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2026 Summer review M&A legal and market developments

In this issue...

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We set out below a number of interesting English and European 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.

Company law

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

Breach of duty to promote success on individual director covertly pursuing their own judgment

The Supreme Court decided that, whilst the court will not interfere where directors act in good faith in exercising their business judgment in managing a company's affairs, this did not extend to a scenario where an individual director pursued their own judgment covertly behind the board's back.

Under a shareholders' agreement (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 a financial adviser 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. An unfair prejudice petition had been made out by a minority shareholder in the High Court,

Key lessons

- **Failure to collaborate openly with the board:** Directors should not pursue their objectives covertly behind the backs of the other members of the board.
- **Scope of requirement of good faith within statutory duty to promote success:** The requirement of good faith within the duty to promote success extends not just to a director's thought process but also to their conduct in pursuing what they believe is the best course for the company to take. Whilst the court will not interfere with the board's good faith subjective business judgments, the purely subjective approach does not apply where a single director pursues their own judgment by a secret strategy concealed from the board.

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although 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 2006 (the CA 2006). By contrast, on appeal, the Court of Appeal had decided that the duty to promote success had been breached. First, on the basis that D had dishonestly deceived the board and therefore not acted in good faith. Secondly, because it was not open to D to act on his own different judgment about a strategy for C's success, since that had been determined by the SHA. The appeal now before the Supreme Court concerned the standard of conduct required of a company director where they genuinely disagree with their fellow directors on the board as to the best route to achieving success for the company. The Supreme Court upheld the decision of the Court of Appeal. It is an established principle that it is for directors to exercise their business judgment in managing the company's affairs. The court will not interfere with their subjective judgment on this if the directors act in good faith in what they consider to be in the interests of the company. However, there was no authority applying this purely subjective test where one director had sought to pursue their own judgment as to the best way to promote the company's best interests by a covert strategy concealed from the board, and which directly conflicted with the strategy which the board as a whole had already resolved on. A duty not covertly or otherwise to subvert management of the company's affairs by the board as a whole was best regarded as part of the duty to promote success. Key reasons were: articles of association typically gave primary responsibility for promoting the success of the company to the board as a whole; for that to be discharged effectively, an individual director must bring their independent view to their colleagues' attention; and the general director duties are owed to the company, meaning a legal person taking decisions through the organs identified in its constitution. D argued that the requirement for good faith in the duty to promote success only governed the director's thinking, rather than their conduct. C, by contrast, contended that the requirement for good faith extended not just to the director's thinking but also to their conduct in pursuit of achieving what they believe is the best course for the company to take. The Supreme Court preferred C's interpretation. An individual director was not permitted to pursue their own dissenting opinion by covert and disloyal tactics to the point of misleading the board. To use their powers to pursue a strategy irreconcilably opposed to that of the board was a plain abuse of power. D had breached his duty to promote the success of C. His conduct was manifestly disloyal to C and he had acted in bad faith towards C. D's fellow directors were the human manifestation of C so far as his conduct was concerned. To the extent he concealed his intended sabotage of the exit strategy from the board, he concealed it from C. (*Saxon Woods Investments Ltd and Ors v Costa* [2026] UKSC 21)

Breach of directors' duties: Acting to the detriment of the company's interests for personal purposes behind the board's back

The High Court decided that an individual had breached his statutory directors' duties and contractual obligations in his former contract of employment in actively working against a proposed transaction behind the board's back, where the board had already determined the transaction was in the company's interests.

The G group manufactured parts for the aerospace industry. GH Ltd was the parent company and GG Ltd was one of its subsidiaries. Company L had acquired GH in early 2017. L was a Chinese company listed on the Shenzhen stock exchange. Mr U was appointed director of each of GH and GG in May 2018 and GH's interim CEO in July 2021, whilst L controlled GH's board. Subsequently, in May 2022 L's nominee Mr V was appointed as a director of GH and, within two months, its CEO and U was told he would not be kept on. The allegations against U were that he was in breach of duty as a director of GH and GG, and in breach of his former contract of employment with GG, in relation to a proposed debt for equity swap relating to L. This involved one of L's shareholders, a Chinese state-owned fund (S). It would have resulted in S's shareholding in L, and indirectly in GH,

Key lessons

- **Duty to support the board's management and decisions:** The judgment contains interesting guidance on a director's duty to support the board's management and decisions.
- **Directors must not act behind the board's back:** The judgment raises issues reminiscent of the High Court decision in *Stobart Group Ltd v Tinkler*[1] that an individual director is not entitled to go off and do their own thing and must support the board's determinations.

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1 [2019] EWHC 258 (Comm).

increasing from 14% to 32% and was notifiable under the UK National Security and Investment Act 2021 (NSIA) in light of GH's military and dual use activities. GH's board had already decided that the transaction was in GH's best interests and essential to obtain refinancing of bank facilities and relieve intercompany debt to avoid insolvency. The Secretary of State issued a call-in notice under the NSIA and then made a final order imposing onerous conditions. Following V's appointment, these were varied to make the terms less severe. GH and GG asserted that U had opposed and acted against the Chinese deal, behind the board's back and to the companies' prejudice, including: lobbying politicians for the issue of the call-in notice and imposition of onerous conditions in the final order; wholly unauthorised, trying to find alternative buyers for GH, to improve his chance of being kept on; and negatively misrepresenting to the bank the level of uncertainty associated with investment from L or S. They also alleged that U's "remedies letter" to the Government, in which U effectively told the Government that the transaction "would be a bad thing for [the G group]", was sent behind the backs of the GH board, L and V. The High Court decided that U had breached a range of his statutory director's duties and also his former contract of employment with GG. Whilst the ostensible purpose of the "remedies letter" was to ensure L complied with a historic deed of covenant restricting its access to military and dual use items, U's real motive was to promote L's divestment of GH. This would have made it harder to get the investment needed from S and potentially would have led to insolvency risk and job losses. U did so contrary to GH and GG's interests and with a view to furthering his own, acting behind the back of GH's board. In doing so he breached his statutory duties both to promote the success of the company and to avoid a conflict of interest with each company. He had also breached his duty to act within his powers, sending his "remedies letter" to pursue the group's involuntary divestment to suit his own employment motives. (*Gardner Aerospace Holdings Ltd v Upton* [2026] EWHC 555 (Ch))

Failure of claims despite breach of statutory pre-emption rules

The High Court dismissed all claims against a company and directors despite established breaches of the statutory pre-emption provisions under the CA 2006. The claims failed on causation, as the claimant could not demonstrate that he could and would have subscribed for the shares but for the breach. A claim against directors for knowingly authorising or permitting the breach and an unfair prejudice petition were also dismissed.

The claimant N was a shareholder and former director of company C. N alleged that his shareholding had been unlawfully diluted from 17% to 0.85% by multiple share allotments which he alleged had been made in breach of the statutory pre-emption rules and that this had led to his removal as a director. N also alleged that the share dilution was part of a scheme in which two of the directors had participated with the effect that they should be jointly liable with C to compensate him under section 563 of the CA 2006. This provides for joint liability with the company of officers who knowingly authorise or permit a breach of the statutory pre-emption rules. C denied such a scheme, alleging the share allotments had been designed to raise capital to meet C's urgent financial needs. N argued that the first pre-emption offer, on the first capital raise, had not been validly communicated to him. C had attempted to send that first offer letter to N by courier and also to an email address. Whilst N's correct address was recorded in C's register of directors/members, and the first offer letter was put in an envelope with that correct address, an incorrect address had been put on the courier envelope.

Key lessons

- **Failure of claims despite technical breaches of the Companies Act:** An interesting example of failure of claims for technical breaches of the statutory pre-emption rules due to lack of causation. To succeed, the shareholder's loss must be suffered "by reason of" the breach of the statutory rules.
- **Unfair prejudice must be suffered in capacity as member:** A reminder that unfair prejudice must be suffered in the petitioner's capacity as a member. Whilst the court found that N could not and would not have taken up his rights anyway, on different facts contraventions of the statutory pre-emption rules that result in a minority's share dilution could amount to unfairly prejudicial conduct.
- **Knowingly authorising or permitting a breach of statutory pre-emption rules:** Inadvertent breaches alone will not attract personal liability of officers for knowingly authorising or permitting a breach of the statutory pre-emption rules.

