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2025 Summer review M&A legal and market developments

In this issue...

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We set out below a number of interesting English court decisions and market developments which have taken place and their impact on M&A transactions. This review looks at these developments and gives practical guidance on their implications. Summaries feature below, and you can click where indicated to access more detailed analysis.

Contractual provisions

A number of cases have looked at common contractual provisions in M&A deals.

Risk of liability for misrepresentation arising from draft disclosure letter

The High Court rejected an application for strike out by sellers over whether incorrect statements in a draft disclosure letter could form the basis of a claim for fraudulent misrepresentation.

Buyer B entered into a share sale and purchase agreement (SPA) to acquire company C from sellers S. B alleged that S had known six days before signing that one of the target group's most significant customers (A) had triggered a price review clause mechanism in a supply agreement with the target group regarding the price at which the group would sell it pharmaceutical product BHCL. B argued that it was misled about the expected pricing going forward. B alleged misrepresentations in a draft of the disclosure letter which was circulated the day before the SPA was executed, including statements that A had not notified S of any competing offer for the supply of BHCL at below a stated price (which, in fact, had happened and been the trigger for the price review mechanism) and that the financial impact of ongoing pricing negotiations could not be

Key lessons

- **Circumventing express exclusion for representations in the disclosure letter:** The case shows that incorrect information in a disclosure letter can be used to raise allegations of fraud and thereby circumvent an express exclusion in respect of any representations having been given in the letter.
- **Importance of updating disclosure letter during course of negotiations:** The case highlights that it is crucial for a seller to update the contents of a draft disclosure letter as facts change during the period over which negotiations progress.
- **Effect of fraud on express contractual provisions:** The judgment also demonstrates that a buyer's express acknowledgement in the entire agreement clause in the ultimate SPA that it has not relied on any representation outside the SPA does not protect a seller against liability for preceding fraudulent misrepresentations.

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quantified at the date of the letter. Four days after the SPA was signed the target group matched the competing lower offer. The disclosure letter contained common wording that disclosure of a matter did not imply any representation not expressly given in the SPA. The High Court declined to grant S summary judgment or to strike out B's claim. The court decided that a disclosure letter could provide information on which a recipient might reasonably rely. Whilst the court accepted that a disclosure letter's primary role was to qualify the warranties, it could still have a dual purpose of providing information which might impact a buyer's decision-making, giving rise to actionable representations. The court accepted B's argument that there was no universal legal principle which automatically precluded the existence of a representation just because it was based on a statement in a draft disclosure letter. To merit going to trial, it was sufficient that the disclosures in question might amount to actionable representations, even if they may not. As fraud was alleged, the contractual provisions on the absence of representations, or excluding liability for misrepresentation, did not or may not operate. (*Veranova Bidco LP v Johnson Matthey Plc & Ors* [2025] EWHC 707 (Comm))

Meaning of "public domain" exception to confidentiality undertaking in NDA

The High Court considered the meaning and scope of the "public domain" exception to the duty of confidentiality in a contractual non-disclosure agreement (NDA). It decided on the facts that the information had not fallen into the public domain, it had retained its confidential quality and that the NDA had been breached by misuse of the information.

C was an advisory and broking boutique specialising in Venezuelan debt. It devised an investment strategy by which Venezuelan distressed debt could be monetised and exploited regardless of US sanctions against Venezuela. This involved a structure using an OFAC sanctions-compliant fund. In 2019 C was introduced to defendants D, who included an investment fund management company (W) and a consulting services company (B) as well as their controlling director/shareholders, to help it source capital. That same year, C, W and B entered into a joint venture (JV) under which W would raise capital for a sanctions-compliant Venezuelan distressed debt fund. They signed an NDA under which W and B were prohibited from using confidential information shared by C, with an exception for information in the public domain (undefined). C shared with D information on its strategy and business opportunity, but the JV ended by November of 2019 without setting up a fund. In July 2020 W set up its own fund focused on distressed Venezuelan debt. The court decided that W and B had breached the NDA by misusing the confidential information and setting up their own fund. It denied D's contention that the information had been in the public domain anyway. The judge took the view that: the fact that Venezuelan debt was distressed was well known in the market; the fact that it could be traded despite sanctions was not widely known; and the business opportunity here, being that you could structure a fund to exploit undervalued distressed Venezuelan debt, was not widely known in the market. It did not matter that much of the information could be obtained from generally accessible public sources. What mattered instead was that the collation of that information to formulate the idea of a sanctions-compliant fund to invest in distressed Venezuelan debt was not widely known and was confidential. The court rejected that related marketing materials sent to about 200 investors who were not subject to express duties of confidentiality brought the information into the public domain. These materials had been marked "strictly confidential" and "private and confidential" and had not been put on a website nor sent to a wider newsletter circulation nor to C's competitors nor to other investors. Even if there is some loss of secrecy, there may still be value to the discloser in preventing further access to the information. Where, as here, an NDA contained a wide

Key lessons

- **Meaning and scope of "public domain" exception:** The judgment gives useful guidance on the meaning and extent of the "public domain" exception to contractual confidentiality undertakings.
- **Care needed when delineating the scope of confidential information and exceptions to the duty of confidence:** When drafting NDAs care should be given when delineating the scope of the definition of "confidential information" to be caught by the express duty of confidence and the related exceptions. Where there are particular areas of sensitivity, for example, in relation to sensitive marketing or promotional materials being circulated, consider express provision that these shall not be treated as falling within the "public domain" exception.

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definition of "confidential information" subject to a duty of confidentiality, that signified that the NDA was intended to protect more rather than less. It would be contrary to that intention to impose an arbitrary interpretation of the words "public domain" to cut down what was protected. However, the relevant officers of W and B were not personally liable as accessories on the basis they had not known they were procuring a breach of the NDA. Permission has been requested to appeal the decision. (*Illiquidx Ltd v Altana Wealth Ltd & Ors* [2025] EWHC 299 (Ch))

Investment bank awarded US$2 million fee for work undertaken on a "handshake"

The High Court held that the claimant investment bank was entitled to be paid US$2 million plus expenses for work undertaken in connection with a merger of two mining companies despite no engagement letter or other contract having been entered into.

The claimant, H&P Advisory Limited (H&P), was a boutique investment bank founded by Ian Hannam (H). The defendant, now Barrick Gold (Holdings) Limited but formerly Randgold Resources Limited (R), was the product of a merger between Barrick Gold Corporation (B) and Randgold. The claimant's case was that it had played a crucial role in the inception of the merger and that an agreement had been reached for it to advise R on the merger.

There was no documentary record of negotiations between H&P and R or of any agreement reached. Emails between H and R's Finance Director made no reference to any agreement regarding H&P's fees and various internal H&P documents and communications exhibited in the judge's view a level of "vagueness as to what the proposed transaction was, or what the fees might be." An objective observer would not have concluded that an offer had been made and unequivocally accepted. The judge therefore concluded that no contract had been formed.

Applying a four-stage framework, the judge then considered whether there was an unjust enrichment claim. Firstly, on the facts the judge found that the defendant had benefited from the work carried out by H&P and that consequently there was enrichment. Secondly, the judge thought it unlikely that certain B employees who had undertaken a substantial part of the work did so on a purely gratuitous basis and concluded that it had been provided at H&P's expense. Thirdly, the judge concluded that the principle of free acceptance was not an unjust factor in English law and that issues of this kind should instead be analysed as an ingredient of failure of basis. On this argument, the judge noted that it was entirely reasonable for a person to accept services from another whilst he was in the process of deciding whether to employ that other, and such acceptance did not give rise to any legal obligation. However, once a positive decision to employ that other had been taken and communicated, the services accepted should be considered in accordance with the terms of that communication. Although there was no contractual relationship between R and H&P, R had continued to treat H&P as a potential provider of services and encouraged them to continue providing free services. This was sufficient to give rise to an unjust factor when it failed.

