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# 2025 Half-year in review M&A legal and market developments

## In this issue…



**Authors:** Philip Broke, Margot Berry, David Lewis, Guy Potel, Mark Richardson, Allan Taylor, Sonica Tolani, Veronica Carson, Darius Lewington, Peter Wilson

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.

### Interaction between indemnity and warranty claims, details in warranty notice and scope of notices clause in SPA

The High Court found that a buyer's ability to bring a claim under a specific indemnity under the sale and purchase agreement (SPA) did not preclude a claim for breach of warranty and it found several bases on which to uphold the buyer's notice of claims.

Buyer B acquired the entire issued share capital of company C from individuals L and P (together, S) in October 2021. L was sole director and CEO of C, whilst P was his partner and not actively involved in the business. C was engaged in providing education and training for young people through military courses and running schools and apprenticeship courses. Its activities in England were funded by the Education and Skills Funding Agency (ESFA). It transpired in early 2022 that C had breached ESFA's funding rules and thereby over-claimed funding. C consequently had to repay an amount (Clawback). B alleged that this had a wider substantial adverse effect on C's business beyond the amount of Clawback, including reducing future funding. S alleged that B was only entitled to claim under a specific funding indemnity in the SPA under which S indemnified B in respect of clawback of any sums ESFA had paid to a group company between March 2018 and the completion date. Separately, warranty B5.2.2 in the SPA stated that C had: (A) during the last four years complied and continued to comply in all material respects with ESFA's funding rules; and (B) so far as the Vendors were aware, was entitled to receive all funding under contracts in place. Other relevant provisions were: (i) a seller limitation where the facts giving rise to a warranty claim were: (a) disclosed; *and* (b) within B's actual knowledge at the date of the SPA; (ii) that "Disclosed" was defined to mean "*fairly disclosed with sufficient details to identify the nature and scope of the … matter… concerned*"; (iii) that the requirement for notices of claim under the SPA was to give details of the facts giving rise to the claim and B's "*bona fide estimate of any alleged loss*"; (iv) that legal proceedings had to be issued and served "*by 14 February 2023*"; and that (v) the seller limitation against double recovery prohibited B from recovering more than once if the same fact gave rise to more than one claim for breach of warranty or to both a warranty and indemnity claim. B notified claims under the funding indemnity and for breach of warranty. S subsequently paid the Clawback amount under the funding indemnity. B delivered a claim form to S on 14 February 2023, which included some warranty breaches which had not been previously notified. The High Court found in favour of B and discussed a series of common Private M&A issues. First, the requirement to issue and serve proceedings "by" 14 February 2023 did not mean they had to be served before that day. They could be served at any time up to the last moment of the last day of the period. "Served" meant served in accordance with the Civil Procedure Rules (CPR). It did not make sense to apply the notices clause in the SPA when the SPA was silent on service of legal proceedings. Further, it was CPR 7.5 that you applied (which determines when service occurs) *not* CPR 6.14 (which determines when service is deemed to occur for the purpose of further steps in the proceedings and deems service the second day after delivery). On the facts here, B did not need to identify individual warranties in its notice of claims. This was a question of construction and how the notice in question would be understood by a reasonable recipient with notice of the context. The requirement for a "bona fide" estimate of loss in the notice did not prevent B from specifying a larger amount later in its particulars of claim when more information was available, as there was no commercial purpose to hold B to the lower figure. Further, the prohibition on double recovery in the SPA did not prevent B from choosing whether to bring a warranty or indemnity claim: it merely precluded recovering more than once on the same matter. The court noted that there was a higher cap on liability under the warranties than the funding indemnity, suggesting the parties had allocated the risk and rights accordingly. As for warranty B5.2.2, paragraphs (A) and (B) formed one composite warranty, and the intervening "and" did not mean both limbs needed to be satisfied to prove a breach, nor that the knowledge qualifier applied to both limbs. Given that the warranty contained two distinct assurances about C's state of affairs, it was impossible to read the first as qualified by the knowledge and awareness requirement of the second. However, the separate disclosure and buyer's knowledge provision should not be read as if the intervening "and" meant "or", which would have saved S from needing to show B had actual knowledge in addition to disclosure and might have meant constructive knowledge was enough. Permission to appeal the decision has been refused. (*Learning Curve (NE) Group Ltd v Lewis* [2025] EWHC 1889 (Comm))

### Key lessons

- **Issue and service of legal proceedings:** On whether legal proceedings must be served in accordance with the notices clause in the SPA or the CPR, analysis may vary depending on the wording of the SPA and express wording is desirable, as there is conflicting past case law.
- **Prohibition on double recovery:** The decision on double recovery is consistent with the principle to allow more than one claim from the Purchaser arising out of the same subject matter, and simply prohibit recovering more than once in respect of any one shortfall.
- **Disclosure and buyer's knowledge:** Buyer's knowledge definitions are more commonly used as a seller limitation outside formal disclosure. By contrast here, B's "actual" knowledge requirement in conjunction with the disclosure test raised the bar for the definition of fair disclosure in the SPA.
- **Level of detail in notices of claims:** Whether individual warranties need to be identified in a claims notice depends on the level of detail that the SPA requires for notices of claim and the nature of the claims in question. It could be necessary on different facts to identify particular warranties in the notice of claim.

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## Breaches of warranty and sellers' awareness

The High Court has awarded damages for breach of material contracts warranties under a share SPA and for overstatement of working capital in locked box accounts relating to a contract that had in fact been terminated and was unlikely to be renewed.

Sellers S sold their shares in company C, an IT consultancy focusing on digital transformation in the public sector, to buyer B for £45 million in late 2022. S's vendor due diligence and financial projections had demonstrated steady growth with heavy reliance on public sector clients. Key SPA provisions included that: (i) "Disclosed" was defined as "*fairly disclosed with sufficient detail to enable a reasonable buyer to identify the nature and scope of the matter disclosed in or under the Disclosure Letter or the Data Room …*". (ii) Warranty 13.2.4 stated that, since the accounts date, C was not party to "*any agreement which, so far as [S] are aware, cannot readily be fulfilled or performed by C on time or without undue or unusual expenditure of money or effort*" and Warranty 13.2.5 went on to add nor "*is loss making*". (iii) Warranty 13.7.1 that "*In the 12 months ending with the Completion Date, the business of C has not been nor, so far as [S] are aware, is likely to be, materially affected in an adverse manner*" by, among other things, "*the loss of any of its significant customers or suppliers;*". B claimed that C's contract with the National Audit Office (NAO) experienced huge challenges and costs overruns. B also claimed that S had failed to disclose that a contract with a significant customer (A) had been terminated a few days before signing (the Aquila contract). The forecast revenue in respect of the Aquila contract had been included in the forecast Ebitda for FY23. Finally, B claimed that C's locked box accounts had been over-stated by failing to write off £90,000 of work in progress (WIP) relating to a Ministry of Defence (MOD) contract that had been terminated and was not expected to get renewed. The High Court found in B's favour on these issues, noting that the SPA had been drafted by skilled professionals, meaning that its language should be given "*very considerable weight*". Warranty 13.2.4 had been breached in relation to the NAO contract, taking into account the extent of overrun and the serious resourcing impact of the NAO wanting to integrate a risk assessment planning tool into an audit management system, which had not been disclosed. S alleged this had been disclosed at two meetings. The court rejected this, emphasizing that the common entire agreement clause in the SPA was wide and caught process at meetings. Otherwise you would drive a coach and horses through the structure of the SPA, including the definition of "Disclosed". There had been no fair disclosure of the risk assessment (RAG) report in the data room. In particular, the court rejected that alleged oral disclosure had been the context for reading the RAG report and that this brought it within requisite fair disclosure. The court also rejected that S could raise an estoppel, where S alleged B had cut short discussion of financials and/or indicated by requesting the RAG report that further financial information was not required. Separately, A had amounted to a significant customer when you looked at the revenue it generated and its strategic importance. The term "significant customer" was not defined, but you had to assess this by reference to C's business. S knew of A's significance and that there was likely to be a material adverse effect on C's business in terms of revenue and growth. Finally, the MOD WIP should not have been included in the locked box working capital but should have been recorded as a post balance sheet event. The effect was that the warranties in relation to the locked box accounts had also been breached. (*Atten Bidco Ltd v Assassa and Ors* [2025] EWHC 2347 (Comm))

### Key lessons

- **Material contracts warranties:** Interesting analysis of breach of warranty and sellers' awareness in the context of common contracts warranties in an SPA context.
- **Oral disclosure and estoppel arguments:** An example of an attempt to allege oral disclosure to circumvent applying the strict contractual definition in the SPA of what amounts to a disclosure, combined with an estoppel argument. The case demonstrates the importance for sellers of meeting the agreed level of disclosure that is specified in the SPA within the written disclosures in the disclosure letter and the data room.
- **Significant customer:** Interesting discussion of what amounts to a significant customer for the purposes of material contracts warranties where the term is undefined.