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The email had also been sent to an email address N said he could longer access. N's evidence was that he had not received the first offer until well after it had expired. The pre-emption offer on the second capital raise had been made on the basis that N's shareholding had already been diluted, even though the shareholders subscribing on the first offer had not even yet paid the subscription price. N applied for: relief against the relevant directors; to be issued or transferred shares to reinstate a 17% shareholding; and also brought an unfair prejudice petition. The High Court dismissed all claims, despite finding breaches of the statutory pre-emption rules. These had been breached in relation to the first allotment as the offer had not been validly communicated to N's address on C's register of members. The effect was that N did not receive the first offer until after the deadline for acceptance. In fact the requisite statutory 14-day acceptance period could not have been met anyway, as the courier company had not despatched the first offer letter in time. As to the email offer, whilst N had agreed to receive documents from C electronically, there was no evidence that he had ever specified the email address that C had used. The statutory rules had also been breached in relation to the second allotment, because that allotment should have been made by reference to the shareholdings members held prior to the first allotment (which had not yet even taken effect). However, the directors had not known of the breaches and, accordingly, had not knowingly authorised or permitted them. Further, the claims against C failed on causation anyway, as N had suffered no loss. He could not and would not have invested anyway. There had been no alleged scheme. The first two capital raises were justified financially, as evidence showed cash was necessary to continue trading. N's unfair prejudice petition also failed because he had not established any conduct of C's affairs which had caused him to suffer prejudice in his capacity as a member of C. Permission has been granted to appeal the decision. (*Ndungu v SPG Ltd (formerly known as Sportpesa Global Holdings Ltd)* [2025] EWHC 3039 (Ch))

Claim for unpaid share subscription time-barred

The High Court decided, on the interpretation of a company's articles of association, that the limitation period in respect of a claim for payment for unpaid shares subscribed for on a company's incorporation had commenced on subscription (not when a call notice was subsequently issued or the shares forfeited) and was therefore time-barred in this case.

Public company Z plc was incorporated on 29 June 2011. Mr N was a subscriber on Z's incorporation and became the holder of 360 million shares of EUR 0.10 each in Z. N then transferred to Z his shares in a Malaysian company, which became Z's subsidiary. N did not pay cash for his 360 million shares in Z. On 5 June 2015 Z served a call notice for payment of EUR 36 million in respect of the shares that N had subscribed for on Z's incorporation. After N failed to pay the sum demanded, Z issued a notice of intended forfeiture on 15 June 2016. Following a declaratory judgment that the shares were unpaid and were entitled to be forfeited, Z forfeited them in June 2018 and commenced proceedings for their payment on 11 October 2018. The High Court decided that Z's claim was time-barred under section 5 of the UK Limitation Act 1980 (the L Act) (which sets a six-year limitation period for actions founded on simple contract). The key point was that N's contractual obligation to pay for the shares arose on registration of Z's memorandum of association in 2011, not when a call notice was later issued nor when the shares were later forfeited. Section 584 of the CA 2006, providing that shares taken by a subscriber to the memorandum of a public company pursuant to an undertaking in the memorandum must be paid up in cash, operates directly on an existing contractual obligation. The effect was that more than six years had elapsed since N's payment had arisen when Z's claim was issued in October 2018. On an interpretation of these articles, no fresh limitation period could start to run on forfeiture, because the claims here were already time-barred immediately before the shares were forfeited. Whilst an express article provided that a person whose shares had been forfeited remained liable for sums payable at the date of forfeiture, that did not resurrect liabilities that were already time-barred, as more than six

Key lessons

- **Limitation period for unpaid subscriber shares commences on subscription:** Interesting guidance that the limitation period in respect of a claim for payment for unpaid shares subscribed for on a company's incorporation commences on subscription. Companies should keep unpaid share subscriptions under review.
- **Express drafting to create a payment trigger operating as condition to debt arising:** Clear and express language would be needed to create a payment trigger operating as a condition precedent to the obligation arising, thereby re-setting the start of the limitation period, but this is not market practice in articles of association.

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years had elapsed since N's payment obligation arose. The court also rejected that a demand was required before the payment obligation arose, which would have meant that the six-year limitation period did not start to run until a demand had been made. It denied that an implied contract of loan arose just because N was liable to pay for his shares and the sum had been left outstanding. Just because a sum due is not paid and not demanded for some time was not enough without more for a loan to arise. On construction of Z's articles, a call notice did not bring about the obligation to pay which the subscriber had assumed on incorporation, but was a procedural step to facilitate forfeiture of unpaid shares where the member was already in breach of their obligation to pay. A call notice could not be issued until sums were already payable. (*Zavarco plc v Nasir* [2026] EWHC 338 (Ch))

Reviewable transactions at an undervalue under UK Insolvency Act: Meaning of "transaction"

The Court of Appeal decided that a "transaction" for the purposes of reviewable transactions at an undervalue under the UK Insolvency Act 1986 (the IA) involves the taking of some step or act of participation by the company and, where the company was not a party to a wider SPA entered into by its shareholder, the relevant transaction was only the separate dividend that the company had entered into itself.

C was a Delaware incorporated limited liability company which operated an oil and gas joint venture partnership in the North Sea. C's shareholder (S) entered into an SPA to sell its membership interest in C to a third party (B), a state-owned entity in the UAE, for USD 1. After the SPA was prepared, but before it was signed, S discovered that it owed C an intercompany balance of USD 84.7 million. This was not reflected in the SPA. It was decided to address this by way of dividend. As C's sole shareholder, S signed a written consent on the completion date approving a dividend in an amount equalling the USD 84.7 million receivable, which extinguished the receivable. C was balance sheet (but not cash flow) insolvent when the dividend was declared. S also wrote off USD 53.7 million that it alleged was owed to it by the group service company that was statutory employer (E) following an insurer's buyout of the S group's defined benefit pension scheme. The premium on the insurer's buyout had been GBP 39 million, equivalent to USD 53.7 million, which S had settled. S claimed the full pension write-off should be treated as consideration received by C because C would otherwise have been recharged that amount by E. Pursuant to the SPA, E was transferred out from C before completion. C was wound up around two years later, and had declared the dividend within two years of its winding up. It was alleged that the dividend was a reviewable transaction at an undervalue for the purposes of section 238 of the IA and was liable to be set aside. C's liquidators assigned any right of action to the appellants (A). The Court of Appeal found in A's favour. The provisions of the IA on reviewable transactions at an undervalue were only triggered if the company was a party to such a transaction. The expression "*enters into a transaction*" in section 238 involved the company taking some step or act of participation. Here, C was not party to the SPA. The only transaction it was party to was the dividend. This was an arrangement C entered into with its parent S. It had been an "afterthought" and had only been decided on after S's SPA with B was agreed. The effect was that it was the dividend that was the relevant transaction for the purpose of assessing classification as a transaction at an undervalue, the extent of undervalue and the availability of the statutory defence of reasonable grounds for believing there was a benefit to the company, not the wider SPA arrangement. Just some sort of linkage between multiple transactions was not enough to treat them as a single transaction for these purposes. You had to consider the defence of reasonable grounds for believing the transaction would benefit the company from C's perspective. Here, there was no benefit to C, the only benefit was to S, meaning that the defence did not apply. The pension write-off did not amount to consideration for the distribution. It was not mentioned in the documentation for the dividend and they were not effected in exchange for each other. The effect was that the amount of the undervalue was the full amount of the dividend. Permission to appeal the decision has been refused. (*TAQA Bratani Ltd and Ors v Fujairah Oil and Gas UK LLC and Ors* [2025] EWCA Civ 1669)

Key lessons

- **Company's interests considered as a separate legal entity:** The judgment demonstrates that the court will consider the company's interests as a separate legal entity when determining whether or not the defence of reasonable grounds for believing there was a benefit to the company applies.
- **Mere linkage to a wider arrangement not enough:** Where a dividend is only for the benefit of the shareholder, the defence of reasonable grounds for believing there was a benefit to the company will not apply just because it is paid as part of a wider arrangement.

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Creditors' interests duty can be triggered by either balance sheet or cash flow insolvency

The High Court indicated that the creditors' interests duty can be triggered by either balance sheet insolvency or cash flow insolvency. It commented that a warrant instrument and warrant certificates issued in breach of directors' statutory duty to act within their powers, when the company was balance sheet insolvent and "teetering on the brink", would be ineffective and could not be ratified by the sole shareholder.