On the question of defences, the court dismissed the argument that H&P were "disappointed risk-takers" and that therefore any restitutionary claim should fail. While H had initially been acting as a risk-taker in respect of his work on the merger, this ceased to be an obstacle to H&P's claim for unjust enrichment once a basis of agreement had been formed, entitling H&P to some recompense for their efforts. The court also dismissed the claimant's arguments that the doctrine of illegality acted as a defence: firstly on the basis that a B employee was in breach of his employment contract by providing information to H and secondly on the basis of

Key lesson

- **Formalising engagement terms:** The case underlines the importance of formalising engagement terms between businesses and advisers. Although H&P was able to recover US$2 million plus expenses, this was far less than the US$18 million it initially claimed. Had it entered into an engagement letter or better documented the basis on which it was undertaking the work, a different outcome might have been achieved. The case also serves as a reminder for businesses to exercise caution when involving advisers in the early stages of a transaction. If a business does not intend to pay for pre-contract work, it would be prudent to clearly communicate this to the adviser.

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alleged breaches by H&P of its regulatory obligations as an authorised person under the Financial Services and Markets Act 2000 (FSMA 2000). On the first point, the judge noted that any breach of employment duties would be a wrong perpetrated against B (not R) and the purpose of these duties would not be materially furthered by denial of the claim. On the second point the judge noted that there was a statutory scheme set out in section 138D of FSMA 2000 which governed private rights of action arising from breaches of regulatory rules. The court concluded that recognising a defence of illegality in this case would constitute an extension of those rights (which the courts had repeatedly been reluctant to agree) and consequently the defence must fail.

In quantifying the value of the enrichment, the court considered internal R documents which demonstrated that R intended to compensate H&P for the early work undertaken and that the value placed by it for these services was US$2 million. The court concluded that the claimant was entitled to recover US$2 million plus expenses from the defendant as a restitutionary quantum merit. (*H&P Advisory Ltd v Barrick Gold (Holdings) Ltd (formerly Randgold Resources Ltd)* [2025] EWHC 562 (Ch))

Limitation period on mixed execution of deeds and duty of rationality

The High Court considered the limitation period where some only of the parties to a multilateral agreement executed it as a deed, and also whether a duty of rationality was implied into facility agreements where a lender refused to consent to the borrower granting security or disposing of assets.

Borrower B, which owned a portfolio of hotels, entered into two secured facilities with lender L. These contained covenants prohibiting B from creating any security or selling or disposing of assets, subject to certain exceptions, without L's prior written approval. B wanted to grant security over one of its properties to another lender as part of a refinancing and L refused approval. B argued that, applying the duty of rationality from *Braganza v BP Shipping Ltd*[1], refusing approval breached an implied term of the relevant facility agreement that a contractual discretion had to be exercised in good faith and not arbitrarily, capriciously or irrationally. The High Court implied a duty of rationality into the facility agreement, but decided on the facts that L had not breached this by acting irrationally. The court discussed the scope of the duty of rationality. The decision-maker was free to act in what it regarded as its own best interests and was not obliged to balance its interests against the counterparty's, but had to: take into account all relevant considerations; not take into account any irrelevant considerations; and not use the discretion for an improper purpose. Here, the court implied a term that L would not refuse approval for reasons unconnected with its own commercial interests or where no reasonable entity could have refused approval. On the facts L had not breached this implied term, taking into account that L had been clear in its negotiations with B that it sought a reduction in B's total indebtedness and in the ratio of loan value to B's Ebitda, whereas the proposed refinancing would have increased this. The High Court also commented on what the limitation period would have been if a cause of action against L under the facility agreement, as restated by a subsequent restatement agreement, had been validly assigned to B. Both the restatement agreement and the original facility agreement had been executed as a deed by some parties only (B, its subsidiaries and guarantor) and under hand by others (L). There were two requirements under section 1(2) of the Law of Property (Miscellaneous Provisions) Act 1989 in order to create a multilateral deed. The first is that it must be clear on the face of the document that it is intended to take effect as a deed by the parties to it. The High Court said that this meant *all* the parties to the document. The second is that the document must have been

Key lessons

- **Mixed execution of deeds:** Whilst the High Court's comments that particular wording is needed to show an intention by all parties for a document to take effect as a deed where only some so execute it departs from prior market practice, pending clarification from the Court of Appeal it is advisable to include such wording in these circumstances. In practice mixed execution of deeds is more common on debt finance than M&A transactions.
- **Duty of rationality:** The court emphasized that you could not treat a requirement for approval as creating nothing more than a mechanism for contractual variation of an absolute contractual prohibition with no express permission qualification.

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1 [2015] UKSC 17.

validly executed as a deed by one or more of those parties. At the end of the operative provisions of both the facility agreement and the restatement agreement here there was merely a statement that the agreement was executed and delivered as a deed by B and its related group entities. That was insufficient. By contrast, an earlier deed of variation to the facility agreement had made clear all the parties intended it to take effect as a deed, by stating: *"It is intended by the parties hereto that this [amendment agreement] shall take effect as a deed notwithstanding that parties hereto may execute this deed under hand"*. The effect was that the facility agreement was a simple contract, not a deed, and the limitation period would have been six years from the date of the alleged breach. This would have made the claim statute-barred. (*Macdonald Hotels Ltd & Anor v Bank of Scotland Plc* [2025] EWHC 32 (Comm))

No prohibition on double recovery as between deferred consideration and indemnity claims

The High Court decided that sellers S were not entitled to invoke a prohibition against double recovery in a share sale and purchase agreement (SPA) in relation to downward adjustments to Ebitda under a deferred consideration calculation, where buyer B was also entitled to bring an indemnity claim under the SPA in relation to the deducted amount.

Deferred consideration was payable under a share SPA for the acquisition of the entire issued share capital of two companies (C) engaged in digital marketing, calculated as adjusted Ebitda multiplied by 6, less the amount of the initial consideration of £6 million. Shortly before signing, one of C's most valuable customers (V) complained about quality and timelines of contracted work. It said that unless its complaints were resolved it reserved the right to terminate the contract and seek repayment of all sums paid as well as to claim for losses suffered. It also refused to pay two outstanding invoices. An indemnity was inserted in the SPA in relation to C's alleged breach of its contract with V, including any costs in re-performing any relevant services. After completion V terminated the contract. B included a specific adjustment to Ebitda in the deferred consideration statement to deduct the amount of the written off invoices, and indicated it would also claim under the indemnity, including the amount of the written off invoices. Although the SPA provided for disputes over Ebitda to be referred to expert determination, S argued the prior question of whether adjustments to the Ebitda figure were allowed in relation to the customer complaint was a question of law for the court, as was the question whether B could both include an adjustment to Ebitda and bring a claim under the indemnity. The High Court found in B's favour and decided that S should contest the adjustments through the SPA's expert determination procedure and any indemnity claim through court proceedings. Under the accounting hierarchy in the SPA, deferred consideration was to be calculated: (a) by adjusting for certain specified

Key lessons

- **Extend seller limitations to catch matters covered in deferred consideration statements:** Sellers could include express language to extend the standard seller limitation excluding warranty or other claims on matters provided for or included as a liability in completion accounts to additionally reflect liabilities reflected in deferred consideration statements.
- **Include "no double recovery" provisions in deferred consideration mechanisms:** The case highlights the merits of including "no double recovery" provisions in mechanisms for determining amounts of deferred consideration. Sellers could consider expressly requiring the determination of deferred consideration to reflect any recovery under an earlier warranty or indemnity claim.
- **Sole remedy under indemnity:** Express wording in the SPA that a particular specific indemnity covering an overlapping matter will be the sole remedy would also help from a seller's perspective.
- **General issues on overlapping deferred consideration and warranty or indemnity claims:** Another case last year highlighted issues that can arise from overlapping matters affecting determination of deferred consideration and founding a warranty claim. In *Onecom Group Ltd v Palmer* [2024] EWHC 867 (Comm) the High Court decided that a buyer's warranty claims under a share SPA were not time-barred because they were treated as contingent on prior final determination of an earn-out under the SPA where the claims were based on facts affecting determination of the earn-out and there was no provision in the earn-out mechanism to reflect the outcome of a related preceding warranty claim.