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## Non-compete covenant caught advancing loans and providing assistance and advice

The High Court found that a seller (W) had breached restrictive covenants in an SPA and investment agreement (IA) not to be concerned or interested in a competing business, by virtue of his activities supporting various competing businesses, even though he had no proprietary interest, nor was employed, in them. In particular, it decided that the covenants encompassed lending to the rival businesses.

Director W sold the entire share capital in company C, which was the holding company of a group manufacturing and selling products for storing materials such as chemicals and oil and lithium batteries. The buyer was S Bidco, of which S Topco was the parent. The consideration was approximately £27.6 million. There was an SPA and an IA, and W was appointed non-executive director of S Topco. Under the SPA W covenanted not to directly or indirectly be "*engaged or be concerned or interested in*" any business which competed with the "Business" in the relevant area for three years from completion. "Business" was defined as those parts of the group's business with which W was involved to a material extent in the "Relevant Period" which, in turn, was defined as the 12 months prior to the date of the SPA. W gave comparable restrictive covenants under the IA for 24 months from ceasing to be a director or shareholder of S Topco.
The allegations against W were that he had: (i) advanced funds for the benefit of company A, knowing they would be deployed for A's rival Spanish business, and to business acquaintance S to fund litigation against a Spanish member of C's group; (ii) helped A source products, giving it details of suppliers and pricing advice; and (iii) failed to notify C's group

of various business opportunities. The High Court decided that W had breached the restrictive covenants. You had to assess a covenantor's activities as a whole, and lending funds here to be applied in a business amounted to being "concerned" in the business. The key allegations amounted to breaches of the restrictive covenants in both agreements. The principle of restraint of trade did apply here, on the basis that the "trading society" test in past case law[1], that the doctrine did not apply to a covenant that had passed into accepted and normal currency of commercial or contractual relations, was not relevant to business sale agreements. However, the covenants here were a reasonable restraint of trade, taking into account: the significant purchase price; that W was integral to the business; that W became non-executive director of S Topco; that both sets of parties had professional advice; the geographical reach of the covenants (UK, Europe and other countries in which group companies conducted business); and that the term of the covenants was not unreasonable. It had been reasonable here to seek to tie W to the business to prevent him exploiting his connections to benefit others. (*Spill Bidco Ltd v Wishart* [2025] EWHC 2513 (Comm))

### Key lessons

- **Meaning of being concerned or interested in a competing business:** Interesting example of a covenantor being held concerned in a competing business despite having no proprietary interest in it.
- **Correct addressees and beneficiaries of restrictive covenants needed:** There was discussion of an error in the SPA in addressing the restrictive covenants to a non-signatory member of C's group. This highlights the importance of ensuring covenants are given to a purchaser direct and also to group companies under the Contracts (Rights of Third Parties) Act 1999.
- **Applicability of doctrine of restraint of trade:** The judgment is a reminder of the scope of the "trading society" test and shows the court's willingness to enforce restrictive covenants in commercial agreements.

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## Third party rights subject to jurisdiction clause

The High Court discussed a third party's rights under the jurisdiction clause in an SPA and also commented that the jurisdiction clause was a "relevant term of the contract" for the purposes of section 1(4) of the Contracts (Rights of Third Parties) Act 1999 (the 1999 Act) by which the third party's rights were conditioned.

Company S had entered into a share SPA with company B to sell B the share capital of company C. At the time D was a director of C. Clause 10.3 of the SPA contained a standard waiver by S in favour of C and its directors, employees and agents regarding any claims in connection with the transaction documents. Those third party non-signatories were granted direct enforcement rights under the 1999 Act. Under clause 18.2 of the SPA the parties agreed the English courts would have exclusive jurisdiction to settle any disputes under the SPA, and under clause 18.3 each party irrevocably submitted to the jurisdiction of the English courts. S brought proceedings against D in the Luxembourg court, alleging that D had assumed the position of a director of S and had acted negligently or in breach of duty in negotiating unfavourable sale terms. D alleged S had breached clause 10.3 in bringing the claim and that in any event the exclusive jurisdiction clause required any claim against him to be brought in England. D sought an injunction in the English court to require S to discontinue the Luxembourg proceedings, and served a claim on S in Luxembourg without permission. S alleged D could not rely on the exclusive jurisdiction clause to serve a claim form outside the jurisdiction without permission. D argued that either clause 18.2 amounted to an agreement by S that disputes with D would be subject to it or that the effect of the 1999 Act was the same anyway. S applied to set aside service of the claim form on it out of the jurisdiction. The High Court found there was a good arguable case in favour of D and dismissed S's application. Whether a

### Key lessons

- **Application of Contracts (Rights of Third Parties) Act 1999 to boilerplate provisions:** Interesting guidance on contractual interpretation of a jurisdiction clause in the context of disputes involving third parties and on the application of s. 1(4) of the 1999 Act to boilerplate provisions, including a jurisdiction clause.
- **Advisability of express wording to apply the boilerplate provisions to third party claims:** The decision shows the importance for clarity of including express wording in third party rights clauses that the third party rights are enforceable: "subject to the other terms and conditions of this Agreement".

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1 *Peninsula Securities Ltd v Dunnes Stores (Bangor) Ltd* [2020] UKSC 36.

jurisdiction clause covers claims by or against third parties initially was a question of contractual interpretation. The jurisdiction clause here was very wide, encompassing "*any dispute which may arise out of or in connection with this deed*", which indeed caught disputes involving third parties. The direct contracting parties could not have intended that warranty claims by B would be determined in one court but any related contribution claims or defences under clause 10.3 in another court. You would otherwise also get another inconsistency if B could only enforce clause 10.3 in the English courts but D could enforce it elsewhere. The court also commented on the effect of section 1(4) of the 1999 Act, which provides that a third party is not entitled to enforce a term of a contract otherwise than "subject to and in accordance with any other relevant terms of the contract". That is an absolute provision, and parties may not contract out of it. The question was whether the jurisdiction clause was a "relevant term of the contract" for the purposes of section 1(4). The court commented that it was, in line with previous case law[2] that it made no commercial sense for contracting parties to be bound by it but not third parties. A third party is both entitled to and bound by the dispute resolution mechanism in the contract for the purposes of the 1999 Act, and the parties' intention on the scope of the jurisdiction clause was not relevant. The court therefore had jurisdiction to determine the claims. Permission has been requested to appeal the decision. (*Campeau v Gottex Real Asset Fund 1 (OE) Waste Sarl* [2025] EWHC 2322 (Comm))

## Interpretation of call option under SHA

The Court of Appeal interpreted some complex and bespoke call option provisions in a shareholders' agreement (SHA). It overruled the first instance decision that the option was only "exercised" by a particular party if service of notice resulted in a binding contract for the acquisition of the other party's shares. Instead, the call option was exercised by service of notice to exercise it, which could only be done once even though the SHA provided for phased option periods.

### Key lessons

- **Clear and express drafting:** Interesting guidance on contractual interpretation in the case of complex call option provisions in an SHA, and demonstrates the importance of clear and express drafting.
- **Primacy of textual approach to contractual interpretation:** It shows focus on the textual approach to contractual interpretation in a sophisticated contract prepared by skilled professionals.