Company Y, which had been in financial difficulties and was balance sheet insolvent, had recently been acquired by G, a company that Mr C controlled. C had wanted Y to merge with S, a logistics company of which C was founder and around 20% shareholder, but this did not happen. Y's principal secured lender indicated Y would be put into administration unless a sale was agreed. So instead Y was sold to a different company, JLL, in June 2024. Y was balance sheet insolvent then but continued to trade, narrowly avoiding going into administration. S and R, another company owned by C, subsequently purported to exercise alleged rights to buy 1.8 billion shares in Y (amounting to a 70% controlling stake) pursuant to warrant certificates and a warrant instrument. These were allegedly created by Y two days before the sale to JLL, when C was Y's sole director, on the basis of a sole director's authorising resolution. Y asserted that the warrant instrument had been forged, unlawfully backdated and signatures not witnessed. Alternatively, Y alleged that the warrant instrument was void or voidable anyway because it had been issued in breach of C's directors' duties. Y argued this could not be ratified by the sole shareholder as the creditors' interests duty had been triggered, in light of Y's insolvency. The High Court decided that the certificates and warrant instrument were void and ineffective and also commented on various related matters. C had breached his statutory director's duty to act within his powers and the creditors' interests duty, and that could not be ratified by the sole shareholder. Either balance sheet or cash flow insolvency was sufficient to trigger the creditors' interests duty[2]. The burden of this duty existed on a sliding scale, depending on the seriousness of a company's financial difficulties. Where a company was balance sheet insolvent but still trading successfully, with adequate funding and unquestioned ability to pay its debts as they fell due, the duty would be lighter than when it was in a cash flow crisis and at serious risk of commercial insolvency too. Here, Y's directors owed a strong creditor duty, involving primary (if not sole) regard to creditors' interests, as Y was "teetering on the brink". C had breached this by failing to give C's creditors as a body any thought at the time. The warrant instrument was contrary to creditors' interests and even to those of Y itself, as it made it less likely Y would obtain third party investment needed to pull through its cash flow crisis. In any event, C, as sole director, had breached his director's duty to act within his powers in executing the warrant certificates and instrument. One reason was that the articles at the time required Y to have two directors and a quorum of two at a board meeting. Another was that C had misused the power to allot and issue shares (including share warrants), which was conferred to raise capital for the company, or to reward or incentivise employees, and not to give priority to certain stakeholders in the company if the company was sold. The warrant instrument could not be saved by section 40 of the CA 2006 on the power of directors to bind the company, because neither R nor S was party to an act or otherwise dealing with Y in good faith. (*Yodel Delivery Network Ltd v Corlett and Ors* [2025] EWHC 3355 (Ch))

Key lessons

- **Categories of insolvency that can trigger creditors' interests duty:** Useful guidance on the categories of insolvency that may trigger the creditors' interests duty—balance sheet insolvency is sufficient, but the duty becomes more onerous as the risk of commercial insolvency increases.
- **Shareholder ratification ineffective:** A reminder of the inability of shareholders to ratify a breach of the creditors' interests duty, this time in the context of the directors' duty to act within their powers.
- **Scrutiny of unusual transactions or arrangements:** Where a company is balance sheet or cash flow insolvent (or nearing that) at the relevant time, any unusual actions or transactions will be scrutinised for potential director breaches of the creditors' interests duty.

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2 Applying *BTI 2014 LLC v Sequana SA.*

Claimant could bring claim in deceit when unaware of underlying representation on which it was based

The Privy Council decided that a person bringing a claim in deceit for fraudulent misrepresentation need not necessarily be aware of the representation or have understood it had been made, if they acted on an unconscious assumption that was caused by the representation and that assumption was one which it was natural for them to make.

CS was a Bermudian insurance company and a wholly-owned subsidiary of bank B. R was a businessman who was the recipient of the representation here. In 2011 and 2012 R transferred USD 750 million to CS as premia under two life insurance policies. The premia were held in a segregated account of CS with B. The transfers were made on B's advice, including the recommendation of Mr L, who was the relationship manager at B, in meetings held in Tbilisi, Georgia. In September 2015 R found out that L had dealt fraudulently with the policy assets by: misappropriating assets; transferring assets from the policy accounts into those of other unrelated clients; transferring assets into the policy accounts at an overvalue to hide losses of those unrelated clients; and making investments from policy assets for secret commissions. R claimed against CS for breach of contractual and fiduciary duties and that, in recommending the life insurance policies, L had impliedly represented on behalf of CS that B (including L himself) was not managing R's accounts or assets fraudulently and did not intend to do so. The Court of Appeal of Bermuda (BCA) had dismissed the misrepresentation claim. By contrast, the Privy Council found in favour of R on that claim. The parties proceeded on the basis that Bermudian law was the same as English law on the relevant issues. It was accepted that L had impliedly represented to R that B did not intend to manage the policy assets fraudulently, but the issue was whether R had to be consciously aware of the representation to succeed in the claim. The Privy Council discussed the constituent elements of a successful claim for fraudulent misrepresentation. This requires that the defendant (D) has made a representation of fact or law, not believing it to be true, intending that the claimant (C) should believe and rely on it, which C did and, in consequence, suffered loss. The concept of a "representation" was not limited to statements. It included actions as well as words, encompassing any act calculated to cause another person to believe a proposition. Contemporaneous awareness and understanding of the specific representation was not an essential element of such a claim. Reliance or inducement was an essential element, but C did not need to be consciously aware of the representation at the time C acts on it. Where C acted on an assumption, what mattered was whether that assumption was one that C would naturally be expected to make. However, on the facts the claim was time-barred here, as it was brought after the expiry of the applicable limitation period (under Georgian law). (*Credit Suisse Life (Bermuda) Ltd v Ivanishvili and Ors* [2025] UKPC 53)

Key lessons

- **Lowering the test for fraudulent misrepresentation:** This decision establishes that it is not a legal requirement of a claim in deceit that the claimant was consciously aware of the misrepresentation or understood it had been made. A fraudulent misrepresentation can cause a claimant to hold a false belief and to act on that belief to their detriment even if they had no conscious awareness of it.
- **Conduct of defendant is key:** In such circumstances the emphasis is on the conduct of the defendant rather than the conscious awareness of the recipient of the representation at the time the representation was made.

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Equitable compensation for breach of fiduciary duty

The Supreme Court has considered, among other things: the effect of an unpaid vendor's lien on a share transfer; the liability of a party as a fiduciary; and the correct approach to quantification of loss for equitable compensation.

Individuals S and his daughter D were the only directors of BVI company C. S was C's sole shareholder at all material times. C went into liquidation in October 2011. Liquidators L challenged a transfer of shares that C held in another company (U) (associated with S and of which S was sole director at the time) to S's company G (of which S was also director) made in February 2016 for no consideration. In June 2017 all U's assets and liabilities were transferred to another group company as part of an intra-group transfer, at which point the shares in U became worthless. G was also now in liquidation. L claimed against S and G for equitable compensation, breach of fiduciary duty in S's case and as a knowing recipient of C's property in G's case (S's knowledge being attributed to it). S had argued that he did not owe fiduciary duties because under BVI law his powers as a director had ceased on liquidation. The Supreme Court denied this. S owed a fiduciary duty to C in his purported exercise of a fiduciary power in transacting with its property. That duty extended to having regard to the interests of its creditors in the context of its insolvency. The 2016 transaction had clearly been intended to protect the shares in U from claims by C's creditors. The Supreme Court emphasized that: arrogation of a fiduciary power and breach of fiduciary duty may occur in the same act; and S was in breach of duty in effecting the share transfers and their registration in 2016. It was irrelevant that the recipient of the shares was a company S controlled rather than S himself. S's conduct in approving the share transfers for registration in his capacity as a director of U should not be considered separately from his conduct in signing the share transfers as a director of C. Both were part and parcel of the same dishonest transaction. S argued C had not suffered loss because it had originally acquired the shares in U subject to an unpaid vendor's lien exceeding the value of the equitable compensation originally ordered in the High Court. The Supreme Court decided that there was no subsisting vendor's lien over the shares in U to preclude C's loss. U had been incorporated in September 2008 with a view to undergoing a future IPO of its shares. The strong evidence was that any vendor's lien would have frustrated the on-sale of the shares as part of a planned IPO and that, consequently, the parties shared a joint intention to exclude a vendor's lien. The test for implying a term need not be satisfied to find that a lien is excluded (nor for a lien to arise). In quantifying C's loss, the date of valuation was the date which reflected the justice of the case. Here, that was the date of misappropriation, when the shares had value. The burden of proof lay on a defaulting fiduciary who wished to rely on a supervening event (here, the 2017 asset and liability transfer) as breaking the chain of causation. They could not rely on their own later wrongdoing to reduce the loss flowing from their own actions. (*Mitchell and another (Joint Liquidators of MBI International & Partners Inc (In Liquidation)) v Sheikh Mohamed Bin Issa Al Jaber* [2025] UKSC 43)

Key lessons

- **Extent of fiduciary duties:** Useful guidance on the extent of a fiduciary's duties, including where a person had held themself out as a director with authority to act and argued for a reduction in quantification of loss suffered where they had themself intermeddled to orchestrate a supervening event.
- **Flexibility over rules on equitable compensation:** Demonstrates flexibility in applying the rules on equitable compensation: S could not hide behind the BVI provision removing his authority as director on C's liquidation; the date for assessing loss depended on what was just and equitable; and it made no difference that the recipient of the shares was a company S controlled rather than S himself.