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items; then (b) in accordance with the accounting principles and policies applied in the last accounts; and then (c) in accordance with relevant accounting standards. It was not open to S to say that there should be no adjustment to Ebitda in the deferred consideration statement to reflect the customer claim if that was what was required by applying the deferred consideration schedule and its accounting hierarchy for preparing the statement. It did not matter that this specific adjustment was not specifically included in either sub-paragraph (a) nor as a line item in the pro forma deferred consideration statement. This merely set "methodology" and could not take precedence over the substance of the deferred consideration schedule in the SPA. Clause 7.18 in the SPA, headed "no double recovery", did not apply at the initial stage of determining the amount of deferred consideration. This prohibited B from recovering damages "*or otherwise obtain[ing] reimbursement or restitution*" more than once in respect of any warranty or indemnity claim, but was not relevant at the stage at which a prior Ebitda adjustment was made. The purpose of the deferred consideration mechanism was to determine the target group's enterprise value. By contrast, the purpose of the indemnity was to provide pound for pound recovery if a customer brought litigation. B might not be fully compensated if it was not entitled to adjust Ebitda to deduct the written off invoices, because an indemnity claim might not reflect the loss of enterprise value flowing from the reduction in future Ebitda. However, the court might take double recovery into account (under clause 7.18) if B brought a claim subsequently under the indemnity. (*Adie & Anor v Ingenuity Digital Ltd* [2024] EWHC 2902 (Ch))

Notices clause in SPA applied to earn-out mechanics

The High Court decided on the facts that the notices clause in a share SPA applied to the delivery of a buyer's determination of the amount of earn-out consideration payable under the SPA. As the buyer had failed to comply with the requirements of the notices clause, its determination was invalid.

Buyer B acquired a target company from sellers S. Earn-out provisions in the SPA required B to prepare and submit its determination of the amount payable to S no later than 60 days after the relevant anniversary of completion. S then had 20 business days within which to notify any objections in writing. Although the notices clause in the SPA required *"any notice or other communication"* under or in connection with the SPA to be delivered in writing either personally, by post or by fax, B sent its earn-out determination to S by email. S argued B's determination was invalid for failing to comply with the notices clause. B alleged the notices clause did not apply because the earn-out schedule in the SPA did not require "service" of an earn-out determination but, instead, just for B to "submit" its determination to S. B argued that the latitude of this formulation contrasted with multiple other provisions of the SPA requiring a "notification" to be given "in writing", to which it accepted the notices clause would apply. The High Court found in favour of S and decided that the Year 2 earn-out determination was invalid. It ordered specific performance, requiring B to engage in the dispute resolution procedure in the SPA. This was the effect of both a literal construction of the notices clause and commercial common sense. The expression *"any notice or other communication"*, delineating what was caught by the notices clause in the SPA, was very general and broad. You should not draw fine distinctions between different forms of communication. Parties to commercial contracts needed clarity over how they were expected to correspond. The notices clause had to apply to contractually significant communications. This included an earn-out determination, which went to the price for the business. *(Hughes & Ors v CSC Computer Sciences Ltd* [2025] EWHC 302 (Comm)). By contrast to this decision, in a later case the High Court considered whether a buyer's

Key lessons

- **Mandatory to follow notices clause in SPA:** The judgment demonstrates that it is mandatory to follow the notices provision in an SPA for matters falling within its scope, failing which rights under the SPA may be barred.
- **Consistent drafting:** The case shows the importance of consistent and clear drafting across different inter-party communication provisions in SPAs or other agreements. The argument raised in this case that different types of provisions were subject to different communication requirements arose from multiple different formulations used in the SPA as to "serve", "submit" or "give notification in writing" of communications between the parties.
- **Breadth of notices clause applying to "other communications":** The judgment shows the broad ambit of notices clauses which commonly are expressed to apply generically to *"other communications"*.

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draft completion accounts were deemed agreed under a share SPA where an email the seller sent disputing certain entries in the draft accounts was not delivered in accordance with the notices clause (for failing to be addressed to the buyer's specified contact in the notices clause). Under the SPA, the notices clause only applied to *"Any notice given to a party under or in connection with [the SPA]"*, omitting the words *"or other communication"*. The court decided that the contractual regime for notifying objections to the draft accounts was *not* subject to the notices clause. It noted that the process for disputing the draft accounts required the seller to *"notify the Buyer in writing"* of his objections rather than give a "notice", which the court here took to imply a less formal process. It stated that there was no commercial purpose in requiring the seller's email of objections to be provided to the individual named in the notices clause when it could be provided to the buyer's representative involved in agreeing the completion accounts. The court indicated it was also relevant that the "deemed agreement" provision in the completion accounts mechanism used the formulation "*If... the Seller fails to make any written notification*", which it took to mean if no attempt whatever was made to give any form of written notification. *(Inspired Education Online Ltd v Crombie* [2025] EWHC 1236 (Ch))

Presumption of third party enforcement rights where contract term purports to confer a benefit on a third party

The Supreme Court decided that trade union T had third party rights to enforce check-off arrangements in employment contracts between its members and their employers under the Contracts (Rights of Third Parties) Act 1999 (the 1999 Act).

The issue related to check-off arrangements under a series of employment contracts, whereby employers deduct trade union subscriptions from employees' salaries at source through the payroll system and pay them direct to the trade union. The employers were three Government departments. In around 2014 the employers began unilaterally withdrawing check-off arrangements, leaving employees to make their own arrangements for paying their union subscriptions. T brought its own claims to enforce the check-off provisions, asserting that it had third party rights under the 1999 Act on the basis the check-off term purported to confer a benefit on it. Under section 1(1)(b) of the 1999 Act, a third party has a direct contractual enforcement right where a contract term purports to confer a benefit on them. Under section 1(2) this right may be excluded *"if, on a proper construction of the contract, it appears that the parties did not intend the term to be enforceable by the third party"*. The issue was whether section 1(2) applied, to exclude the application of third party rights here. The Supreme Court found in T's favour. There was a strong presumption of third party enforceability where, as here, a contractual term purports to confer a benefit on a third party expressly identified in the contract for the purposes of the 1999 Act (by name, as a member of a class or as answering a particular description). This was so here because there was no express term stating the contrary. In order to conclude otherwise you would therefore need to imply a term that the parties did not intend the check-off provision to be enforceable by T, where the test for implying terms under English law has a high bar. You would need to show that implying a term was necessary to give business efficacy to the contract or so obvious that it went without saying. The Supreme Court concluded that there was no basis to imply a term here to rebut the presumption that third party rights were conferred on T. For the presumption to apply that a term purporting to confer a benefit on a third party creates direct third party enforcement rights, you did not need to show that the parties positively intended the relevant term to be enforceable by the third party. However, for the exclusion in section 1(2) to apply, to rebut that presumption, you had to show that the parties had a positive common intention that the obligation should *not* be legally enforceable by the third party. It was not at all clear that was intended here and, if anything, the opposite was the more natural conclusion. It was irrelevant that the check-off arrangements had originated from collective agreements between the Government and trade unions in the 1960s which were not themselves legally binding. (*Secretary of State for Department for Environment, Food and Rural Affairs & Ors v Public and Commercial Services Union* [2024] UKSC 41)

Key lessons

- **Strong presumption that a term purporting to confer third party benefit is enforceable:** The Supreme Court's decision establishes that the presumption is strong that a contractual term which purports to confer a benefit on an identified third party is enforceable direct by that third party.
- **Clear and express drafting is desirable:** When drafting agreements containing terms which purport to confer a benefit on third parties, rights under the Contracts (Rights of Third Parties) Act 1999 should be expressly excluded if the contracting parties do not intend to create enforceable third party rights.