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The English law SHA related to company C, a Greek fintech company. W held 51.49% of C and J held 48.51%. Schedule 1 gave J the right to buy W's shares. J's call option potentially was exercisable in four periods at six-monthly intervals. For the first three periods W could reject the the call option if the option price was less than EUR 5 billion for C as a whole, but otherwise was deemed to accept it. In the fourth period W automatically was deemed to accept the call option if exercised, irrespective of price. In each period, each party would appoint a valuer. If the valuations were within 15% of each other, the option price was to be the average of the two valuations. If they were more than 15% apart, a third valuation expert would decide the value. Critically, if J had not "previously exercised" its option, W was entitled to exercise its own call option over J's shares 31 days after J's option exercise dates at the same price. The parties appointed experts to conduct a valuation for the first option exercise period which ran from 31.12.23 to 29.1.24. J stated by letter on the last day of the period that it believed it did not need to exercise the option before the third valuation expert's report, but that if they were wrong they were irrevocably exercising their option on that date. On 8 February W rejected that alleged exercise of the option and argued for a so-called "one shot interpretation", whereby J was only entitled to send an exercise notice (by service of the notice) in one of the four periods and would otherwise have no option remaining in later periods. By contrast, J argued that it benefited from a "multi-shot interpretation", whereby the option was not exercised unless the service of a notice resulted in a binding contract for the acquisition of shares. The issue was the meaning of "*previously exercised*". The Court of Appeal found in favour of W's "one shot interpretation", overturning the first instance decision and applying the textual analysis when interpreting the SHA. It noted that one paragraph of schedule 1 to the SHA expressed the right to exercise the option "*by sending the [J] notice…*", whilst another stated the date of exercise was the date the notice under para 2.12 was "*sent*" and a further paragraph stated that J's option would be exercised by J "*sending [W] an irrevocable written notice…*". Further, W's call option would be exercised by W "*sending an irrevocable notice*" and this was also how J's call option worked in the fourth option period. The effect was that J had "exercised" its own option merely by sending an exercise notice. If you interpreted the SHA any other way J would not be able to block W's option just by sending the exercise notice which, on the "multi-shot" interpretation, was the key driver in

2 *Nisshin Shipping Co Ltd. v Cleaves & Company Ltd. & Ors* ([2003] EWHC 2602) and *Millen v Karen Millen Fashions Ltd* [2016] EWHC 2104.

serving that notice. It would also give a different meaning to the term "exercise" depending on whether applied to J or W or to which option period. This was a complex agreement drafted by skilled professionals, and you would expect a term to be used consistently. Permission to appeal the decision has been refused. (*JP Morgan International Finance Ltd v Werealize.com Ltd* [2025] EWCA Civ 57)

## Specific performance of share SPA and right of first refusal agreement

The High Court ordered specific performance of a share SPA and payment under a right of first refusal agreement (ROFR) on the basis both were legally binding and enforceable agreements. It also determined that the applicable model code for trading securities did not prevent specific performance of the SPA.

S and B entered into a share SPA in June 2021. This related to the sale of S's shares in PGC, which was a Guernsey company listed on the International Stock Exchange in Guernsey (TISE), and a ROFR relating to future investment opportunities. Under the SPA B agreed to acquire the shares for a total of NZ$2,081,560.26, with a settlement term of 30 business days. Under the ROFR, B would pay S US$400,000 within 30 days of executing it. The parties disagreed over how the shares should be transferred, which was not specified in the SPA. B, who already held dematerialised shares in PGC, insisted on electronic transfer through CREST, whilst S offered stock transfer forms and paper certificates. S sought specific performance of the SPA and of payment due under the ROFR after S failed to pay sums due under both agreements and to complete the SPA. B denied the agreements were legally binding and alleged the analysis was impacted by his position as a PDMR in relation to PGC for the purposes of the model code applying under TISE. B also alleged that, if the ROFR was legally binding, its performance was conditional on completion of the SPA. The High Court found in favour of S that both the SPA and ROFR were clear and legally binding agreements and awarded specific performance of the SPA. The court looked at the hallmarks of a binding contract. The SPA was headed "Share Purchase Agreement"; the opening words were "hereby agrees"; it set out the key terms and identified a "trade date" and a time for settlement; it had formal signature blocks; and no "subject to contract" wording. B had not met the heavy burden of proof that would be needed here to prove no intention to create legal relations. WhatsApp messages exchanged in the lead up to signing both agreements confirmed the parties intended to be bound. It made no difference that B could not trade in shares in PGC during a prohibited period. This was not relevant to intention to create legal relations, not least as S was not aware of details around this anyway. In any event, this model code did not prevent completion of this SPA, because the date of "dealing" under it was the date of the SPA. The SPA was not uncertain. It contained all the key terms for a binding contract, including identification of parties, of number of shares being sold and of price. It was not relevant that B could nominate another person or entity as buyer prior to settlement: the purchase obligations were on B. Likewise, the method of settlement was not uncertain, S could simply adopt either method. The court also emphasized that the SPA was not uncertain for lacking the following common provisions: entire agreement; governing law; jurisdiction; confidentiality; amendments; interpretation; severability; assignment and succession. There was no implied term that settlement had to be effected electronically through CREST. That was unnecessary to make the agreement workable. The Government's Final Report of the Digitisation Taskforce, published on 15 July 2025, was also not relevant, being merely forward-looking. However, the court upheld S's claim for an implied term of co-operation between the parties not to frustrate settlement. It also decided the ROFR was enforceable independently of the SPA, with no implied conditionality on the SPA first completing, and ordered payment of sums due under the ROFR with interest. (*Perelman v Kerr* [2025] EWHC 2331 (Comm))

### Key lessons

- **Guidance on common provisions in SPAs:** Useful guidance on common provisions in SPAs on share transfer and conditionality and hallmarks of a binding agreement.
- **"Nominated buyer" provisions:** An interesting discussion of a "nominated buyer" provision and a suite of common SPA clauses whose absence did not make the agreement uncertain.

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## No general doctrine of deemed fulfilment of condition precedent on party's own breach

The Supreme Court decided that there was no general doctrine of deemed fulfilment of a condition precedent (CP) to the accrual of a debt, the failure of which was caused by a party's own breach of contract, and that an equivalent result to deemed fulfilment could not be achieved by contractual interpretation or an implied term. The counterparty's remedy was in damages and not for payment of the debt.

The dispute arose in relation to deposits payable under three memoranda of agreement (MOA) for the sale of three ships. Under clause 2 buyers B had to provide an escrow holder without delay with various documents so that it could open an escrow account. B was also required to pay a 10% non-refundable, forfeitable deposit into that account within three days of the MOAs being signed and the escrow holder confirming that the account was fully open. Under clause 13 sellers S could cancel the MOAs if the deposit was not paid and claim compensation. After the MOAs were signed B failed to provide the designated documents to the escrow holder. This meant the escrow account could not be opened nor the deposits paid. S served notice to terminate under clause 13 and claimed aggregate deposits totalling US$4.94 million as a debt. The issue was whether, where the accrual of a party's obligation to pay a debt is subject to a CP which that party wrongly prevents from being fulfilled, you can treat the condition as dispensed with so that the debt still accrues. The Supreme Court allowed B's appeal and overturned the Court of Appeal decision, deciding that S had a remedy only in damages for B's breach of contract, and not a valid debt claim. There was no general principle of English law of deemed fulfilment of a condition precedent caused by a party's own breach. The Supreme Court favoured past authority that such a principle would fundamentally undermine the law on contracts for the sale of goods (and also for the sale of land). In the very least there would need to be exceptions. A supposed general rule which had to be stated in terms which significantly but uncertainly qualified and curtailed it would not make for a robust principle of law. Further, the various formulations of the alleged principle of law were all "fictional". There had been no performance, and the ingredients of a true waiver or estoppel (such as representation plus reliance) had not been satisfied. Instead, English law of contract was based on the express and implied terms of the contract, in line with the principle of freedom of contract. This promoted certainty and predictability. B's breach could be appropriately dealt with through the remedy of damages, subject to contractual limitations on damages (such as mitigation and remoteness). So far as contractual interpretation was concerned, past cases supporting a presumption that the parties did not intend a party to profit from its own breach were context-specific. Applying such cases here would mean the parties had not intended what they said in this contract. It would effectively strike out the condition and rewrite the contract terms. Implication of terms would render clause 2 unworkable and, again, rewrite the contract. (*King Crude Carriers SA & Ors v Ridgebury November LLC* [2025] UKSC 39)

### Key lessons

- **Express language needed:** The judgment highlights that it is open to the parties to a contract to include an express term that a CP to a debt obligation does not apply where failure of the CP is caused by the debtor's own breach, but that English law will not apply a doctrine of deemed fulfilment or implication of a term to that effect in these circumstances.
- **Deposits on M&A transactions:** The issue in this case would be less likely to arise in an M&A context, where deposits are relatively rare outside particular industry contexts. In the rare circumstances that deposits are payable on M&A transactions, this is more commonly on signing the sale and purchase agreement (SPA) and likely the SPA would be terminable for material beach if the funds were not transferred. The obligation to pay would be more in the nature of a CP to the SPA coming into force in the first place.