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Contractual provisions

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

Breach of seller's requirement to notify pre-completion changes, related warranty breaches and scope of seller limitations

The High Court considered allegations of breach of warranty, the scope of key seller limitations and alleged breach of a pre-completion obligation on the seller to notify the buyer of events or developments that could affect the financial or trading prospects of the target to any material extent.

Seller S sold a polystyrene business to buyer B. It transpired that the business had been involved in an unlawful anti-competitive buyer's cartel for some years setting monthly contract prices, and that the European Commission was investigating this. This had not been disclosed. Under the share sale and purchase agreement (SPA), between signing and completion S had to "*…promptly notify the Buyer in writing, providing reasonable detail, of any events or developments which could affect the financial or trading prospects of the [Business] or the [Target] to any material extent*". There were warranties in the SPA that: (i) in the last three years the company (C) had not been involved in any legal, administrative or arbitration proceedings and, so far as S was aware, there were no circumstances likely to give rise to such; (ii) there was no governmental or other investigation regarding C and, so far as S was aware, there were no circumstances likely to give rise to such; and (iii) C had not breached competition law in any place where the business operated. S's awareness was defined as S's actual knowledge (including that of S's directors and officers) after making reasonable enquiry of particular named individuals "*and of such other persons within the [Business] as are relevant to the subject matter of the particular warranty*". There was a fraud carve-out to the seller limitations in the SPA. Finally, B could terminate the SPA on breach of warranty or of pre-completion covenants giving B claims exceeding EUR 10 million if completion took place. The EC imposed substantial fines on participants in the cartel. S only admitted breaching the competition warranty and argued the warranties were time-barred anyway. The High Court found that S had breached both the pre-completion notification obligation and the warranties. S should have notified C's involvement in price settlements between signing and completion. It did not matter that the cartel had been long ongoing. You just needed an adverse event that was more than de minimis and novelty was not required. It was material as the settlements exposed companies to fines of up to 10% of worldwide turnover. The SPA was a sophisticated agreement drafted and negotiated by skilled professionals.

Key lessons

- **Risks in pre-completion notification obligations:** The judgment demonstrates the risk to a seller in agreeing to a pre-completion obligation to notify a buyer of adverse changes or developments or warranty breaches. This puts a buyer in a strong position and gave rise here to a separate standalone buyer claim that, in this case, was outside the scope of the seller limitations on liability and the seller's knowledge qualifier. It was also not limited to novel matters and was given a low materiality bar. These issues could be mitigated through express drafting.
- **Scope of fraud carve-out:** It is significant that the court was prepared to apply the fraud carve-out to the seller limitations here to breaches of warranties qualified by knowledge as to the likelihood or otherwise of the relevant circumstances arising, and that the court applied the contractual definition of deemed knowledge to establish such fraud.
- **Scope of definition of seller's awareness:** Also from a seller's perspective, the decision demonstrates the merits of tight and targeted definitions of seller's awareness, with clear and express delineation of a limited scope of individuals of whom reasonable enquiry must be made.

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This meant you had to construe it primarily by a textual analysis. On this approach the seller limitations, including the knowledge qualifier, only applied to warranty claims, not the notification obligation, particularly as express knowledge qualifiers were used elsewhere in the SPA but not in the notification clause. On a balance of probabilities B would have terminated the SPA if the settlements had been notified.

The High Court also decided that the awareness-qualified limbs of the "no litigation" and "no investigations" warranties had been breached. These qualified both the existence of the relevant circumstances and that those circumstances were likely to give rise to the relevant outcome. However, where, as here, the relevant individuals whose knowledge was deemed to be S's knew their conduct was likely to be contrary to competition law, you could readily infer they knew both. The effect was that the warranties must have been given fraudulently. The scope, in the seller's awareness definition, of the words "*…other persons….relevant to the subject matter of the particular warranty*" was intentionally wide and could catch all of the statutory directors of C and its subsidiaries; employees of C or its subsidiaries; and employees within S's wider group providing supervision or services to C and/or its subsidiaries. The court took into account the structure of S's group, where some of a subsidiary's activities were carried on by directors or employees of that entity and some by individuals employed by other group entities. As the question of fraud depended on S's actual knowledge (including S's deemed actual knowledge), you had to determine the question applying the deemed knowledge definition. Further, the court was prepared to aggregate the knowledge obtainable through reasonable enquiry of such individuals to establish S's awareness. Whilst fraud was not a necessary ingredient of a claim for breach of warranty, it may be so where the alleged breach depends on the warrantor having knowledge it has warranted that it did not have. The court decided that the fraud carve-out to the seller limitations applied, meaning the warranties were not time-barred. For the fraud carve-out to apply it was sufficient for warranties to have been given and repeated fraudulently. The underlying cartel conduct need not have involved fraud. (*Synthos Spolka Akcyjna v Ineos Industries Holdings Ltd* [2026] EWHC 83 (Comm))

Failure of claims for fraudulent breach of warranty

The High Court dismissed a buyer's claims for fraudulent breach of seller warranties in an SPA relating to the sale of a health business, on the basis that fraud was not proved.

Buyer B entered into a share SPA with seller S and a related disclosure letter. B alleged that S had failed to fairly disclose that one of target company C's most key customers (A) had invoked a price match clause under its supply agreement with C and was renegotiating the price. Ultimately, a price drop of nearly 50% was agreed. B brought claims for fraudulent breach of warranty by one or more of S's executives. S had given business warranties subject to disclosure in the disclosure letter or the data room. Business warranties in the SPA included: (i) "*Since the applicable Accounts Date … the [Businesses] have been carried on in the ordinary and usual course consistent with past practice … without any … material alteration to the nature, scope or manner of the Businesses.*" (the Usual Course Warranty). (ii) "*None of the Companies … is currently renegotiating any material term of any Key Contract, which upon conclusion, would have an adverse or detrimental effect on the [Businesses].*" (the Material Contracts Warranty). The High Court proceeded on the premise that the effect of the SPA was that non-fraudulent claims in simple contract and claims in negligence were excluded, meaning that B had to establish fraud to succeed in its claims. It decided that the Usual Course Warranty had not been breached because the change to the contractual arrangements in question was not relevant to the past "post-accounts date" period covered by that particular warranty. However, by contrast, when A had invoked the price match clause under the supply agreement that triggered "renegotiation" for the purposes of the separate Material Contracts Warranty and that warranty had been breached. It did not matter that the extent of the price drop could not be finally quantified until renegotiations concluded. The ultimate price drop here would barely cover production costs. Generic disclosure of increased market competition and downward pressure on pricing was not enough, nor was disclosure that pricing discussions with A were ongoing without specifying that the price match clause had recently been invoked anew. Further, S could not rely on what might have been said in due diligence calls or prior correspondence. If further materials were needed to interpret the disclosure letter they should have been expressly disclosed.

However, fraud had not been proved against S's executives, with the effect that B's claim failed. To establish fraud B would have had to prove that one or more of S's executives:

Key lessons

- **Scope of general contracts warranties:** Interesting analysis on the applicability or otherwise of a general contracts warranty on contract renegotiation once a price match clause was invoked.
- **Aggregation of knowledge denied:** Useful guidance from the court on a buyer's inability to aggregate knowledge to establish a fraudulent breach of warranty where there was no knowledge qualifier to the warranty and no express provision deeming whose knowledge amounted to that of the seller.
- **Importance on sell-side of effecting formal disclosures:** From a seller's perspective, all critical information must be captured in the disclosure letter or data room, not just discussed on calls.

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knew the facts which made the warranty false; had sufficient knowledge of the terms of the warranty in question; and knew or were reckless as to whether the warranty was falsified by that knowledge. This was a high bar, as it was unlikely senior executives would be reckless in this sense. The High Court distinguished *Synthos Spolka Akcyjna v Ineos Industries Holdings Ltd*[3], and decided that you could not aggregate the knowledge of individual executives here to establish fraud. It was not enough if one person knew the relevant facts but not that they made the warranty untrue, and another person knew the terms of the warranty but not the facts that made it false. The *Synthos Spolka Akcyjna* case was distinguishable because the warranties there were as to the seller not possessing certain knowledge, whilst there was also an express provision in the SPA there deeming a particularly wide delineation of people's knowledge to be that of the seller. The judge had taken the view there that if, in fact, they did have that knowledge, the warranty must have been given fraudulently. By contrast here, a negligent failure to check disclosures was not the same as conscious awareness a warranty was false and disclosure inadequate. Nor was it reckless for executives to rely on a proper disclosure process that was in place. Permission has been granted to appeal the decision. (*Veranova Bidco LP v Johnson Matthey plc and Ors* [2026] EWHC 1021 (Comm))

Equity term sheet binding despite being subject to definitive agreement and warranties in MWD actionable as representations

The High Court decided that an equity term sheet that was expressed to be entered into as binding subject to a definitive agreement was legally binding even though a definitive agreement had not been agreed, whilst warranties in the management warranty deed additionally operated as actionable representations.