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Statutory third party enforcement rights under Contracts (Rights of Third Parties) Act 1999 despite no benefit conferred

The High Court decided that a third party could directly enforce a contract term under the Contracts (Rights of Third Parties) Act 1999 where the contract expressly granted it a direct enforcement right, even though the term in question did not confer a direct benefit on it.

H carried on business as an FCA authorised peer-to-peer lender arranging loans from lenders to businesses. Ms L was carrying on business as a property investor with a portfolio of ten residential properties. Funds were advanced to L for developing a property (the Property) for a term of nine months under a loan agreement, secured by charges over both that and nine other properties, with further advances made subsequently. The loan agreement, which was headed "HNW LENDING LIMITED LOAN AGREEMENT", was expressed to be made between L and *"the Lender (acting by [H] (as Security Agent))"*. Clause 26.7 of the loan agreement stated that: *"… while [H] is not a party to this Loan Agreement, [H] may take the benefit of and specifically enforce each express term of this Loan Agreement and any term implied under it pursuant to the [1999 Act]"*. H brought enforcement proceedings when L defaulted on interest and repayment, claiming possession of the Property and payment of sums outstanding plus interest. L alleged H lacked standing to bring the claim. The High Court rejected L's application for strike out and decided that H had title to claim under the loan agreement and charge. Clause 26.7 of the loan agreement appeared to have intended to confer on H equivalent rights to those of the lender, thereby enabling H to enforce obligations owed to and benefiting the lender. It did not matter that L owed no express obligations to H under the agreement. Whilst section 1(1)(a) of the 1999 Act grants a third party the right to enforce a contract term direct *"if the contract expressly provides that he may"*, that right is not limited to such terms purporting to confer a benefit on that third party, which instead is an alternative route of third party enforcement addressed in section 1(1)(b). Alternatively, clause 26.7 was effective pursuant to section 1(1)(b) to confer on H the benefit of the covenants and enforcement rights owed to the lender anyway, because that is also what clause 26.7 purported to do. The courts should aim where possible to give effect to parties' contractual provisions rather than treating any part of them as otiose. The judge granted L leave to appeal to the Court of Appeal, taking into account that he had reached a different conclusion on the question of enforceability to the earlier County Court judgment on an equivalent claim by H. (*HNW Lending Ltd v Lawrence* [2025] EWHC 908 (Ch))

Key lessons

- **Scope of express statutory third party enforcement right and interaction with alternative third party enforcement right where a contract term purports to confer a benefit:** The judgment gives helpful clarification on the ambit and scope of the statutory third party enforcement rights, both where a contractual term grants this expressly and the alternative ground where a term purports to confer a benefit on a third party, as well as the distinction between the two.
- **In line with general principles:** The outcome is in line with the principle that section 1(1)(a) of the Contracts (Rights of Third Parties) Act 1999 grants a direct statutory third party enforcement right, without a requirement for the third party to have received a benefit under the term in question any more than it need have given consideration.

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Purported assignment ineffective as breached SPA

The High Court decided that there had not been a valid assignment of warranty rights under an SPA because the purported assignment did not fall within any of the categories of permitted exceptions to the prohibition on assignment in that SPA. The purported assignment would in any event have been champertous and, consequently, void as contrary to public policy.

In 2021 company C concluded a revolving credit facility agreement with bank B (the Facility). Subsequently, in 2022, it entered into a share SPA with sellers D, to acquire a target company. In 2023 C brought proceedings against D for

Key lesson

- **Express terms of contractual prohibition on assignment and permitted exceptions:** The judgment demonstrates the importance of following the precise express provisions of a contractual assignment clause and the express permitted exceptions delineated in the SPA.

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breach of warranty under the share SPA. Clause 13 of the SPA prohibited a party from assigning, transferring, charging or declaring a trust over the SPA or any of its rights under it without the prior written consent of the other party, save with limited exceptions. These included where the assignee was a "*lender providing financial facilities*" to the assignor. Company A, whose directors were also directors of C, was incorporated in early 2024 and immediately took an assignment of B's rights in relation to debts that C owed B under the Facility (the Bank Assignment). The consideration was £750,000 plus, among other things, 10% of the net proceeds of the warranty claim. C then entered into a separate deed of assignment under which it purported to assign its right, title and interest in the SPA to A (the SPA Assignment). Again, the consideration included a share in the proceeds of the warranty litigation. C went into administration ten days later and A applied to be substituted as claimant in the claim for breach of warranty. The High Court refused A's application. The court decided that the exception to the prohibition on assignment in clause 13 of the SPA for lenders to C did not apply here. Whilst the Bank Assignment had transferred B's rights to debts that C owed B under the Facility, A had not advanced funds to C nor provided it with "financial facilities". A had merely acquired B's rights of action as a creditor, not B's obligations as a lender, without any novation of the loan facility. The purported assignment was therefore ineffective. Further, it could not give rise to a trust in respect of C's rights of action in favour of A, as this was also expressly precluded by clause 13. It was in any event champertous and therefore void anyway as contrary to public policy. Champerty occurs where a person agrees to maintain or support litigation by another person in exchange for a share of the proceeds, despite having no interest in the claim being litigated. Here, A had no property rights relating to C and no involvement in the SPA or its performance. The fact that A was C' s creditor as a result of the Bank Assignment did not affect this. The assignments were part and parcel of the same transaction, establishing A as a significant secured creditor of C and leaving other creditors with very little recovery. (*Tactus Holdings Limited (In Administration) v Philip Mark Jordan and Ors* [2025] EWHC 133 (Comm))

Valuation of leaver shares under articles of association

The Court of Appeal considered the effect of leaver provisions in a company's articles of association. It upheld the earlier High Court decision and decided that a deemed transfer notice had been served for the transfer of a member's shares when he retired from his position as a director of the company, but not on an earlier date on which he had been dismissed as an employee of a different group company. This meant that the member was entitled to be paid a higher "fair value" for his shares, rather than lower "market value".

C was the holding company of SP Limited, which was an engineering company. Mr T held 24% of the shares in C, with the remainder held by another company (SC). SC was controlled by Mr R, who was T's co-director of C. T was both an employee and director of SP and was also a director of C. T was dismissed as an employee of SP in October 2022 and brought proceedings before the Employment Tribunal in respect of that dismissal. The following month he was also removed as director of SP. T subsequently resigned as a director of C in May 2023 when he retired at the age of 65. Article 11.3 of C's articles of association provided that: *"If any Employee Member shall cease for any reason…to be employed as an employee, director or consultant of a Group Company (**and does not continue in that capacity** in relation to any Group Company), then a Transfer Notice shall be deemed to have been served…on the date of such cessation"*, whereupon they would be obliged to offer their shares for sale to the other shareholder(s). The transfer price would be "market value" (which applied a minority discount) with

Key lessons

- **Clear and express drafting of leaver provisions:** Clear and express drafting is required for leaver provisions in articles over how compulsory transfer provisions operate where a dismissed employee has, or over whether or not they should continue to have, continuing roles with other companies in the same group.
- **Interpretation of articles of association:** The court will interpret the articles in the round, taking into account reasonably ascertainable surrounding circumstances when they were adopted, such as public filings at Companies House. The Court of Appeal took the view here that the sensible meaning of article 11.3 was to allow the higher transfer value where, for example, someone left employment in order to continue as a consultant or otherwise continued in the business.