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## Effect of loss-sharing clause and guarantee under joint venture agreement

The High Court interpreted profit and loss-sharing provisions and a guarantee clause in a joint venture agreement (JVA). It decided on the facts that the guarantee had been discharged and that any claim under it would in any event have been outside the statutory limitation period.

Mr K and Mr S entered into a joint venture (JV) with Mr D in August 2006 to develop and sell villas in Cyprus. C was the Cypriot JV company, owned by K (through a nominee) and S, and was also a party to the JVA. All three parties were directors of C. K and S provided the land for the JV, whilst D provided funding by way of loan to C (the PD Loan). The project ran into numerous problems and the relationship between D on the one hand and K (and S) on the other hand broke down. One area of dispute was funding. The regime under the JVA included that: (i) C was deemed to have contributed a "deemed purchase price" of CYP 330,000 for the land for the development; and D would lend CYP 800,000 to C, or more if required (the PD Loan); (ii) the PD Loan was repayable automatically on certain events, including "*the insolvency of [C]*" (clause 5(c)). Beyond that, it was due to be repaid as soon as C "(acting reasonably)" was able to do so. (iii) The JVA contained a joint and several guarantee in D's favour in relation to C's obligations under the JVA, although the clause in question in one place used the term "guarantor" singular and, in another, "guarantors" plural, where neither term was defined; (iv) Clause 6(e) of the JVA stated: "*Following the repayment of the PD Loan to [D] and the Deemed Purchase Price … the Net Profit shall be shared (or the Net Loss shall be borne as the case may be) 50% for [C] and 50% for [D]*". D alleged clause 6(e) meant the PD Loan had to be repaid before profits or losses were shared and sought recovery of the whole outstanding balance of the PD Loan, alleging K had guaranteed repayment of the loan. K denied giving any guarantee and alleged it would in any event have been discharged on various bases. The High Court found a valid guarantee, denying this was inconsistent with the 50:50 arrangement. However, it decided that the guarantee was now discharged. The court agreed with D that the PD Loan and the deemed purchase price had to be repaid before profits were shared, but disagreed on losses. The condition on prior repayment of the loans solely related to a profits scenario. Clause 6(e) provided for loss-sharing (50:50) between D and C where C had insufficient funds to repay the whole PD Loan and the deemed purchase price. The effect was that D's damages were capped at 50% and there was a guarantee as to such 50%. The High Court rejected that there was no enforceable guarantee. It was clear that the guarantors were K (and S), not least as there were no other parties to the JVA than D and C. However, the guarantee had been discharged because the claim was brought outside the statutory limitation period and, in any event, D had agreed to defer repayment of his loan at some point after October 2009. His aim had been to get a chance of a market recovery which would increase his return in the interim, due to the strong rate of interest on the PD Loan. C, in return, continued to operate as a going concern rather than ceasing to operate and crystallising the loss. The High Court also looked at the meaning of "insolvency" in clause 5(c), which was undefined. This did not require an insolvency process and a balance sheet insolvency test was sufficiently certain. On this basis C had been insolvent since September 2009, meaning the PD Loan had been due for repayment from that date. However, there had been an understanding to defer repayment. Permission has been requested to appeal the decision. (*Dunn v Kazolides* [2025] EWHC 2212 (Ch))

### Key lessons

- **Interpretation of JVAs:** The case provides guidance on the interpretation of joint venture agreements, especially regarding profit/loss-sharing and the operation of guarantee clauses where drafting is defective.
- **Discharge of guarantees:** The judgment confirms that guarantees may be discharged by material variations or time extensions not agreed to by the guarantor.
- **Clear and express drafting:** The case underscores the importance of clear and express drafting of JVAs and guarantees, and the risks of informal variations.

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## Agreement concluded by email against backdrop of WhatsApp communications

The Court of Appeal decided that a legally binding contract had been formed through email and against a backdrop of WhatsApp exchanges between two parties concerning broadcasting rights for the FIFA Club World Cup 2025 (FCWC) in South Korea.

FIFA licensed broadcasting rights in the FCWC to the D group of companies which, in turn, was authorised to sublicense them in different countries. C ran an e-commerce platform in the South Korean market and a web-based video streaming service. The main issue in dispute was whether D and C had concluded a binding contract under which D granted C co-exclusive live and video on demand broadcasting rights in South Korea for the FCWC. An email of 27 February 2025 from C set out C's offer and invited a response. An email of 3 March 2025 was D's response that purported to accept the offer and indicated they would start contract drafting and share the draft agreement soon. There was a backdrop of WhatsApp messages around these emails. At a trial of a preliminary issue, the High Court had decided a contract had been formed and that C was entitled to specific performance. It had also granted C injunctive relief to protect its broadcasting rights. The Court of Appeal upheld the High Court decision. Where terms were still to be agreed, in deciding whether parties had reached a legally binding contract you had to look at the whole course of the parties' negotiations. A binding contract might be concluded despite an understanding that a formal document will follow including further terms. The burden of proof is on the party alleging a binding contract. Where there will be a subsequent formal written contract, the question whether the parties' agreement is subject to contract depends on whether they have agreed all essential terms as they see it. If the context of the negotiations is that performance is urgent, it is more likely they intended to be bound immediately. The Court of Appeal decided on this basis it was clear that the parties had come to an agreement by which they intended to be legally bound immediately by the exchange of emails. C's email of 27 February summarised the deal terms. Evidence indicated it was common industry practice to agree deal terms orally or informally by WhatsApp and follow up more formally by email. That email used the word "proposal", which would have been taken to mean "offer" as, indeed, D described it in its email response of 3 March. The parties' subsequent communications showed they regarded themselves as having reached a binding agreement, including a tone of mutual congratulation. The parties had agreed all the essential terms by the time they exchanged the emails. D's head of media rights in Asia-Pacific had messaged on 6 March that C should start marketing without waiting for the long form agreement. The emails exchanged were not labelled "subject to contract" even though D was used to using that term in draft heads of terms with other parties. (*DAZN Ltd v Coupang Corp* [2025] EWCA Civ 1083)

### Key lesson

- **Role of WhatsApp communications in assessing intention to create legal relations:** Interesting example of the role of WhatsApp communications in providing evidence that a binding contract has been concluded.

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### Implied term as to reasonable price

The Court of Appeal overturned a High Court decision that a contract for the sale of goods was unenforceable for lack of an agreed price, where the parties had agreed on a price for part of the quantity of goods covered but had left the remainder to be supplied at an "open price to be fixed". The Court of Appeal implied a term that the price was to be fixed at a reasonable or market price.