Buyer B acquired a financial services technology company (C) from seller S. The two claimants were C's CEO and COO respectively at the date of the SPA. Related agreements included a management warranty deed (MWD), a disclosure letter and an equity term sheet (ETS) between B and management, including the claimants. Four months after completion the claimants' engagements as CEO and COO respectively were terminated. The ETS had been premised on the basis that there would be: a subsequent investment agreement (IA); a post-completion restructuring to insert a newly-incorporated holding company (Holdco) into C's group; and an award of equity in the Holdco to the claimants. In fact, none of that happened. The ETS was expressed to be "*legally binding on the parties, subject to a definitive agreement*". The claimants alleged B had breached its obligations under the ETS. B argued that its only unconditional obligation under the ETS was to negotiate in good faith definitive documents. B also alleged fraudulent misrepresentations by the claimants in the MWD, including that there were no material contracts between any of C's group companies and any former worker or shareholder in a group company other than on normal commercial terms in the ordinary course of business. The High Court decided in the claimant's favour on the status of the ETS. The words binding "*subject to a definitive agreement*" in the ETS meant that the ETS was immediately legally binding but would be superseded and replaced by a definitive agreement. They did not mean that the ETS would only be binding if there was a definitive agreement. One factor was that the ETS contained "obligatory language" on what would happen after completion, for example, that its terms "will be" reflected in an IA and that specified securities "will be" issued to specified members of management. Any other interpretation would contradict the purpose of the "legal effect" clause. Another factor was the structure of the ETS, which: contained a number of detailed terms; began with a preamble; set out a table of terms; and then contained an "afterword" on implementation mechanics. The claimants were entitled to damages on the assumption they would have retained

Key lessons

- **Importance on sell-side of restricting liability to contractual claims for breach of contract:** Sellers need to avoid language in SPAs, management warranty deeds or disclosure letters that might suggest that warranties operate as representations.
- **Clear and express language needed:** Clear and express wording is needed, from a seller's perspective, to limit claims in relation to sale shares to claims under the agreement and to expressly exclude remedies in respect of misrepresentation prior to the SPA.
- **"Subject to" formulations:** The judgment gives interesting guidance on the effect of a formulation "subject to" entry into a definitive agreement, albeit fact-specific and after reviewing other provisions of the equity term sheet in question in the round.

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3 [2026] EWHC 83 (Comm), as above.

their equity award for at least two years. Separately, the court found that the warranties in the MWD could amount to actionable representations, although on the facts they were neither untrue nor made fraudulently. The premise here was that: they involved an element of providing information that was otherwise unlikely to be within B's knowledge; they were contained in drafts of documents seen before the final deal documents were executed; and that on the facts the MWD (and disclosure letter) were signed before the SPA, as set out in a signing protocol. Most significantly, the court decided that express provisions in the MWD and disclosure letter suggested the warranties could amount to representations, including the exclusion of liability for non-fraudulent misrepresentation in the MWD whether made before or in the deed. Permission has been requested to appeal the decision. (*Hoffman and Anor v Finalto Group Ltd and Anor* [2026] EWHC 921 (Comm))

Contractual interpretation: Application of the natural and ordinary meaning of the words

The Court of Appeal decided that a judge interpreting a deferred consideration clause in an agreement for the sale of land had incorrectly applied the principles of construction, failing to first determine the natural and ordinary meaning of the words used before considering them in the light of other provisions and the agreement's overall purpose.

W entered into an agreement with H for the purchase of a holiday park, with a view to the siting of static caravans. Under Schedule 4 of the agreement, W's obligation to pay H deferred consideration depended on whether the Coal Authority reduced a protective buffer zone of influence (ZOI) around the heads of two mineshafts of a former colliery on the land by a long stop date. The ZOI was defined in the agreement as a radius of 27 metres around the two mine shafts on which development was prohibited, including installing static caravans. Within a year the Coal Authority agreed in writing to reduce to a radius of 3.66 metres the area in which placement of static caravans (as opposed to permanent structures) was prohibited, but did not reduce the ZOI. The question was whether or not that triggered deferred consideration. The judge at first instance had found that it did, on the basis that you could not give Schedule 4 its plain meaning in two respects. One reason was that it only envisaged reducing or releasing the ZOI. The other was that it would defy commercial common sense. Instead the judge had construed the agreement purposively, and decided that deferred consideration was payable if the Coal Authority increased the area on which static caravans could be positioned, even if it did not reduce the ZOI. The judge had said that a reasonable reader would appreciate that the general object of the transaction was a sale of the area for siting static caravans, and that deferred consideration would be payable if the Coal Authority agreed in writing to allow static caravans to be sited there. Significantly, the judge had interpreted Coal Authority guidance as meaning that the ZOI could not be reduced just by the Authority itself, but required a dataset to be updated. The Court of Appeal overturned the High Court decision on the basis there had been no reduction in the ZOI. The judge had failed to apply the key principles of contractual construction[4]. He had not objectively determined the natural and ordinary meaning of the words used both alone and in their immediate context and then considered them in the round with the rest of the agreement and its overall purpose. The judge had been wrongly influenced by his incorrect view that the Coal Authority could not itself reduce a ZOI, of which there was no evidence. He had also incorrectly been influenced by the parties' prior negotiations, which were not relevant. Schedule 4 had been drafted by professionals, and a reasonable reader would have understood that the language meant what it said. It referred to a reduction of the ZOI or a release in that zone, not change of use or partial exoneration or grant of consent for particular uses. There was no ambiguity and no commercial absurdity. Rectification of the agreement would not be ordered, as the judge had not considered common intention and, without findings on that, rectification could not be granted. (*Westfield Park Ltd v Harworth Estates Investments Ltd* [2025] EWCA Civ 1374)

Key lessons

- **Application of plain and natural meaning of words used:** In the case of unambiguous wording in a contract drafted by skilled professionals, the court is likely to focus on a textual analysis and apply the natural and ordinary meaning of the words.
- **Requirements for rectification:** Clear evidence of a common intention is needed to found a claim for rectification.

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4 From *Arnold v Britton* [2015] UKSC 36 and *Sara & Hossein Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] UKSC 2.

Execution of deeds by UK Companies and statutory presumption of due execution under UK Companies Act 2006

The Court of Appeal decided that a lease and underlease had not been validly executed as deeds under the CA 2006, where the sole director's personal assistant had signed by writing their name on the documents, and that only a purchaser in good faith can invoke the statutory presumption of due execution.

Companies HO and LO were both subsidiaries of GH Limited. Mr C was co-founder of the group and executive chairman. C was sole director of HO and LO and a co-director of both GH and its holding company. HO was freeholder of a London site on which it built a hotel, completed in December 2007. The plan was for SB, another company of which C was sole director (until 2015), to manage the hotel. It was intended to help fund the construction by selling rooms in the hotel to investors on the basis investors would receive shares in SB. Initially SB would be another wholly-owned subsidiary of GH. It would remain a subsidiary for five years after the hotel opened, but would cease to be so when investors were issued shares. Against this backdrop, HO granted LO a 999-year lease of a valuable annex to the hotel in June 2008 and LO entered into a 15-year underlease with SB. At the time of the annex lease, a pre-existing freehold sale contract was in place giving SB a contractual right to a transfer of the entire freehold in the site, including the annex. HO finally transferred the freehold interest in the site to SB in April 2014, after SB was no longer a subsidiary of GH. Investors who had previously taken leases of hotel rooms had been issued shares in SB the previous month. In May 2021 SB brought proceedings challenging the validity of the underlease and lease, following proceedings from LO for outstanding rent. The lease and underlease were each stated to be signed as a deed by each corporate party "acting by two directors or a director and a secretary", as permitted under section 44(2) of the CA 2006. Whilst the documents purported to be signed by the parties' company secretary and C, as their sole director, C had not signed either himself. Instead his personal assistant had written "S Conway" on the documents on his instruction. The Court of Appeal decided that did not amount to a valid execution. Further, the statutory presumption of due execution (under section 44(5)) did not apply here. That statutory presumption only operated in favour of a purchaser "in good faith". LO could not avail itself of that presumption if SB, as purchaser, did not wish to. In any event the two purchasers, LO and SB, had not acted in good faith. A purchaser who knew a document was not signed on its behalf by two authorised signatories could not take the benefit of the presumption. Here, C had purportedly signed the lease and underlease on behalf of HO, LO and SB, knowing he had not in fact done so. As sole director of all three companies, his knowledge was attributed to them. In any event, SB had an arguable claim against C (as LO's sole director) for breach of duty in relation to the annex lease scheme. The pre-existing freehold sale contract had conferred on SB a beneficial interest in the site. The annex lease scheme had rendered the freehold site different from what SB had intended to buy. It had deprived SB of its economic interest in the annex for no valuable consideration. Whilst SB retained the right under the underlease to use the annex, it had to pay LO a market rent to do so. SB had a claim to recover trust property that a director had "converted" to their own use and to which the standard limitation period did not apply. This arguable claim was remitted to the trial judge. (*South Bank Hotel Management Company Ltd v Galliard Hotels Ltd and Ors* [2026] EWCA Civ 56)