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limited exceptions. One of these was where a transfer notice was deemed served on an employee member's "retirement at 65 years of age", when the transfer price would instead be "fair value" (which would be higher because it valued shares on a proportionate basis). R was expressly excluded from the definition of "Employee Member", with the effect that these deemed transfer provisions only applied to T. The question was whether T was entitled to fair or market value for his shares. This hinged on whether article 11.3 had been engaged in October 2022 or May 2023. The Court of Appeal upheld the first instance decision that T was not deemed to have served a transfer notice until he retired in May 2023, meaning that he was entitled to receive fair value for his shares. The appeal turned on the interpretation of the phrase *"does not continue in that capacity"*. You had to look at the articles in the round when interpreting this phrase and also interpret it by reference to any extrinsic facts about C or its membership that would be reasonably ascertainable by any reader of C's constitution and public filings at Companies House, and commercial common sense. The Court of Appeal decided that the expression "that capacity" referred back to the single capacity of being "employed" generically, whether as an employee, director or consultant of a group company and not in a particular one of the three capacities listed in article 11.3. This was the better reading of the article and made more commercial sense. There would otherwise be anomalous outcomes, taking into account that at least part of the purpose of article 11.3 was to give the option of a clean break when an employee member ceased to be involved in the day to day running of the business. For example, there would otherwise be a forced transfer of shares at the lower value where an employee member ceased to be a director but continued to be employed within the group, or if T changed his status from employee to consultant. Indeed, T was the only employee member when the articles were adopted and, as such, the "consultant" limb of article 11.3 could only ever apply to him if he changed his status from employee to consultant. (*Syspal Capital Ltd v Truman & Anor* [2025] EWCA Civ 469)

Exclusion of liability for "anticipated profits" caught lost charges

The Court of Appeal has upheld the earlier High Court decision to strike out a claim for lost charges for alleged breach of an exclusivity clause in a supply agreement, on the basis that the claim fell within an exclusion clause in respect of "anticipated profits".

VM entered into a telecommunications supply agreement with mobile network operator EE to access its radio access network. EE agreed to provide services to VM to facilitate provision of 2G, 3G and 4G mobile services to VM's customers. The agreement contained an exclusivity clause obliging VM to use EE's network exclusively to provide those services to its customers. Subsequently the parties agreed to extend the agreement to provision of 5G services or, failing such agreement, for VM to be entitled to provide 5G services to its customers from a different network. VM put some of its customers onto competitors' networks, arguing that this fell within the "5G services" exception. EE claimed around £24.6 million in damages for having been deprived of revenue that it would otherwise have earned. Clause 34.5 stated: *"… neither party shall have any liability to the other in respect of anticipated profits…"*. VM applied for summary judgment to strike out EE's claim on the basis that this exclusion clause applied. The High Court had granted summary judgment in VM's favour. The Court of Appeal dismissed the appeal by a majority. The majority of the Court of Appeal decided that there was no overarching principle of law limiting an exclusion of liability for loss of anticipated profits to losses outside the contract rather than sums payable if it was performed. The Court of Appeal rejected EE's argument that, in the context of breach of the exclusivity clause, even if you regarded loss of revenue as loss of profit, the claim was for profits already lost as a result of diversion of customers to other networks, rather than loss of profits that were still anticipated to be made in the future. A claim in respect of anticipated profits could not vary depending on the time when the claim was brought and you interpreted the clause when it was entered into. If the parties had intended detailed distinctions between different types of

Key lesson

- **Clear and express drafting needed on the scope of exclusion clauses:** The judgment highlights the importance of clear and express drafting. If the parties had intended to distinguish between anticipated profits and loss of profits, or to narrow the meaning of anticipated profits to profits that were expected to be earned outside the contract, they should have provided to that effect in the drafting.

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loss of profit claims, the exclusion clause would have specified that expressly in the drafting. Further, any claim EE might have had for wasted expenditure was not excluded. EE in any event would receive substantial minimum revenue payments under the agreement. It was also relevant that the clause was part of a lengthy contract drafted with the assistance of legal advice on both sides and involving careful allocation of risk for both parties. (*EE Ltd v Virgin Mobile Telecoms Ltd* [2025] EWCA Civ 70)

Company law

There have been particular cases of interest on a number of company law issues.

Power of directors to bind company on a transaction with a shareholder

The High Court has looked at the scope of section 40 of the UK Companies Act 2006, on the power of directors to bind a company, when considering whether directors D had exceeded their powers in registering an entity on company C's register of members and, if they had, whether it had any discretion to decline to rectify C's register of members.

Buyer P entered into a share SPA with C itself for the purchase of B ordinary shares from C out of treasury. Under C's articles of association, before being entered on C's register of members P had to enter into a deed of adherence (DoA) to a shareholders' agreement (SHA). A form of DoA was scheduled to the SHA and comprised a multilateral novation agreement needing to be executed by all existing parties. The existing parties to the SHA were C, its majority shareholder J and another corporate shareholder Q. Q never executed the DoA, but D nonetheless entered P as a shareholder on C's register of members. P alleged that it was not bound by the SHA, but had brought an unfair prejudice petition as a member. The High Court initially refused to stay the unfair prejudice petition on the basis Q's failure to execute the DoA meant that P was not bound by the SHA nor the arbitration agreement within it. C then applied for an order to rectify its register of members on the basis that D had lacked power under C's articles to register P as a member. C argued that the court did not have a discretion to refuse rectification because the registration had been beyond the company's powers. The question was whether P could claim the benefit of section 40 of the UK Companies Act 2006 (the Companies Act), which provides that, in favour of a person dealing with a company in good faith, the power of directors to bind the company is deemed to be free of any limitation under the company's constitution. One issue was whether section 40 applied as between a company and a shareholder. The High Court dismissed C's claim. The court held that D had indeed exceeded their powers, because C's articles clearly required a DoA to be legally effective to bind the transferee before D had power to register them. However, it did not necessarily follow that C could rely on that against P. Section 40 could apply between the company and a shareholder to validate registration as much as between the company and a third party with no existing relationship with the company. In any event, P was not a shareholder in C when it entered into the SPA, and was only registered several months after that. C had sold the B shares on the basis that P would get registered title to them. The shares had been sold out of treasury and C could not remain their registered owner. The High Court also denied that P was not party to *"any transaction or other act"* with C, as required for section 40 to apply. It rejected that D's act of registration was a unilateral, discrete act by D that was separate from P's acquisition of shares from C. You had to distinguish it from the different scenario where a buyer acquires shares from another shareholder and subsequently delivers a stock transfer form to the company, where the acquisition and registration might instead be regarded as separate acts. Registration was not invalid because C had no capacity to register members; it was invalid, subject to section 40 or ratification, simply because D had exceeded their powers, the consequences of which were saved by section 40. The claim for rectification of the register therefore failed. (*Jusan Technologies Ltd v Uconinvest LLC* [2025] EWHC 704 (Ch))

Key lessons

- **Scope of power of directors to bind a company and of court's discretion to refuse rectification:** The judgment gives interesting discussion of the scope of section 40 of the Companies Act as between a company and shareholder and of the court's discretion to refuse to rectify a company's register of members.
- **Structuring deeds of adherence to shareholders' agreements:** It demonstrates the benefits of a unilateral deed poll format for deeds of adherence over multi-party novation agreements, and of setting that as a requirement contractually in the SHA.

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Purported forfeiture of shares ineffective

The High Court decided that a purported forfeiture of shares for failure to pay non-shareholder debts owed to the company was ineffective on the basis that the company's articles of association only allowed forfeiture for unpaid amounts due in respect of the shares in question, not in respect of other debts owed to the company.