In 2018 S agreed to supply 1,200 metric tonnes (MT) of orange juice pulp wash (Wesos) annually to B for three years from 2019 to 2021. The contract value was EUR 5.76 million at an invoicing price of EUR 1,600 per MT, where the actual quantity supplied would be adjusted to reflect the "real" price. Under the contract the parties agreed on a "real" price per MT of EUR 1,350 for one-third of the amount to be delivered each year (400MT). The price for the remaining two-thirds would be "*an open price to be fixed latest by December of the previous year*". By late 2018 B needed less Wesos. In 2019 B accepted and paid for 400MT but refused to take more than 126MT in 2020 and only paid for 84MT. S terminated the contract in September 2020 for repudiatory breach. B argued that the contract was unenforceable as to the notional amount of 800MT each year, as it was left to the parties to agree the price for that. B argued this meant you could not imply a reasonable price under section 8(2) of the Sale of Goods Act 1979 (SGA), which provides for a buyer to pay a reasonable price where a contract does not cover the manner for agreeing price. B argued the effect was that no comparable term could be implied by law. Overturning the High Court decision, the Court of Appeal decided that there was an enforceable contract as to the full 1,200MT a year. The Court of Appeal denied the effect of section 8(2) of the SGA was that you could not imply a term at common law as to a reasonable price. That section only applied where the price was not determined by the contract, the assessment of which should include terms properly implied by law as well as is express terms. You could imply a relevant term here, so that it was unnecessary to apply section 8(2). The starting point was that the parties had intended to reach a binding agreement as to the full quantity of Wesos contemplated by the contract, noting: that the term was fixed; the agreement to invoice and pay euros for the full amount (subject to adjustment); the contract value. Delivery methods, quantity of product, timing of delivery and contract value were all agreed. This was a volatile market which merited some flexibility on pricing. The parties were

### Key lessons

- **Willingness of court to uphold parties' bargain:** The judgment shows that the court will endeavour to uphold the parties' bargain where it is satisfied they intended to create legal relations. However, it also demonstrates the benefit of expressly setting the full price mechanism in the contract.
- **Advantages of expert determination mechanisms:** If this is not possible at the outset, there may be merit in including an expert determination mechanism with objective criteria for determining the price to apply if the parties fail to agree outstanding aspects.

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experienced in the trade and had a past track record of operating under agreements containing pricing flexibility. This was the type of contract the court would aim to uphold. Factors the court would consider included: the parties' intentions; the commercial context; and whether there were objective criteria you could apply to determine the price. Even though the market for Wesos lacked transparency, there was an established transparent market in relation to frozen concentrated orange juice (FCOJ). It was generally accepted that for Wesos of this quality the price was around 70% of FCOJ. Taking this into account, the Court of Appeal implied a term that the price of the remaining two-thirds of Wesos each year could be fixed at a reasonable or market price. The fact that there was no arbitration clause in the contract did not affect the analysis. The court could itself provide a dispute resolution mechanism here. Permission to appeal the decision has been refused. (*KSY Juice Blends UK Ltd v Citrosuco GmbH* [2025] EWCA Civ 760)

### Effect of repudiatory breach on termination rights under SHA

The Court of Appeal decided that curing a repudiatory breach does not deprive the innocent party of the right to elect whether to affirm or terminate the contract. However, on the facts, a compulsory transfer notice was not deemed served under an SHA for the buyout of shares at the lesser of issue price or fair market value; there had been no acceptance of a purported termination; and the SHA remained in force.

Company H owned a hospital at which claimant C was a senior consultant and heavily involved in management. Under the SHA in relation to H, defendant D had originally subscribed for 51% of the A shares in H and C was to take 49% of them but, in fact, had only subscribed and paid for one share. Disputes arose and D admitted various repudiatory breaches of the SHA, including: (i) wrongfully registering itself as owner of the A shares to which C was entitled; (ii) breaching statutory pre-emption rules by allotting to itself 2000 B shares without offering a proportionate entitlement to C; and (iii) wrongfully purporting to terminate the SHA by letter dated 28 August 2020 allegedly on the basis of an incorrect recital in the SHA that C held 1,652 A shares. It was also alleged that D had wrongfully failed to recognise C's appointment of individual S as his nominated director in accordance with C's nomination rights under the SHA. C alleged that D's breaches had triggered a compulsory transfer provision in clause 7.1(d) of the SHA entitling him to buy out D's shares at the lower of issue price and fair value. This stated that a transfer notice was deemed served if a shareholder committed a material or persistent breach of the SHA which, if capable of remedy, was not remedied within ten business days of the board serving notice to remedy the breach (with shareholder consent). D argued that the compulsory transfer provision had not been triggered because its breaches were capable of remedy and the board had not issued a notice to remedy the breach anyway. By contrast, C argued that repudiatory breaches were by their nature irremediable for all purposes and that no remediation notice was needed because any repudiatory breach was irremediable for the purpose of this compulsory transfer clause. The Court of Appeal upheld the High Court decision that, whilst all four breaches were repudiatory, C's argument that repudiatory breaches were by their nature irremediable was rejected. A repudiatory breach was not necessarily incapable of remedy for the purposes of clause 7.1(d), which did not even use the word "repudiatory". In determining whether a breach of contract is capable of remedy, the court should apply a practical rather than a technical approach in which the common law rules on repudiation have no place. The parties could have provided in the contract that a repudiatory breach was incapable of remedy, but they did not. C had elected to affirm the contract (rather than accepting D's purported termination letter) and try to rely on the contractual right of compulsory acquisition. As far as clause 7.1(d) was concerned, service of a remediation notice was a necessary step for the deemed transfer process, taking into account the severe impact of compulsory transfer on share valuation. However, no notice had been served here and all four breaches had in practice now been remedied anyway. Even where clause 7.1(d) did not apply other remedies may be available. Depending on the circumstances, an innocent shareholder might be able to: accept a repudiatory breach, claim damages or bring an unfair prejudice petition. C's relationship with members of H was not relevant to whether the various breaches were capable of remedy on the facts. The analysis might have been different if the SHA had contained an express duty of good faith, but it did not. (*Dr Rohit Kulkarni v Gwent Holdings Limited and Ors* [2025] EWCA Civ 1206)

#### Key lessons

- **Repudiatory breach:** Interesting guidance on repudiatory breach and material or persistent breach of an SHA in the context of the compulsory buyout trigger.
- **Express duties of good faith:** Another reminder that inclusion of an express generic duty of good faith can raise the bar on compliance with other provisions in an agreement.

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## Company law

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

### Interaction between directors' duties and shareholders' unanimous consent

The Judicial Committee of the Privy Council dismissed an appeal from a decision of the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands) (the CAECSC), finding liability for breach of directors' fiduciary duties which on the facts had not been approved by members applying shareholders' unanimous consent.

Mr F formed a JV in relation to a scrap metals business in 1999 with Mr O and Mr L (the Principals). They decided in 2008 to float the business on the Hong Kong Stock Exchange. Cayman Islands company CT was formed as the IPO vehicle. Equal numbers of shares in CT were issued to D (a Dutch company owned by O and L) and to H (a BVI company owned by F). Integral to the IPO, the Principals envisaged a share incentive scheme (the Scheme) for three key employees, including F's brother (the Intended Beneficiaries). However, neither the share price nor the prior lock-up period before the Intended Beneficiaries would receive shares had yet been agreed between Principals. The IPO was postponed due to the global financial crisis. The plans for the flotation then changed and, in 2010, BVI company E was incorporated to use a different structure. Again, equal numbers of shares in E were issued to D and H. E's directors were F and the Intended Beneficiaries. E's sole function was to facilitate the Scheme. D and H each transferred four shares in CT at par to E, which held 6% of CT's issued share capital when the IPO took place in July 2010. CT subsequently paid dividends to E. E in turn passed on what it received (totalling HK$8.7 million) to its directors and H, with the effect that D received nothing as shareholder in E. E subsequently sold its shares in CT in April 2014 for HK$150 million. The price was paid into F's personal bank account, D knew nothing of this and there was no approval at a board meeting. Over the next two years F paid the sale proceeds to the Intended Beneficiaries in equal shares. In March 2017 D applied to the BVI court for an order to wind up E. A winding up order was made in June 2018 and E's liquidators brought proceedings against the former directors and H to account for the sale proceeds and any dividends on grounds of breach of fiduciary duty and knowing receipt, among others. The Judicial Committee of the Privy Council upheld the findings of directors' breach of duty by both the trial judge and the CAECSC against F and the other directors in receiving and (in F's case) distributing the sale proceeds and dividends. It decided that there had been no valid shareholders' unanimous consent for the purposes of *Re Duomatic Ltd*[3]. The directors had owed fiduciary duties to act in E's best interests, not to act for a collateral purpose and not to put themselves in a position of conflict between their personal interests and those of E. Here, D and H had not assented to the way F had paid on the sale proceeds and the dividends. The burden of proof was on F as director to justify the way he had handled the funds. He could not do so and was liable to account to E for the amount of the payments. Details of the Scheme had not yet been finalised by shareholders and the directors lacked authority to settle outstanding aspects themselves. Interestingly, the Privy Council discussed what degree of assent would have been needed to establish shareholders' unanimous consent for the purposes of *Re Duomatic Ltd*. This did not require the features of a binding contract. You were not looking at the test for creating legal relations, nor whether assent was legally enforceable. It was simply a matter of whether the shareholders intended to bind themselves legally as if they had passed a formal resolution. That had not happened here and the directors were liable to account to E for the payments. (*Fang Ankong & Anor v Green Elite Ltd (Virgin Islands)* [2025] UKPC 47)