Key lessons

- **Delegation under section 44(2) of the CA 2006 not allowed:** Section 44(2) of the CA 2006 (execution by a company "acting by two directors or a director and a secretary") does not permit delegation by the relevant officer.
- **Scope of statutory presumption of due execution:** The judgment emphasizes the restricted scope of the statutory presumption of due execution, which does not confer an automatic deeming of due execution. This cannot be assumed just because a document appears to have been duly executed.

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Test for manifest error in expert determination

The Court of Appeal has emphasized that the test that must be satisfied to set aside an expert determination (ED) for manifest error can be hard to meet, and also decided that there was no separate category of contractual terms containing a mathematical "formula": an ED in relation to such terms had to be interpreted according to the same principles.

Company W owned a football club. LS was the head leaseholder of a sports stadium and in March 2013 had granted W a 99-year concession to use the stadium to hold football matches. There was an anti-embarrassment provision in clause 20 of the concession agreement (CA). This provided a formula for arriving at additional consideration due to LS if W's "relevant shareholders" made gains from entering into a "qualifying transaction" above a threshold amount. This meant the sale or transfer of any direct or indirect interest in W or the football club, and also caught grant of a right to purchase shares. In 2021, relevant shareholders entered into transactions with third parties which included share sales and grant of call options to acquire further shares. There was a dispute over additional consideration due on the call option element. LS argued the share and call options amounted to a single qualifying transaction, which would have significantly increased the premium due. The dispute was referred to an expert for determination under clause 50 of the CA, which stated that an ED "*shall (in the absence of manifest error) be final and binding on the parties*". The expert had found in favour of LS. In arriving at his finding, the expert had taken the three separate limbs of the definition of "consideration" in the CA (the second and third of which were separated by the word "or"), and relating to different transaction types, and blended them into a hybrid calculation. The High Court had subsequently overturned that decision and found that the determination was not final and binding due to two manifest errors. One was the melding of the separate elements of the "consideration" definition into a hybrid calculation, and the other was treating the sale and option transactions as a single qualifying transaction. The Court of Appeal reinstated the ED. A party could not challenge the outcome of an ED here just because the expert may have made a mistake in reaching it (absent, of course, fraud). Generally, an error would be manifest if, after investigation limited in time and extent, it was so obvious as to admit of no difference of opinion. This did not mean without the need for adversarial argument. All that was needed was that argument might persuade a judge, despite their view to the contrary, that the interpretation was correct. There was no basis to treat contractual formulae differently and the test to apply to them for manifest error was the same. The expert's approach had been based on an arguable finding that there was one qualifying transaction. The anti-embarrassment provisions were not clear, nor was their application straightforward in this case. Whilst the High Court had found that the expert had misread the word "or" to mean "and", the Court of Appeal stated that in certain contexts the word "or" may be used conjunctively. Although a different starting point from that of W and the judge, it was not obviously wrong. (*WH Holding Ltd v London Stadium LLP (formerly E20 Stadium LLP)* [2026] EWCA Civ 153)

Key lessons

- **Test for establishing manifest error hard to meet:** The case is a reminder of the high test for establishing manifest error. If parties do not wish to be held to an expert's mistakes, they must include express wording to establish this.
- **Treatment of mathematical formulae:** The judgment is interesting in emphasizing that the test for establishing a manifest error had to be applied the same way in relation to contractual terms containing a mathematical "formula" as other contract terms.
- **Assessment of qualifying transactions:** Express wording is desirable to clarify whether parties intend to prevent or apply aggregation of "qualifying" transactions when determining amounts due under additional consideration mechanisms.

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Default interest rate in facility letter not an unenforceable penalty

The Court of Appeal has upheld an earlier High Court decision that a default interest rate in a facility letter was not an unenforceable penalty even though the same default rate was charged on multiple different events of default, and considered whether defaults that affected the credit risk of the borrower merited the same default rate as a non-payment default.

L had agreed to advance a bridge loan of £1.881 million to C Ltd in July 2020. Under the facility letter interest was payable at 1% per month, with a default rate of 4% per month and interest compounded monthly in each case. The facility was secured by a debenture over C's assets, personal guarantees from its husband and wife directors and third party mortgages over the family home (the Property) and five buy-to-let properties. In September 2020 L alleged that a non-occupation covenant had been breached through residential occupation of the Property, and claimed default interest on the outstanding sum. The family remained in occupation and failed to pay this. In November 2020 L demanded immediate repayment of the full amount plus interest. Later in November joint receivers were appointed by L. The High Court had upheld the single default interest rate even though any event of default, not only non-payment, switched the interest rate to the default rate. The High Court had considered all the primary obligations to which the default rate applied and, in turn, the legitimate interests L had in enforcing them through the default rate, viewed at the date of the facility letter. If it was extortionate in respect of any of them it would fail in respect of all of them. The repayment risk was an established very strong interest and was indispensable from a lender's perspective. The High Court had decided that the default rate also was not unduly high when assessed against each other default scenario. The High Court had in particular discussed the credit risk interest here. Experts agreed that the preferred exit from the loan was a refinancing and that enforcement of the security was a last resort. Credit risk interests might destroy chances of a potential refinancing. In the circumstances, the High Court had concluded that the credit risk was a legitimate interest of L. The Court of Appeal now upheld the High Court decision and decided that the High Court judge had correctly applied the test as to what amounts to an unenforceable penalty[5]. The credit risk interest was a marginal prospect and L had every reason to want to ensure it did not deteriorate further. The Court of Appeal denied that the judge had wrongly taken into account events post-dating the loan. Instead the judge had recognised clearly that the question was what an objective party would have thought at the time the agreement was entered into. The Court of Appeal also denied that it was relevant to ask whether the credit risk interest was adequately protected without the deterrent of a default interest rate of 4% per month compounding monthly. The question was not whether the legitimate interest was "adequately" protected. Instead, it was whether the default rate was "out of all proportion" to the legitimate interest. (*Houssein and Ors v London Credit Ltd and Anor* [2026] EWCA Civ 830)

Key lessons

- **Single default rate on all multiple different events of default:** Where a single default rate is charged on the occurrence of all events of default, the default rate must be necessary, in relation to each separate primary obligation to which the default rate applies, to protect the innocent party's legitimate interests, otherwise the entire default interest provision will be unenforceable.
- **Test for unenforceable penalty:** The correct test is whether the sum payable to protect a legitimate interest is extravagant, exorbitant or unconscionable, not whether the legitimate interest is "adequately" protected.

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5 Applying *Cavendish Square Holdings BV v Talal El Makdessi; ParkingEye Limited v Beavis* [2015] UKSC 67.

Restitutionary claim for M&A success fee fails where written agreement governs relationship

The High Court dismissed a claim for USD 11.7 million in fees for M&A advisory services allegedly provided to a defendant shipping company in connection with a merger. The claimant maritime advisory firms argued that their services went beyond the scope of a written advisory agreement and that they were entitled to a claim in restitution for quantum meruit on the basis of unjust enrichment. The court held that the work fell within the advisory agreement and that, even if it did not, the contractual framework—including a no oral modification clause and provisions requiring written agreement to any change in scope—barred any restitutionary recovery.

