on the balance of probabilities. Mr Buttimore and Mr Maguire agreed that the standard of proof was the same whether TWC's was seeking to quantify its claim as a debt due under the CFD corresponding to the value of the class A shares or whether the court was seeking to assess damages for a breach of the CFD by Mr Truell.

48. It was common ground that the class B shares had no value.

49. The task of valuing the class A shares in Zedra was made needlessly difficult by both parties.

50. First, Mr Truell insisted that the appropriate date for the valuation was 31 March 2019. It was said on his behalf that an audited NAV value for each class A Zedra share existed for that date (in the sum of £149.42) and that either no figure exists for 31.01.2019 or that to get a figure for this date would require "retrospective analysis" at "disproportionate cost". Mr Maguire was not able to explain why it was so complicated or expensive to produce a calculation of a value for the Zedra shares for 31.01.2019. I found it hard to understand why it should be especially as the Zedra shares were listed on the Guernsey's International Stock Exchange ('**TISE**').

51. Secondly, Mr Truell failed to comply with court orders requiring him to disclose documents in his possession, power or control relevant to the valuation of the shares as identified in the Disclosure Review Document.

52. The necessary data to calculate the value of the shares clearly existed. On page 12 of the quarterly update report for the first quarter of 2019 on the performance of Zedra produced by Mr Truell and DCIL contains a graph shows the rise and fall in the share price at all times from June 2010 – end of March 2019. However, the graph is reproduced on a too small a scale in the report to be able to read the figure for 31 January 2019. It shows a price per share rising to a high in mid to late 2018 of just over 500p and a rapid drop by 31.03.19 to just below 150p.

53. However, TWC also failed to take two obvious steps. First, the CFD contained a dispute resolution clause. Clause 3.2 provided in the form rectified by the order of 20 June 2022 "In the event of a dispute, the Net Asset Value shall be calculated by the independent directors of Zedra in conjunction with the auditors of Zedra." It was not clear to me why TWC did not call upon the directors and auditors of Zedra to comply. They had access to the data in the graphs. It seems that they were never asked. The second obvious step in the absence of disclosure from Mr Truell was to instruct a valuation expert. Paragraph 12 of the order of Simon Tinkler on 10 March 2023 envisaged that an application for permission would follow after inspection of documents. Regardless of any assistance that an expert may have been able to provide in relation to documents, a suitably qualified company valuation expert may have been able to assist the court by reference to the price of Zedra shares TISE or other third-party sources. No such evidence was produced.

54. In the circumstances, the court was left in the position of having to do its best by reference to bits of information as to the value of the shares before and after (but not on) the relevant valuation date.

55. It was clear from the report for Q1 2019 that Mr Truell's reason for wishing to persuade the Court to use the valuation as at 31.03.19 was that there was a major and very sharp fall in the value of Zedra Shares in that quarter to 149 p share. This was due to the failure of a company called Tantalum Corporation Limited ('**Tantalum**').

56. According to an update published for Q1 2019, the demise of Tantalum was both sudden and unexpected:

> "We have made a prudent sharp markdown in Tantalum. At the end of February we were shocked to find that management had wilfully refused to implement the strategy … The consequences were severe indeed… Basically there is not much left other than the key team".

57. It is a fair inference from this document that the problem with Tantalum was not discovered until February 2019 and that the value of the Zedra shares at 31.01.2019 had therefore not yet been effected by it. I have no doubt that Mr Truell had access to documents which would have given a much fuller picture of the effect of Tantalum and precisely when and how it came to affect the value of Zedra shares. Those documents were not disclosed by him. In accordance with the principles in Bahia v Sidhu [2022] EWHC 875 (Ch) at [90] – [91], I am prepared to draw the inference from his unexplained failure to disclose those documents that they would not have assisted his case and would have assisted TWC's case by showing that Tantalum problem had had little or no effect on the value of Zedra shares as at 31.01.2019.

58. In his skeleton argument and oral submissions, Mr Maguire submitted that as a matter of arithmetic based on the figures and information provided in the Q1 update, it was possible to determine that the NAV of each class A share on 31.12.18 was £376.14. Mr Maguire pointed out that this was the last NAV value which was available before Mr Hurwitz served his notice to strike. Mr Buttimore did not dispute the mathematics used to reach this figure. However, he submitted that the court should instead take the figure provided by Mr Woolly for the value as at 30.09.18 in his email of 16 October 2018 of £542 and use it to give the appropriate valuation as at 31.01.19.

59. As I see it, I have three firm datum points for the value of the class A shares two of which are based on audited reports signed by the directors and one of which comes from a senior manager at DCIL:

    a. 30.09.18: £542

    b. 31.12.18: £376

    c. 31.03.19: £149

60. Mr Buttimore referred me to a part of the text on page 3 of the Q1 report which stated that the "stock markets rallied strongly" in early 2019 in support of his submission that I should assume that the 30 September 2018 value persisted until 31.01.19. However, in my judgment, there are three problems with that submission:

    a. The words relied upon are far too generic. The parts of the report dealing with the performance of the Zedra Cell itself in Q1 are far more negative.

    b. Whilst it is clear, as I have held, that the impact of Tantalum comes only after the valuation date, it is also clear that based on the graph I have referred to above, that £542 figure from 30 September 2018 is a peak value which is not sustained until 31.12.18.

    c. After the share price reaches £376 (on 31.12.18) it does not rally again significantly. Indeed, the graph, appears to show a further step down to a figure of around £360 and then shortly thereafter, on a date which it is impossible to read, it plummets suddenly in an almost vertical line to £149 by 31.03.19.

61. I do not accept Mr Buttimore's submission that I should draw the inference from Mr Truell's failure to provide quantum disclosure that the value of the shares at 31.01.19 was no lower than £542. That is plainly contradicted by the evidence I have that the value had dropped to £376 by 31.12.18 and that it continued to fall until some point in February when the price collapsed to £149. Doing the best I can on the limited evidence available I am satisfied on the balance of probabilities that the NAV of the class A shares was no lower than £360 on 31.01.19. That is the price from which the big fall to £149 seems to happen at some point in February 2019 due to the problems with Tantalum.

Conclusion

62. In summary, in light of my findings as to the true construction of the CFD and the value of the class A shares on 31.01.19, the sum due to TWC under the CFD is: £360 x

362.298752 = £130,427.55. In my judgment this became due and payable to TWC as a fixed sum under the CFD on 1 March 2019 (i.e. 30 days the CFD was terminated on 31 January 2019 by the notice to strike).

Interest

63. As to interest, the base rate since 2019 has varied considerably. It went down to 0.1% for most of 2020 and 2021 but then rose to 5.25% by the time of the hearing. Having regard to the principles summarised in Carrasco v Johnson [2018] EWCA Civ 87 at [17] and taking account of the fact that TWC is vehicle for an investment by an individual rather than a first-class commercial borrower, the appropriate rate to apply, in my judgment, is 3 percentage points above the Bank of England base rate from 2 March 2019 until the date of this judgment.