#### Key lesson

- **Degree of assent needed to establish shareholders' unanimous consent:** A helpful reminder by the JCPC of the level of assent needed for the purposes of shareholders' unanimous consent.

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3 [1969] 2 Ch 365.

## Transfer of company's sole share in breach of fiduciary duty

The High Court set aside a share transfer carried out in breach of duty by a director, and decided that the claimant could trace into further shares that had subsequently been issued. It also discussed the inability of a party acting in bad faith to rely on the provisions in the Companies 2006 (the CA 2006) on the power of directors to bind the company.

The issues arose in relation to a business running bubble tea outlets. The brand had been developed by Mr S through a company he controlled (Bubble City). In April 2019 S decided to restructure to introduce new investor Mr X. S sold Bubble City to a new company Enno under a business sale and purchase agreement (BPA). X had invested in Enno and S, a Mr M and another would have an interest in and be employed by it. X and M were Enno's directors and an operating subsidiary of Enno was set up (Opco). Under a business purchase agreement (BPA) dated 10 August 2019 S sold Bubble City to Enno. On 12 August 2019 S transferred his one share in Bubble City to Enno for £1. Under the BPA S could "recall the deal" after one year or waive that right for a fee of £70,000. The parties' relationship broke down and M purported to remove X as director of Enno in June 2020 and dilute X's shareholding by carrying out a large share issue. Then on 1 July 2020 S notified M that he wanted to "recall" the deal. A settlement agreement followed, entered into by M, on Enno's behalf, and S. This provided for the transfer of the single subscriber share in Opco from Enno to Bubble City, and for the single share in Bubble City back to S (clause 2). The share transfers subsequently took place and S was appointed director of Opco in place of M, who resigned. X knew nothing about these transactions, despite being a director of Enno and its majority shareholder. Enno was left insolvent. Over a year later 99 further shares in Opco were allotted to Bubble City. M put Enno into creditors' voluntary liquidation. The claimant (C) was assignee of Enno's claims and sought to set aside the transfers and get equitable compensation. The High Court decided that Bubble City held the 100 shares in Opco as C's nominee and ordered S, as its director, to transfer them to C. It also ordered S, M and Bubble City to pay C equitable compensation. M had been in clear beach of duty in transferring Opco's share out of Enno, which diverted the full value of Enno's business for his own and S's interests. The creditors' interests duty had been triggered and breached by M. No honest and intelligent person acting as director could reasonably have believed that the transfer of the share in Opco was in the interests of Enno's creditors. There had been a genuine dispute over the recall of Bubble City, and M had apparent authority to arrange the return of the share in Bubble City to S, but the transfer of the share in Opco was not a good faith compromise of that dispute by M. Under section 40 of the CA 2006, the power

### Key lessons

- **Effect of share transfers effected in breach of directors' duties:** The judgment provides guidance on the consequences of share transfers in breach of fiduciary duty, including the ability to trace into subsequently issued shares and the personal liability of directors and recipients for knowing receipt and dishonest assistance.
- **Power of directors to bind the company:** The judgment demonstrates that s. 40 CA 2006 cannot be relied on by a party not acting in good faith.
- **Rectification of register of members:** It also confirms the restrictive approach to standing for rectification of the register under section 125 of the CA 2006. The High Court commented that C would not have had standing to apply to court for rectification of the register of members of Opco under section 125 in relation to the new 99 shares, on the basis C was not a "person aggrieved" under that section, which was limited to those whose name had been wrongly included or omitted from the register. This did not extend to a person who was not currently entitled to be registered as a member but was seeking an order requiring the transfer to them of shares.

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of directors to bind a company is deemed to be free of any limitation under the company's constitution when it deals with a person acting in good faith. However, here S had full knowledge of M's breach of fiduciary duty to Enno and so could not rely on section 40. The effect was that the transfer of the share in Opco was void and could be severed from the settlement agreement under the severance clause. S was also liable for dishonest assistance. S had acted with M to remove the bubble tea business from Enno and pass it back to S himself. S had also hindered X's efforts to get his loan back, whilst assisting repayment of other creditors. This met the current test for dishonesty[4], which you judged against the standards of honest commercial behaviour of ordinary decent people. C also had a claim against Bubble City for knowing receipt. S's knowledge of M's breach of fiduciary duty was attributed to Bubble City, of which S was director and sole shareholder. Although the subsequent 99 shares in Opco had genuinely been allotted to facilitate potential investors rather than for an improper purpose, C could trace its proprietary interest in the subscriber share into them. The High Court also found that a claim for unlawful means conspiracy was made out as between M, S and Bubble City. (*12345 Retail Group Ltd v Bubble City Ltd & Ors* [2025] EWHC 1083 (Ch))

4 *Ivey v Genting Casinos (UK) Ltd (trading as Cockfords Club)* [2017] UKSC 67.

### High Court allows access to register of members for purpose of making "mini-tender offer"

The High Court considered whether a request under section 116 of the CA 2006 for a copy of the register of members of a company to enable an investor to make a "mini-tender offer" was made for a "proper purpose" in accordance with section 117(3) of the CA 2006.

Litani LLC (L) wished to make an offer (mini-tender offer) to certain small shareholders of Aviva plc (A) to purchase their shares at a discount of up to 17.5% of their market value and requested a copy of A's register of members for the purpose of making the offer (Request). A applied to the High Court for a ruling that the Request was not being sought for a "proper purpose" and for a direction that it should not comply with the Request. This was on the basis that (i) the holders of the vast majority of A's shares would not receive any offer – allowing L access to the register would serve no good purpose and would subject shareholders to the risks inherent in the disclosure and processing of their private data; (ii) of those who did receive an offer, the vast majority would not accept it, making the offer an "unwelcome inconvenience"; (iii) those who chose to accept the offer would be economically disadvantaged by virtue of the 17.5% price discount – they could obtain full value for their shares by using A's own sales platform or its registrar; and (iv) the court could not be confident that those accepting the offer would receive a "safe and convenient" service given L's lack of transparency and concerns expressed by the US Securities and Exchange Commission about similar mini-tender offers in the United States. Having considered relevant case law and guidance from the Chartered Governance Institute, the High Court held that the Request was compliant with the requirements of section 116(4) and there was no impropriety in L's purpose. Although L undoubtedly proposed to make the mini-tender offer for commercial reasons, this was not in itself a ground on which the court could deny it access to the register. While it was clear that acceptance of L's offer would be economically disadvantageous, it was for the shareholders to assess the value of the offer received and compare it with alternatives. Although the proposed mini-tender offer would only be made to a small subsection of A's members and most members' data would be disclosed for no productive reason, there was nothing to suggest that the data would be misused or wrongfully disclosed. L had deliberately concealed details about its ultimate ownership and broader operations, but the court could not find a person's purpose to be "not proper" based on unresolved doubts about its associates and broader operations. Moreover, it was not for the court to express a view about the desirability or otherwise of mini-tender offers generally, which were not unlawful or subject to specific regulatory control. (*Aviva plc v Litani LLC* [2025] EWHC 3134 (Ch))

#### Key lesson

- The decision shows that the court's discretion to refuse a request for access to the register of members is narrow. Provided the purpose of the request is to make a genuine offer to shareholders, the court is unlikely to be willing or able to deny it. This will be the case even where the offer is clearly commercially disadvantageous – it is for shareholders to reach their own conclusion on the merits of any proposal.