After ceasing to be a director of company C, individual E brought proceedings against C which he lost. E failed to pay a large costs order against him and C purported to forfeit his shares, which were fully paid. C's articles included provisions on calls, lien and forfeiture which were an expanded version of those provisions from the public company model articles (PMA), which apply to partly paid shares. C's articles extended this concept, expressly applying the lien provisions over every share "whether or not fully paid" and in relation to "all monies payable". A call was also defined in article 25.1 as requiring the shareholder to pay to C a specified sum of money which was "payable by that member" to C. In September 2021 C sent a "call notice" under article 25 requiring E to pay the original costs sum, failing which it would forfeit his shares, which ultimately it did. E alleged that the call and forfeiture of his shares were unlawful. The High Court decided that E's shares had been forfeited unlawfully and the forfeiture was invalid, whilst noting that many interpretation issues had arisen over the articles due to poor drafting when the PMA had been adapted. The definition of "call" in article 25.1 on a "specified sum of money" impliedly must be limited to calls in respect of unpaid capital on specific shares. That would be the meaning that would be conveyed to a reasonable person reading the articles for them to make sense and to construe them reasonably as a coherent whole. Significantly, the words "in respect of shares which that member holds" (linking C's rights to sums due in relation to specific shares) had not been been replicated from the PMA in article 25.1 (on the power of directors to send a shareholder a call notice), but had been retained in the same or equivalent formulations in the articles that followed on: liability to pay calls; notice of intended forfeiture; directors' power to forfeit shares; and the effect of forfeiture. There would be an inconsistency if call notices could be issued in respect of any debt of a shareholder but could only be enforced by forfeiture if they were a call on an amount owed in respect of that share. Instead, you should construe articles consistently and in the round and resolve rival meanings by looking at commercial common sense. The interpretation that the definition of "call" was limited to calls in respect of unpaid capital was also consistent with that in the Companies Act which, in line with the principle of maintenance of capital, only envisages forfeiture in relation to partly paid shares and that a company may only acquire its shares in a manner expressly permitted under the Companies Act. (*Key Choice Financial Planning Ltd v Evoy* [2025] EWHC 4 (Ch))

Key lessons

- **Consistency of drafting:** The judgment highlights the need for clear and consistent drafting when adapting the statutory model articles.
- **Commercial common sense:** It also shows the willingness of the court to adopt a commercially sensible interpretation when construing articles.

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Transactions for the purpose of putting assets beyond reach of creditors can catch assets not beneficially owned by a debtor

The Supreme Court has upheld the earlier Court of Appeal decision that a transaction can fall within the scope of section 423 of the Insolvency Act 1986, on transactions aimed at putting assets beyond the reach of creditors, even if the asset transferred is not legally or beneficially owned by the debtor.

Bank B sought to enforce in England a series of judgments obtained in Abu Dhabi, with a value of around £20 million, against individual H, as well as related claims against H's family over assets transfers to them that H had procured. The judgment debts arose under guarantees that H had given in respect of credit facilities that B had granted to two companies connected with H. Section 423 of the Insolvency

Key lesson

- **Broad ambit of statutory provision:** Useful clarification that just because the relevant assets are not legally or beneficially owned by a judgment debtor but, instead, by a company owned or controlled by them, does not prevent a transfer from falling within the scope of section 423 of the Insolvency Act 1986 if the aim of the transaction was to put those assets beyond the reach of creditors. The Supreme Court indicated that not only should section 423 of the Insolvency Act be interpreted this way (on transactions for the purpose of putting assets beyond the reach of creditors) but also sections 238 (on transactions relating to insolvent companies) and 339 (on transactions relating to bankrupt individuals) of the Insolvency Act.

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Act 1986 (IA) allows a transaction to be challenged and set aside if the transaction was aimed at putting assets beyond the reach of creditors. The issue in this case was whether section 423 can apply to a transaction under which a debtor procures that a company which they own transfers a valuable asset for no consideration or at an undervalue, and this reduces or eliminates the value of the debtor's shares in the company available to enforce against. Here, this was a property transfer to H's son for no consideration. The Supreme Court found in B's favour and dismissed the appeal. It decided that the language of section 423(1) and the purpose of the section indicated that a "transaction" for this purpose was not confined to dealing with an asset owned by the debtor. Section 423(1)(a) contains two limbs. It applies both to a transaction where a person makes a gift to another person and also to one where they "otherwise" enter into a transaction with the other person for no consideration. H argued that the concept of "gift" (requiring ownership by the debtor) applied to both limbs. The Supreme Court rejected that the word "gift" limited the transactions to which the second limb applied. Instead, the wording of section 423 and the related sections of the IA strongly supported the view that a "transaction" for the purposes of the section need not involve a disposal of property belonging to the debtor, where the assets available to enforce against a person were reduced as a result of the transfer. There would otherwise be a significant limitation on the operation of the section. If that were intended, one would expect to see that expressly spelt out in its wording. (*El-Husseiny and Anor v Invest Bank PSC* [2025] UKSC 4)

Antiguan company law: no special notice needed to amend AGM resolution to replace board

The Judicial Committee of the Privy Council (JCPC) held that the shareholders of an Antiguan company were entitled to amend an AGM resolution at the meeting to include a resolution dealing with the removal of existing directors and the appointment of new directors without needing to provide special notice. The JCPC also held that the failure to obtain shareholder approval for the company's entry into of a 'poison pill' rights agreement (Rights Agreement) governed by Delaware law rendered the agreement invalid because the agreement purported to change the rights attached to the company's shares.

Sinovac Biotech Ltd (S) was an Antiguan company whose shares were listed on NASDAQ. In February 2016 S was the subject of two competing bids: one from a consortium which included S's directors and the other from a consortium that was supported by the appellant, 1Globe Capital LLC (G). In March 2016 S entered into the Rights Agreement, which provided for S to declare a dividend of one preferred share purchase right (Right) in respect of each Common Share. The Rights were exchangeable for additional Common Shares if an outside investor acquired 15% or more of S's Common Shares (Trigger Event). In December 2017 S called an AGM, with one of the items of business being the re-election of the directors. At the AGM a shareholder proposed motions (Shareholder Motions) for the removal of all but one of the incumbent directors and the appointment of new directors. Shares representing 37% of S's issued share capital were voted by proxy in advance of the meeting and were overwhelmingly in favour of the re-election of the directors. However, shares

Key lessons

- **Understanding a company's constitution and the statutory framework:** The decision highlights the importance of understanding a company's constitution and the statutory framework for shareholder meetings and resolutions. If S's chair had adjourned the meeting, this would have allowed shareholders represented by proxy to consider and vote on the amended resolutions, which may have resulted in a different outcome.
- **Consider all potential arguments to litigation:** The decision also illustrates the importance of considering all potential arguments when bringing litigation. The JCPC noted that multiple arguments were not pursued at trial or on appeal, some of which might have had an important bearing on the court's final decision.
- **Differences between IBCA and UK Companies Act:** Finally, it is worth noting that a key difference between the IBCA and the UK Companies Act is that section 168(2) of the UK Companies Act requires special notice to remove a director. Therefore, while *Betts* could be relied upon to amend a director re-election resolution to propose alternative nominees, it would not be possible to amend the resolution at the AGM of a UK company to deal with the removal of directors without special notice having been given.

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representing 45.5% of the issued share capital voted in favour of the Shareholder Motions and there was a majority against the re-election of the directors and for the election of the new directors. The results were not declared at the meeting and on 5 March 2018 S announced that the incumbent directors had been re-elected. G filed a claim in the Antiguan High Court seeking declarations relating to the validity of the vote on the Shareholder Motions.

The JCPC found that the judge had erred in concluding that a 'minimum standard of fairness' meant that a group of shareholders could not be acting lawfully by proposing a resolution for the replacement of directors without adequate prior notice to the company. Section 109 of the International Business Corporations Act of Antigua (IBCA) and S's By-Laws provided that the election of directors at an AGM was general business, which did not require special notice. It was an important aspect of shareholder democracy that shareholders retain the freedom to elect whom they choose as directors at an AGM, without that being subject to prior notice. The JCPC cited *Betts & Co Ltd v Macnaghten [1910] 1 Ch 430* as authority for the proposition that where shareholders are on notice that the business of an AGM is to include the election of directors, they are taken to have it within their reasonable contemplation that any appointments of directors, within the powers of the company's constitution, might be made. The JCPC rejected S's arguments that the reasoning in *Betts* had been overtaken by modern developments in shareholder communications and meetings. The JCPC overturned the lower court's ruling that section 71 of the IBCA contained an implied obligation on shareholders to give advance notice to S of any proposal to replace a director. This undermined the clear intent of section 109, namely that proposals about the election of directors at an AGM do not require prior notice. As there were no submissions at trial or on appeal that the AGM should have been adjourned, the JCPC did not decide on this issue. However, it noted that English common law suggested that the chair of a meeting had a residual discretionary power to adjourn a meeting "so as to give all persons entitled a reasonable opportunity of voting."