The claimants, R, were engaged by the defendant, E, to assist in the possible acquisition of a rival business. R asserted that they were engaged to provide limited services under an advisory agreement (Agreement), principally the development of an acquisition model to assist E in studying a possible acquisition of a rival business. They contended that over the course of the transaction they delivered a broader range of M&A advisory services and that these services were provided on the basis of a shared understanding that E would pay a further fee, to be agreed or otherwise assessed at a reasonable market rate. R claimed unjust enrichment, asserting that the basis for the provision of the additional services had failed and/or that E freely accepted the benefit of those services with knowledge that R expected to be paid. E denied that any work fell outside the Agreement and argued that the written contractual framework precluded restitutionary recovery, maintaining that any further payment was purely discretionary. The court rejected R's argument that pre-contractual communications were relevant and admissible to demonstrate that the Agreement's purpose was to appoint R to a limited role rather than as a full M&A adviser. Citing the Court of Appeal in *Merthyr (South Wales) Ltd v Merthyr Tydfil County Borough Council* [2019] EWCA Civ 526, the court noted that previous documents could be looked at to show surrounding circumstances and the commercial and business object of a contract, but that it was not permissible to rely on evidence of what was said during pre-contractual negotiations for the purpose of drawing inferences about the meaning of the contract. Applying general principles of contractual interpretation, the judge rejected R's argument that the provisions in the Agreement dealing with the scope of services should be given a restrictive meaning. The judge considered each category of work individually and found that the main tasks R undertook fell within the scope of the services to be provided. The court then turned to the unjust enrichment claim. The remedy for unjust enrichment was not a broad fairness jurisdiction but required an established unjust factor. One recognised unjust factor was failure of basis, which occurred when a benefit had been conferred on a joint understanding that the recipient's right to retain it was conditional. An alternative was free acceptance, where a defendant was held to have benefited from services rendered if they ought to have known that the claimant expected to be paid for them and yet did not take a reasonable opportunity to reject the proffered services. Applying *Barton v Morris* [2023] UKSC 3 and *Rock Advertising v MWB Business Exchange Centres* [2018] UKSC 24, the court found that the terms of the Agreement left no room for a restitutionary claim, even in respect of non-contractual services. The Agreement contained a no oral modification clause and two further clauses that specifically dealt with the possibility of expanding the scope of services. Those provisions reflected

Key lessons

- **Secure written agreement before performing additional work:** Where a services agreement requires any expansion of scope to be documented in writing, an adviser who performs additional work without obtaining a written variation does so at its own risk. The court will not allow a restitutionary claim to substitute for the agreed contractual amendment process.
- **No oral modification clauses and scope-change provisions are powerful barriers to restitutionary claims:** The presence of a no oral modification clause and provisions specifically addressing how scope may be expanded will usually displace an unjust enrichment claim, even in respect of work that might otherwise fall outside the contract.
- **Vague assurances do not create a "shared basis":** Assurances of the kind "we will take care of you" or suggestions that additional payment would be considered were treated by the court as consistent with a discretionary bonus for work performed under the existing agreement, and were insufficient to establish the objectively shared conditional basis required for a failure of basis claim.
- **Pre-contractual negotiations cannot be used to restrict the meaning of a contract:** Evidence of pre-contractual communications may be admitted to illuminate surrounding circumstances and the commercial object of a contract, but it cannot be used to draw inferences about the meaning of its words.

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a clear consensus that if additional services were required, a written document would be needed, and this displaced any unjust enrichment claim based on the alleged provision of such services. The provisions also pointed significantly against any conclusion that the parties were operating on the joint basis alleged by R. R also sought to advance, in its closing submissions, a new and unpleaded case that there was a failure of basis where E had indicated it would pay a discretionary bonus but failed to do so. The judge declined to allow the point to be advanced at that stage, and in any event found that it failed to take account of the fact that E had offered a USD 1 million discretionary bonus at the end of the transaction; there could not be a failure of basis merely because R chose not to accept that offer. The court also held that it would be unjust to allow a claim for additional remuneration on a free acceptance basis. The parties were performing a written contract requiring scope changes to be agreed in writing, and R had therefore assumed the risk that additional work performed without a written variation would not be remunerated beyond any discretionary bonus E might choose to pay. (*RMK Maritime (Europe) Ltd and RMK Maritime Capital LLC v CMB.Tech NV (formerly Euronav NV)* [2025] EWHC 2739 (Comm))

Anti-avoidance clause in financial adviser engagement letter triggers full fee despite original transaction falling away

The court held that the fee provisions in an engagement letter between a UK financial adviser and a Cayman Island special purpose acquisition company (SPAC) were triggered even though the original transaction had not proceeded and the engagement had expired by effluxion of time.

The claimant, S, was engaged by C to assist it in achieving a US listing by way of a de-SPAC merger. S identified a potential merger partner, G, and agreed by an engagement letter to provide advice in connection with a proposed reverse takeover of C by G. The engagement had a 12-month term, expiring in July 2023. The transaction with G did not proceed and instead C completed a de-SPAC merger with a NASDAQ-listed company, M, assisted primarily by US advisers. The merger with M completed in September 2023. S claimed it should have been paid its cash fee of USD 2 million plus damages for the failure to deliver 6.5 million M shares (Carry Shares) pursuant to an anti-avoidance provision in the engagement letter. The court held that S succeeded on both heads, awarding the USD 2 million cash fee and USD 5 million damages in respect of the undelivered Carry Shares. The key provision dealing with remuneration was clause 5.6 of the Schedule of Terms and Conditions attached to the engagement letter, which provided for S to be remunerated "*where the Appointment is terminated for any reason, other than [for]…material breach …and the Transaction or…[an] Equivalent Transaction completes, within a period of twelve months after the effective date of termination of the Appointment (the Tail Period) or if an agreement is entered into during the term of the Appointment hereunder or within the Tail Period which subsequently results in a completed Equivalent Transaction*". The judge acknowledged that clause 5.6 addressed its purpose "rather clumsily, in an over-long first sentence with rather inelegant syntax". The court identified two separate limbs: Limb 1 addressed the scenario in which the Appointment was terminated early and an Equivalent Transaction completed within the Tail Period;

Key lessons

- **Separate distinct triggers into distinct sub-clauses:** The core problem in clause 5.6 was that two independent triggers for liability were collapsed into a single sentence, with only the word "or" separating them. The dispute could have been avoided by having each trigger appear in its own numbered sub-clause, with an explicit statement that either trigger independently gave rise to the payment obligation.
- **Use consistent and precise language throughout:** The engagement letter distinguished between "termination" and "expiry" elsewhere, yet clause 5.6 used "termination" as if it were a catch-all. Using that same distinction consistently (or expressly stating that the clause applies "whether the Appointment expires or is terminated") would have avoided the ambiguity.
- **Beware anti-avoidance provisions:** More broadly, the decision serves as a reminder to parties seeking to appoint new advisers mid-transaction that carefully drafted anti-avoidance provisions in existing engagement letters may continue to bite even after the original transaction has fallen away and the engagement period has expired.

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Limb 2 addressed the scenario in which an agreement was entered into during the term or within the Tail Period which later resulted in a completed Equivalent Transaction. C argued that early termination was a precondition common to both Limbs. The court rejected that submission, holding that the word "or" between the two limbs was a clear signal that Limb 2 described a distinct situation. The court also rejected C's arguments that any Equivalent Transaction had to involve G specifically, and that S had to have actually provided services in connection with it. The court characterised clause 5.6 as an anti-avoidance provision designed to protect S against the risk that C would avoid the obligation to pay remuneration—for example, by terminating the agreement early without cause and/or extending the time for completion of any Equivalent Transaction. Without clause 5.6, C could easily have sidestepped that obligation by completing a de-SPAC merger—as it in fact did—with a different counterparty through different advisers. A second area of dispute concerned the basis for assessing damages in connection with the failure to deliver the Carry Shares.

By the agreed valuation date (180 days post-completion), C's shares were thinly traded, illiquid and volatile, with insufficient trading volumes to sell 6.5 million shares in the public market at once. The court rejected C's argument that S had to prove on the balance of probabilities what it would actually have done with the shares. Instead the court had to make an assessment of their value based on the evidence available. In quantifying the loss the court applied the compensatory principle from *Robinson v Harman* (1848) 1 Exch 850 that the innocent party is, "*so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed*". The court considered three valuation methodologies, which produced a range of USD 3.5 million to USD 7.54 million, and assessed the loss to be USD 5 million. Upholding the claim, the court ordered C to pay the cash advisory fee of USD 2 million, and USD 5 million in respect of the damages for failure to deliver the Carry Shares. (*Strand Hanson Limited v Conduit Pharmaceuticals Limited* [2025] EWHC 3287 (Ch))

Listed companies

The following decisions are of particular interest to listed companies

FCA fines issuer for announcing inaccurate financial results

The Financial Conduct Authority (FCA) has censured a premium listed company (J) for announcing inaccurate financial results and failing to take reasonable steps to establish and maintain adequate procedures, systems and controls.