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### Shareholders entitled to relief where company fails to circulate written resolution

This case concerned whether the Court had jurisdiction to grant relief to a shareholder where the company failed or refused to circulate a proposed written resolution at the shareholder's request.

The claimants, Mr and Mrs Webster (the Ws) were directors and holders of 47.6% of the shares in ESMS Global Ltd, the first defendant. The second and third defendants, Mr and Mrs Sood (the Ss), were directors and holders of another 47.6% of the company's shares. The remaining 4.8% of shares were held by the trustee for the company's employee benefit trust, which was not a director. The relationship between the Ws and the Ss had broken down, with the board of directors routinely deadlocked. To resolve the deadlock, the Ws proposed appointing an independent director and sent

#### Key lesson

- The decision clarifies that members have enforceable statutory rights under sections 292 and 293 of the CA 2006 to require circulation of written resolutions and that the court has jurisdiction to grant declaratory and injunctive relief to enforce these rights, even where the statute provides for criminal sanctions. However, unlike the power of members to call a general meeting where the directors fail to do so, the CA 2006 does not give the members an automatic right to circulate the written resolutions themselves. The members must instead apply to the court for appropriate relief.

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the company a formal request under section 292 of the CA 2006 to circulate a written resolution to appoint the director and approve his remuneration. The Ss refused to agree to circulate the resolution and the Ws applied to the court for an order to require the company to circulate the proposed written resolution, or, if the company failed to comply, to allow the shareholders to circulate the resolution themselves. The defendants argued that where a statute created an obligation and specified a remedy (here, a criminal sanction), the general rule was that this remedy was exclusive, particularly where the statute was a more recent Act and created a new duty. The High Court disagreed and granted the relief sought. The High Court distinguished between statutes imposing public duties (where only public remedies were available) and those conferring private rights (where civil remedies may be available). Sections 292 and 293 of the CA 2006 conferred explicit rights on the members, not just public duties. The fact that the statute imposed a criminal penalty on directors did not mean that the private rights could only be enforced by prosecuting the directors. The criminal remedy was inadequate to vindicate private rights, as it did not ensure compliance or provide a direct remedy to the aggrieved member. The High Court therefore granted a declaration that the company was required to circulate the written resolutions, an injunction compelling the company to do so, and an ancillary order allowing Mr Webster to circulate the resolutions himself if the company failed to comply. (*Webster and another v ESMS Global Ltd and others* [2025] EWHC 3107 (Ch))

## Listed Companies

The following decisions are of particular interest to listed companies.

### CEO and CFO liable for misleading trading update

The Upper Tribunal has upheld a Financial Conduct Authority (FCA) decision to fine the former Chief Executive Officer (D) and former Chief Financial Officer (A) of a premium listed bank (M) in relation to a misleading trading update announced by M.

D and A (Executives) were M's only executive directors from April to October 2018. By 11 September 2018, M was aware that the correct risk weighting for its commercial immovable property (CLIP) loans was 100% not the 50% M was using. On 5 October 2018, external lawyers advised that M was not required to make a proactive announcement about its miscalculation under MAR. On 16 October 2018, external accountants were formally engaged to review and remediate M's relevant policies, procedures and controls. On 24 October 2018, M's Q3 trading update said that "risk weighted assets at 30 September 2018 were £7,398m". This reflected a 50% risk weighting for CLIP loans. On 23 January 2019, M announced that risk weighted assets (RWA) at 31 December 2018 were expected to be approximately £8.9 billion. This included RWA adjustments of around £960 million, including about £563 million to correct the CLIP loans error. M's share price dropped by 39%. The FCA fined M and the Executives. The Executives referred their FCA decision notices to the Upper Tribunal.

The Tribunal held that M had breached Listing Rule (LR) 1.3.3R. The Executives were knowingly concerned in M's breach (under section 91(2) of the Financial Services and Markets Act 2000) but their penalties were reduced by 25% to £167,325 (for D) and £100,950 (for A). M's Q3 trading update contained an unqualified statement of RWA when M knew that a material error had been made regarding CLIP loans, but it did not inform the market of this. If a listed company decides to report figures they must be accurate and reliable, or it must "come clean about that". It is irrelevant that any qualification may be embarrassing or commercially

### Key lessons

- **FCA focus on misleading information:** This is another example of FCA civil enforcement action against an issuer and its executive directors for failing to take reasonable care to ensure that announcements are not misleading.
- **Breach must be material:** The FCA accepted that LR 1.3.3R was only contravened where information was materially misleading, false or deceptive or if material information is omitted.
- **Greater clarity on scope of director liability:** This decision clarifies the requirements for a director to be knowingly concerned in a breach of the Listing Rules. These may be easier to satisfy than some expect, e.g. no requirement for personal wrongdoing such as recklessness.
- **Good legal advice requires good instructions:** If legal advice is to be useful and provide meaningful protection from liability, the lawyers need to be instructed properly and with reasonable care, and asked to advise on the correct issue or document.

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inconvenient. An argument that M acted reasonably because proper internal governance procedures had been followed was rejected. Some information provided at the relevant Board and Audit Committee meetings was partial, some was wrong, and the overall impression was misleading. To be "knowingly concerned" in a breach, a person must have been actually involved in the contravention and had knowledge of the facts on which the contravention depends. It is immaterial whether they had knowledge of the law, unless they received and were relying on independent legal advice that the activity concerned was not in contravention of the law and that advice was based on a correct and complete factual matrix. M's external lawyers were not instructed to advise on the Q3 trading update and were given incomplete and incorrect facts. (*Donaldson and Arden v Financial Conduct Authority* [2025] UKUT 185 (TCC) and *FCA Final Notices to Craig Donaldson and David Arden* – 2 July 2025)

## Takeover Panel Hearings Committee Chair upholds Executive ruling that no mandatory offer required

The Chairman of the Hearings Committee of the Takeover Panel (Panel) has upheld the Executive's ruling that there was no obligation on Third Point LLC (Third Point) to make a mandatory offer for Third Point Investors Limited (TPIL) pursuant to Rule 9 of the Takeover Code (Code) as a result of proposals comprising an acquisition, redemption and subscription of shares in TPIL.

TPIL was a Guernsey incorporated company whose share capital comprised (a) ordinary shares, which entitled the holders to one vote per share and were listed on the Official List of the London Stock Exchange and (b) unlisted redeemable B shares, which also carried one vote per share, except on matters where the UK Listing Rules (UKLRs) stipulated that the approval of the holders of the listed shares (in this case, the ordinary shares) was required (Listing Rule Reserved Matters). Third Point was TPIL's investment manager and, together with its concert parties, held ordinary shares representing 15% of the total voting rights, and 25% of the economic rights, of TPIL. TPIL was undertaking a series of transactions, following which the Third Point concert party would be interested in ordinary shares representing approximately 26.2% of the total voting rights, and 43.7% of the economic rights, of TPIL. TPIL was also re-registering as a Cayman Islands company, which would take place at least two business days before completion of the other transactions. A group of shareholders in TPIL (Investor Group) argued that (a) the Third Point concert party was acquiring control of TPIL as a consequence of the transactions and should therefore be required to make a mandatory offer pursuant to Rule 9 of the Code and (b) although TPIL would not be subject to the Code when the transactions completed (as it would be a Cayman Islands company), the Panel should still have jurisdiction to require a mandatory offer to be made as TPIL was a company to which the Code applied when the transaction proposals were first announced.