Turning to the Rights Agreement, the JCPC found that this added to the rights conferred by shares and should therefore have been approved by special resolution.

Allowing the appeal, the JCPC granted G declaratory relief to the effect that the new directors were duly elected, and that the incumbent directors ceased to hold office, at the AGM. (*1Globe Capital LLC v Sinovac Biotec Ltd (Antigua and Barbuda) [2025] UKPC 3*)

Validity of acts of sole directors of private companies with model articles

The High Court upheld the validity of a resolution to apply for an administration order passed by a sole director of company C. C had adopted the private company model articles in full without modification and had not always had a sole director.

The issue in this case was whether C had validly brought the administration application made by its sole director D on its behalf. C had previously had multiple directors in the past. It had adopted the private company model articles (MA) in full without modification, but there was previous conflicting case law on whether the MA need to be amended where a private company only has one director. In *Re Fore Fitness Investment Holdings Ltd, Hashmi v Lorimer-Wing*[2], the High Court had held that the MA should be amended for a sole director to run a company, in order to specify expressly a quorum of one at board meetings and expressly allow a minimum number of directors of one. The relevant provisions of the MA under consideration were: article 7(2) of the model articles, which provides that if the company only has one director and no provision of the articles requires it to have more than one director, the director may take decisions without regard to any

Key lessons

- **Expressly provide for sole directors under articles of association:** Whilst it is interesting and helpful that the High Court here followed the approach in *Re Active Wear Ltd*, pending a Court of Appeal decision on this subject it remains advisable to apply the reasoning in *Re Fore Fitness* and expressly provide in the articles that, for so long as the company only has one director, the quorum at board meetings will be one director only, coupled with a provision allowing a minimum number of directors of one.
- **Ratification of past acts of sole directors:** Applying *Re Fore Fitness* strictly, the issue remains of whether any key historic decisions of a sole director of a private company with unamended MA require ratification, although the decision in *Re KRF Services* is helpful in any general retrospective analysis on validity of past actions of sole directors.

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2 [2022] EWHC 191.

provisions of the articles on directors' decision-making; and article 11(2), which provides that the quorum for directors' meetings should never be less than two and, if not fixed by the directors, is two. The High Court in *Re Fore Fitness* had held that article 11(2) took precedence over article 7(2) despite prior market practice to the contrary. By contrast, in the later case of *Re Active Wear Ltd*[3] the High Court had held that administrators had been validly appointed by the sole director of a company where the unmodified MA were in place. It had decided that Article 7(2) would be stripped of any practical meaning if article 11(2) took precedence in a scenario where a company had aways had a sole director operating under the unamended MA. Here in the *Re KRF Services* case the High Court applied *Re Active Wear Ltd* and upheld the validity of the resolution passed by D as sole director. The court even took the decision in *Re Active Wear Ltd* a stage further by applying it where the company had not always had a sole director in the past. This was important because the High Court in *Re Active Wear Ltd* had placed significance on the fact that the company in question in *Re Fore Fitness* had previously had multiple directors. Here in the *Re KRF Services* case the court decided that it was irrelevant that C had more than one director in the past, taking into account the use of the present tense in article 7(2). C only had one director now, which meant that the first condition in article 7(2) was satisfied. Part of the decision in *Re Active Wear Ltd* was that article 11 was not a provision of the articles which required the company to have more than one director. It followed that the second condition was also satisfied. The judge also commented that the effect of applying the interpretation given to article 11(2) in *Re Fore Fitness* would be that article 7(2) could never take effect, which was unlikely to have been the intended effect of the MA. (*Re KRF Services (UK) Ltd* [2024] EWHC 2978 (Ch))

Unfair prejudice must concern conduct of affairs or act or omission of company

The High Court struck out parts of a shareholder's petition that a company's affairs had been conducted in an unfairly prejudicial manner, holding that an alleged right to an increased shareholding under an inter-shareholder arrangement did not amount to conduct of the company's affairs nor an act or omission of the company.

Petitioner P had worked for company C, which initially was owned by respondent R, and of which she was a director. In July 2018 a 10% shareholding was transferred to P. P alleged that this had been effected pursuant to an agreement under which her shareholding would increase in stages over the following eight years, up to a maximum of 50%, dependent on her performing to R's reasonable satisfaction, to be assessed in good faith. P also alleged that the parties had reached a new agreement 11 months later under which she was entitled immediately to a 49% shareholding and to 49% of profits. R denied that such agreements existed. In October 2021 C paid dividends to P and R in the proportions 10% and 90% respectively. P sought declaratory relief on the basis of a constructive trust in relation to an alleged 49% shareholding. She also brought an unfair prejudice petition under section 994 of the Companies Act that C's affairs had been or were being conducted in an unfairly prejudicial manner, seeking a 49% share purchase order. The High Court found in R's favour and granted his strike out application. It rejected P's argument that repudiation of a personal right to a greater shareholding under an alleged share transfer agreement amounted to conduct of C's affairs. You had to contrast that with an allotment of shares, which triggered certain statutory obligations on the part of a company and was a process which undoubtedly involved conduct of a company's affairs. It was not any breach of an SHA that would potentially qualify as conduct of the company's affairs or an act or omission of the company for the purposes of section 994, but only breach of those terms of the agreement which set out how the company's business was to be run. There had to be a causal connection between the personal actions of a shareholder and the relevant conduct of the company's affairs for such matters to be pleaded to support an unfair prejudice petition. In turn, such conduct must have caused unfair prejudice to the petitioner as a member. Here, the matters relied on lacked these causal connections. P's complaints over divdends was entirely "parasitic" on her claims to receive additional shares, where the alleged agreement for her to take a 49% shareholding was purely a personal agreement between P and R and did not involve C. (*Re 36 Bourne Street Ltd, Brierley v Howe* [2024] EWHC 2789 (Ch))

Key lesson

- **Unfair prejudice must concern conduct of company's affairs:** The decision highlights the importance on focusing on the express statutory requirements for bringing an unfair prejudice petition under section 994 of the Companies Act including, here, the need for the alleged unfair prejudice to concern conduct of the company's affairs or an act or omission of the company.

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3 [2022] EWHC 2340 (Ch).

Duty to promote success and unfair prejudice on breach of SHA duty of good faith

The Court of Appeal decided that, in addition to an unfair prejudice petition previously made out by a minority shareholder in the High Court, a director had breached his statutory duty to promote the success of the company on breach of a contractual requirement in an SHA to work in good faith towards an exit by a specified date. It also allowed the minority shareholder's appeal that the court should have made an unconditional order for the purchase of its shares.