J was party to various fixed price turnkey contracts in the engineering, procurement and construction (EPC) sectors. J's half-year (HY) 2024 results included a USD 140 million exceptional charge for J's exit from these and large-scale EPC contracts. An auditor's review report was not required or included. In response to dialogue with its auditors, J announced an independent review and its share price fell by 60%. It fell a further 30% after J announced that, as a result of the review, it had identified "material weaknesses and failures in the Group's financial culture", including "inappropriate management pressure and override to maintain previous reported positions… and over-optimism and/or lack of evidence in respect of accounting judgments. The cultural failings appear to have led to instances of information being inappropriately withheld from, and unreliable information being provided to, [J's] auditors".

The FCA fined J £12,993,700 for breaching LR 1.3.3R (now UKLR 1.3.3R) and Listing Principle 1 (LR 7.2.1R, now UKLR 2.2.1R). J failed to comply with relevant accounting standards, made poor and/or over-optimistic accounting judgments

Key lessons

- **Accounting matters – Procedures and controls:** The FCA has again (as with Carillion plc) made clear that an issuer's obligation to maintain adequate procedures, systems and controls extends to ensuring compliance with applicable accounting standards.
- **Financial reporting – Procedures and controls:** The FCA said its Decision Notice to Carillion plc and Final Notice to Metro Bank PLC in 2022 should have led J and other listed firms to consider whether the risks identified in them might arise in their own businesses and what action to take as a result. Accordingly, J's breaches were aggravated.
- **No action against executives:** Unlike with Carillion plc and Metro Bank PLC, the FCA has not taken public enforcement action against J's executive directors. Its decision did not criticise any person other than J.
- **FCA focus on misleading information:** This is another example of FCA civil enforcement action against an issuer for failing to take reasonable care to ensure that announcements are not false or misleading.

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and failed to ensure that J's auditors were provided with sufficient information to fully assess certain accounting judgments. J failed to account properly for certain costs, assumed unrealistic cost savings, under-estimated future costs, attempted to inappropriately recognise additional revenue, released provisions and contingencies in order to offset losses elsewhere, failed to write off unsupportable debit balances, and recognised a USD 140 million exceptional charge in its HY 2024 results, a significant portion of which related to the above and were prior year accounting errors, but which were wrongly not characterised as such. Having commissioned an auditor review of J's HY 2024 results, J left its auditors (and its Audit, Risk and Ethics Committee) with insufficient time to properly review the proposed exceptional charge. The appropriate exercise of accounting judgments and compliance with accounting standards is critical to ensuring that investors are accurately and fully informed. A listed company should have in place procedures, systems and controls that provide clear, consistent and transparent reporting throughout the company. (*FCA final notice to John Wood Group PLC* – 3 March 2026)

Only announcement by an issuer can cleanse inside information

The ECJ held that information is only made public and accordingly ceases to be inside information when it is announced by an issuer.

A Swedish municipal authority awarded a contract to one of two tenderers. The losing tenderer was a Swedish listed company (H). The authority emailed the bidders and other interested persons to inform them at 14:34 (Email). A recipient at H forwarded the Email to OP, recommending that he sell his H shares. OP passed this on to TK. By 14:40 both had sold their H shares. H later issued a press release on its website and its share price fell sharply. OP and TK were convicted of insider dealing. They appealed, arguing that under Swedish freedom of information laws the Email was publicly accessible at the request of any interested party and accordingly the information in it had ceased to be inside information. The Supreme Court of Sweden referred certain questions to the European Court of Justice (ECJ) for a preliminary ruling.

Inside information must have "not been made public" (Article 7(1)(a) of the Market Abuse Regulation (EU) 596/2014 (EU MAR)). An issuer must inform the public as soon as possible of inside information which directly concerns it (Article 17(1) of EU MAR). The issuer of a financial instrument is best placed to determine whether information bears the hallmarks of inside information and to ensure the prompt dissemination of precise, complete and correct information. The public legitimately base their investment decisions on the information the issuer makes public. In order for information to be made public under Article 7(1)(a), public disclosure must have taken place in compliance with Article 17 and also Article 2(1) of Regulation (EU) 2016/1055. Disclosures of information by third parties appointed by the issuer for that purpose, using media in which the public has reasonable confidence, may satisfy these requirements. Information does not cease to be inside information merely because the outcome of a tendering procedure is communicated to a limited circle of recipients. The fact that any interested person could request access to a document is not tantamount to making that information public. (*"Brännelius" (TK & OP v Riksåklagaren)*, European Court of Justice, Case C-229/24, EU:C:2026:298)

Key lessons

- **Relevance in the UK:** While this decision relates to EU MAR, the equivalent wording in the UK Market Abuse Regulation is substantially the same. Accordingly, we expect the UK courts will have regard to this decision.
- **A surprising outcome:** The ECJ's decision conflicts with long-standing practice regarding how information can be made public and accordingly cease to be inside information. If followed by the UK courts this would cause significant issues where information which a reasonable investor is likely to use is widely available but has not been announced by an affected issuer under Article 17. This includes information regarding public events (e.g., closure of the Strait of Hormuz), changes in law or prices (e.g., commodities), or information in the issuer's IPO prospectus.
- **Inconsistent with EU MAR and EU guidance:** This decision seems inconsistent with Recital 28 of EU MAR ("Research and estimates based on publicly available data, should not per se be regarded as inside information") and ESMA's guidance that credit ratings cease to be inside information once disclosed on a credit ratings agency's website or to its subscribers. The Advocate General cited Recital 28 but the ECJ did not.
- **Inconsistent with UK guidance:** This decision is also inconsistent with UK Financial Conduct Authority guidance in MAR 1.2.12G to MAR 1.2.14G.

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Notification of inclusion on insider list disclosed inside information

The ECJ held that a notification of a person's inclusion on an insider list may (even if partly inaccurate) constitute inside information in certain circumstances.

The Chief Executive Officer (CEO) of a Swedish listed company (S) also owned another company (V). V obtained credit from an investment bank (C) in exchange for pledging shares in S. Following a fall in S's share price, C initiated a sale of the pledged shares. S's head of communications emailed C stating that CEO had been logged on S's transparency register (insider list) and could not sell (Email). A few minutes later, an insider list was opened and CEO was registered in it. The sale of S shares was temporarily suspended but resumed that afternoon. The Swedish regulator sought to fine C about €3.05 million for insider dealing. The Supreme Court of Sweden referred certain questions to the ECJ for a preliminary ruling.

The alleged inside information (contained in the Email) was that CEO had just been placed on S's insider list and could not sell S's shares. "Inside information" is sufficiently precise if it: (1) indicates circumstances or an event which exist or has occurred (or may reasonably be expected to); and (2) is specific enough to enable a conclusion to be drawn as to their possible effect on the prices of financial instruments (Article 7(2) of EU MAR). Regarding condition (1), information which turns out to be incorrect (or partly so) may constitute inside information if it can be established that, on the date when it was disclosed, it could be regarded as being credible and it was capable of conferring an economic advantage on the person possessing it in relation to other investors. Regarding condition (2), stating that a person has been included in an insider list is not, by itself, sufficiently precise. However, the Email said CEO was prevented from selling S shares, implying CEO knew of an event with adverse implications for S. A communication from an issuer to the effect that a person has been included on an insider list and is prevented from selling shares in that issuer, even if the reasons for their inclusion are not clear, is capable of being information of a precise nature, provided it can be established that a reasonable investor would be likely to use that communication as part of the basis of their investment decisions. (*Finansinspektionen v Carnegie Investment Bank AB*, European Court of Justice, Case C-363/24, EU:C:2026:215)

Key lessons

- **Relevance in the UK:** While this decision relates to EU MAR, the equivalent wording in the UK Market Abuse Regulation is substantially the same. Accordingly, we expect the UK courts will have regard to this decision.
- **Communicate carefully with non-insiders:** It seems no offence would have been committed if the Email had just said that CEO could not deal in S shares. The ECJ focused on the reference to possible sales. If a non-insider must be informed that inside information exists, then communications with them should be worded neutrally and with care.
- **Accuracy versus credibility:** There is a tension between the ECJ's objective approach to inside information and its decision that inside information can include (objectively) incorrect information which a reasonable investor could regard as credible. This implies that credible but wholly false rumours could constitute inside information, which does not seem right.
- **Precision versus price sensitivity:** The ECJ considered that information which satisfies the test of price sensitivity must be regarded, as a general rule, as satisfying the test of precision. This seems to unhelpfully conflate two separate requirements.

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