The Executive noted that a mandatory offer was required where a person acquired shares which, taken together with those already held by it and its concert parties, represented 30% or more of the voting rights of a company. Voting rights for these purposes meant all the voting rights attributable to a company's share capital which were currently exercisable at a general meeting. The fact that the ordinary shares, and not the unlisted B Shares, were permitted to vote on Listing Rule Reserved Matters, did not affect the analysis of whether the B Shares carried voting rights currently exercisable at a general meeting. As the proposed transactions would not result in the Third Point concert party being interested in shares carrying 30% or more of the total voting rights in TPIL, there was no obligation to make a mandatory offer under Rule 9.1 of the Code. Even if the Rule 9 thresholds were triggered as a result of the transactions, the Panel would not have jurisdiction to require a mandatory offer. This was because the acquisition of interests in shares in TPIL by the Third Point concert party would only occur after TPIL's had re-registered as a Cayman Islands company, at which time the Code would not apply to TPIL. The Hearings Committee chair agreed with the Executive's ruling and concluded that the Investor Group's appeal had no reasonable prospect of success. The chair therefore rejected its request that the Hearings Committee be convened to consider the appeal. (*Takeover Panel Statement 2025/15 – Third Point Investors Limited*)

### Key lesson

- **Clarification that mandatory offer rules cannot be circumvented:** In its submissions to the Hearings Committee chair, the Executive noted that if the Investor Group's arguments were to be accepted, a Code company could, after its IPO, issue B shares or special shares to a person which carry 30% or more of the voting rights of that company without a mandatory offer or Rule 9 waiver being required, so long as those B or special shares were not able to vote on certain resolutions under the UKLRs. This would be highly undesirable and inconsistent with both the Code definition of voting rights and the Executive's well-established practice. The decision clarifies that the mandatory offer rules cannot be circumvented in this way.

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## Good Faith

Two recent cases have looked again at contractual duties of good faith, fiduciary duties and the relationship between contracting parties.

### Breach of express duty of good faith but no loss

The High Court decided that, although a civil engineer contractor had breached express duties of good faith under consortium and collaboration agreements, the counterparty had failed to show that it had lost a real and substantial chance of winning the sub-contract as a result of that breach.

Two engineering companies (M and B) planned to bid together for work as a JV sub-contractor on the HS2 rail project, where the main contractor was itself a JV (EKJV). Their bid ultimately failed. In January 2019 M and B entered into a consortium agreement, clause 3.1 of which provided that: "*[B and M] shall co-operate and collaborate with each other in accordance with the terms of this Agreement and in the course of their performance of their obligations pursuant to any associated [Professional Services Contract (PSC)] each of B and M shall act in good faith towards the other and use reasonable endeavours to forward the interests of the co-operative enterprise*". In February 2019 EKJV employed them jointly as "the Consultant" to provide professional services. Then a year later B and M entered into a collaboration agreement, clause 3.3 of which stated that: "*each of [B] and [M] shall act in good faith towards the other and use reasonable endeavours to forward the interests of the Consortium…*". B alleged that M had breached these clauses, giving rise to a claim for loss of chance, primarily by undermining proposals for a factory at Scunthorpe which B planned to build bespoke to manufacture pre-cast concrete. This had formed part of the proposal with EKJV and was in the bid to HS2 Ltd. B also alleged M had given a slide presentation on the project to one of its key competitors in breach of these express duties of good faith. B further asserted that M had breached clause 3.2 of the collaboration agreement (prohibiting entry into other contracts on the project) and claimed an account of the profits arising from the installation works that M undertook. The High Court dismissed B's claims, despite finding that M had breached these requirements of good faith. A contractual obligation to act in good faith meant a duty to act honestly. However, the court referred to established case law that bad faith may include conduct which would be regarded as commercially unacceptable to reasonable and honest people, even if not necessarily dishonest. A duty of good faith may catch fidelity to the bargain. From February 2020, when M and EKJV discussed EKJV's concerns over the cost of the Scunthorpe factory, M was "trying to ride two horses at the same time" and privately trying to work direct with EKJV. However, B had failed to satisfy the court that it had a real or substantial chance of winning the sub-contract and that M's breach was the effective or dominant cause of reducing that. That meant a chance that was neither non-existent or negligible. Prospects of less than 10% would be negligible. That prospect was negligible by spring 2020 and EKJV's termination letter of 18 September 2020 effectively terminated the collaboration agreement. The court doubted that B could have funded the Scunthorpe factory anyway. (*Matiere SAS v ABM Precast Solutions Ltd* [2025] EWHC 1434 (TCC))

#### Key lesson

- **Express duties of good faith:** Interesting guidance on application of express duties of good faith and the principles applying to loss of chance, which was the basis of B's claim.

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### Anti-embarrassment, alleged breach of undertaking and duties of good faith

The High Court considered whether an "anti-embarrassment" provision had been undermined by avoidance action by the obligor.

G sold his shares in company C to a new entity, Superco, which was jointly run by Mr F and Mr H. F agreed under a deed of undertaking (DOU) entered into on 27 May 2020 to pay G 7% of the net proceeds (the SF Payment) in the event of a sale of a controlling interest in Superco shares (clause 3.1.3). There was an express duty of good faith under clause 5.3.1 of the DOU, whereby F was obliged "*to act in good faith in relation his obligations to pay any SF Payment to [G] and give effect to clause 3.1.3*" and, under clause 5.3.2, *undertook that he would "not take any action or do any other thing with the intention of avoiding any of his obligations to pay any SF Payment* [to G], *or otherwise with the intention of reducing the amount of the SF Payment which may become payable…*". Before the DOU was executed, F had on 31 March 2020 transferred 20% of his shares to Mrs F (the GF transfer) and additional shares were issued under a management scheme on the same date. On 31 October 2020 F and Mrs F disposed of 20% of the issued shares in Superco to an LLP (L) (the Livingbridge Transaction). In July 2022 F and Mrs F transferred shares in Superco to the trustees of a family trust. Finally, the remaining shares were sold to Bidco Ltd in September 2022 in the sale of a controlling interest for a sum that included an amount in respect of the shares that had been transferred to the trust. G alleged the GF transfer had been a sham to circumvent obligations under the anti-embarrassment provision and that F owed additional consideration on the disposals and allotments before the majority sale. F argued the GF transfer was a legitimate attempt to obtain entrepreneurs tax relief. G also alleged a representation and warranty to him in an email in November 2019 that F would hold no less than 40% of the issued shares prior to a majority sale. The High Court found in favour of F, subject to some issues around late payment. The entire agreement clause in the DOU ousted any extra-contractual representation and warranty claim. Further, there was no evidence F had intended to avoid or reduce his commitments under the DOU. The court accepted that the main driver for the GF transfer was to get entrepreneurs tax relief, noting that Superco's articles of association contained standard provisions designed to achieve this. In any event, the GF transfer and the management scheme were entered into before the DOU. The Livingbridge Transaction had been a genuine chance to increase the value of Superco's shares by introducing a substantial investor. There was no general duty of good faith here, and the scope of F's good faith obligations under clause 5.3.1 was focused on the obligation to make the SF Payment. This obliged F to advise G promptly of a share sale resulting in acquisition of a controlling interest, to act openly and honestly to G's enquiries and to calculate the amount due to G. The DOU was not a relational agreement in which, in certain circumstances, a broader duty of good faith might be implied. Here, the only basis of claim was for a delay in arranging for G to be paid. F was also not in breach of clause 5.3.2. There was no irrebuttable presumption that F intended the natural and foreseeable consequences of his action. F had been free to dispose of his shares with no restrictions until there was a sale of a controlling interest as there was no prohibition on prior disposals. (*Gallagher v Fraser and Another* [2025] EWHC 2326 (Comm))

### Key lessons

- **Interpretation issues under anti-embarrassment provisions:** An interesting example of interpretation issues under an anti-embarrassment provision and which demonstrates that if the beneficiary of the provision desires to impose checks and balances on the obligor's conduct during the term of the provision, such as restrictions on disposals, this should be done expressly in the drafting.
- **Scope of contractual duties of good faith:** Another example of the court's narrow interpretation of contractual duties of good faith. Had they intended to do so, the parties could have set the parameters of a wider good faith obligation in the agreement.

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White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom
**T** +44 20 7532 1000