Under the SHA company C and its investors were under a contractual obligation to work in good faith towards an exit by 31 December 2019, to give good faith consideration to any opportunities for an exit before that date and, failing that, to engage an investment bank to "cause" an exit after that date on such terms as the board of directors consented to, such consent not to be unreasonably withheld. "Exit" was defined to include a sale of all or substantially all of C's share capital or business or assets. No exit was achieved by the deadline. When defendant director and indirect investor D instructed financial adviser F to work on the sale process there was no explicit instruction to work towards the contractual deadline in the engagement. Allegedly this was because D believed a higher value might be obtained by delaying the process. C had still not been sold four years after the deadline. Petitioner P brought an unfair prejudice petition. The High Court had found in favour of P that there had been unfair prejudice, because P had been unable to sell its shares in the way provided for in the SHA. However, the court had decided that D had not breached the statutory duty to promote the success of the company under section 172 of the Companies Act. As remedy for the unfair prejudice, the court had made an order for P's shares to be bought by D, but only if it was us determined at a later trial that a purchase offer exceeding US$75 million (net of debt) would have been received by 31 December 2019. P appealed both on the determination as to no breach of fiduciary duty and also on the conditional nature of the share purchase order. The Court of Appeal found in favour of P on both points, while upholding the High Court's finding of unfair prejudice. Before addressing whether the judge at first instance had been correct to make a buy-out order that was conditional, the Court of Appeal had to first determine whether D's conduct amounted to a breach of duty. The duty on directors under section 172 of the Companies Act is to act in a way they consider in good faith would be most likely to promote the success of the company for the benefit of the members as a whole. The Court of Appeal stated that, given the duty under section 172 was a fiduciary one, there was no basis to conclude that the requirement of "good faith" in that context was any less than a requirement of honesty. This had been clearly stated in *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)*[4]. There were both subjective and objective elements to the established test for dishonesty. The court had to first ascertain subjectively the actual state of the individual's knowledge or belief as to the facts. The question whether their conduct was honest or dishonest was then to be determined by applying the objective standards of ordinary decent people. The judge at first instance had found that D had misled the board and concealed from them that he was doing nothing to achieve a sale of shares before 31 December 2019 and, in fact, was doing what he could to prevent it. That should have led to a finding that he was behaving dishonestly and so in breach of fiduciary duty under section 172. Further, in causing C to breach its obligations under the SHA D must have been in breach of his fiduciary duties to C. The Court of Appeal made an unconditional order for D to buy P's shares in C on a non-discounted basis as a pro rata proportion of the open market value of C as at 31 December 2019. It would be unjust if P were left as a minority shareholder in the circumstances. (*Saxon Woods Investments Ltd v Costa* [2025] EWCA Civ 708)

Key lessons

- **Meaning of "good faith" in the context of the duty to promote success:** The Court of Appeal judgment gives interesting guidance on the "good faith" element to the statutory directors' duty to promote success and the meaning of dishonesty more generally, including when the test for assessing whether the duty to promote success has been met involves an objective element.
- **Remedies for unfair prejudice:** The judgment contains interesting discussion of the scope of the court's discretion to award relief for unfair prejudice.

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4 [2017] UKSC 67.

Listed companies

The following decisions are of particular interest to listed companies.

Passive investors may pursue claims regarding information published by issuer

The High Court has declined to strike out claims brought by passive investors against an issuer under section 90A and Schedule 10A of FSMA 2000 in respect of published information.

Investors brought claims with a total value of around £1.5 billion against a listed company (S) under sections 90A and 90 and paragraphs 3 and 5 of Schedule 10A of FSMA 2000. The Schedule 10A claims alleged: (a) untrue and misleading statements in and omissions from information published by S between 2007 and 2019 in relation to non-compliance with sanctions, financial control failures and bribery by members of S' group (Paragraph 3 Claims); and (b) dishonest delay by S in publishing related information (Paragraph 5 Claims). For Paragraph 3 Claims totalling £762 million, neither the claimants nor their agents read or considered S' relevant published information (Price Reliance Claims). Instead, they alleged that they relied on the market to set the price of S' shares having taken account of the published information. S applied to strike out those Paragraph 3 Claims which were Price Reliance Claims and the Paragraph 5 Claims.

The Court found that the meaning of reliance in paragraph 3 of Schedule 10A was clearly a developing area of law. Such disputed questions should be resolved on the basis of actual facts established at trial. Striking out the Price Reliance Claims would also not dispose of this case or substantially reduce the burden of the trial. The Court had doubts as to whether it was right to say that the common law test of reliance (from the tort of deceit) applied to paragraph 3 of Schedule 10A. It was arguable that paragraph 3 contemplated a broader test for reliance which would work consistently for omissions and misstatements. The common law test in relation to implied representations was uncertain and developing. It was also not easy to draw the precise line between indirect reliance (which S accepted the common law accommodates) and the Price Reliance Claims. A previous case decided that paragraph 5 of Schedule 10A only imposed liability upon an issuer for dishonest delay if the issuer actually later published the delayed information. The Court had more doubts about whether this was correct. It was better to decide this novel point of law on the basis of actual facts established at trial. (*Various Claimants v Standard Chartered PLC* [2025] EWHC 698 (Ch))

Key lessons

- **Judicial scrutiny of Schedule 10A of FSMA 2000 continues:** This adds to the small but growing number of decisions regarding section 90A and Schedule 10A of FSMA 2000. So far only the *Autonomy case* (which had an unusual claim structure) proceeded to judgment following a trial, with all multi-claimant claims settling. Given the potential size of multi-investor claims (£1.5 billion in this case), the stakes are high for issuers and investors.
- **Paragraph 3 claims by tracker funds can proceed:** While this is only an interlocutory decision, the investors will welcome the opportunity to pursue their Price Reliance Claims under paragraph 3 of Schedule 10A at trial. They will also welcome the Court's approach to reliance.
- **Price reliance claims still face difficulties:** However, the Court appreciated the difficulties which the Price Reliance Claims faced and acknowledged it may be an uphill struggle for the investors. Convincing the Court not to strike out claims is one thing, winning at trial is another.
- **Expands grounds for dishonest delay claims:** This decision casts considerable doubt on arguments that claims under paragraph 5 of Schedule 10A can only be brought if the issuer publishes the delayed information later.

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FCA fines executive for failing to notify share trades and for trading during closed periods

The Financial Conduct Authority (FCA) has fined a former executive of a company with listed equity shares (W) for failing to notify transactions in W's shares and for trading during closed periods.

S was the Chief Supply Chain Officer of W. While not a director, he was a person discharging managerial responsibilities (PDMR), as defined in Article 3(1)(25) of the Market Abuse Regulation (MAR). Between April 2019 and November 2020, S executed 115 transactions in W shares which he failed to notify to W and the FCA as required by Article 19(1) of MAR, or seek clearance for as required by W's Share Dealing Code. These included sales and purchase of shares worth nearly £4.15 million in total, and ultimately resulted in S disposing of his entire holding of W shares (worth over £450,000 at the start of this period). 18 of these 115 transactions (relating to shares worth over £550,000) also took placing during closed periods in breach of Article 19(11) of MAR. During this period, S received 7 emails reminding him of his obligations as a PDMR, referring him to the Share Dealing Code, reminding him of the commencement of closed periods and attaching relevant documents. The FCA informed W of S' trading in September 2021. S failed to provide W with an explanation for his conduct and W terminated his employment with immediate effect. The Final Notice does not suggest that S traded while in possession of any inside information.

The FCA fined S £123,500 for breaching Articles 19(1) and (11) of MAR. The FCA considered that S was on notice as to his PDMR obligations. S followed the correct process for one additional transaction in August 2020, obtaining clearance and submitting a notification. The FCA considered that this demonstrated S' awareness of the requirement to notify W. The FCA considered that S committed the breaches deliberately or recklessly, given he received 7 reminder emails and demonstrated his awareness of the process (and therefore the requirement) to notify W. The FCA did not identify any personal benefit that S derived directly from the breaches. There was no evidence that they had a material adverse impact on the market or significantly impacted W's share price. (*FCA Final Notice to András Sebők* – 26 November 2024)

Key lessons

- **First enforcement action for trading during closed period:** This is the first enforcement action by the FCA for a breach of Article 19(11) of MAR. It previously fined one other PDMR for breaching Article 19(1).
- **A sizable fine:** PDMRs should note the significant size of the fine. This was calculated as 30% of S' relevant income over the period, less a 30% settlement discount.
- **No action taken against issuer:** It seems that W's actions were sufficient to show that it had established and maintained adequate procedures, systems and controls. It had internal policies in place and provided regular reminder emails to its PDMRs attaching relevant documents. The FCA noted the absence of individual training on MAR for S, but did not labour this point.

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