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2018 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 Scottish court decisions and market developments which have taken place and their impact on M&A transactions. This review looks at these developments and gives practical guidance on their implications. Summaries feature below, and you can click where indicated to access more detailed analysis.

Contractual provisions

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

"No oral variation" clause binding

The Supreme Court recently overturned an earlier Court of Appeal decision and decided that "no oral variation" clauses are effective. This means that a purported variation of an agreement which does not meet the requirements of such a clause will not work. On the facts, the result was that an alleged oral variation did not succeed.

The relevant clause stated that "*All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect*". The licensee was in arrears of fees and proposed a revised schedule of payments. The licensee alleged that the operator had agreed orally to vary the licence, whilst the operator argued that the revised schedule was merely a proposal. The Supreme Court decided that the "no oral variation" clause was effective and the purported variation had not worked. The Supreme Court said that any other interpretation would override the parties' intentions. Whilst party autonomy and freedom of contract operate up to the point when a contract is made, beyond that stage they apply purely to the extent the contract allows. The Supreme Court emphasized that "no oral variation" clauses are commonly used and have a number of key benefits. They: prevent attempts to undermine written agreements informally; avoid misunderstandings and disputes over whether the parties meant to vary the contract and on exactly what terms; and make it easier for parties to police internal rules around authorities required for variation. Contract law would not

Key lessons

- **Important to follow express stipulations of a variation clause**: To be effective, a variation must comply with the express requirements of the clause.
- **Internal procedures for authorising variations**: Parties should have clear internal procedures for authorising contract variations and should be scrupulous in specifying when discussions are subject to contract. By upholding "no oral variation" clauses here, subject to the limited parameters around which estoppel might be raised as a defence, the judgment makes it easier for parties to police such processes. When drafting agreements, it can also help to define "in writing" to exclude communications by email, so as to establish that variation by email is caught by the prohibition and minimise consequences from employees exceeding their remit in email exchanges.

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override these. The risk that a party might act on a purported variation and then be unable to enforce it should, instead, be protected against the counterparty by the doctrine of estoppel. However, the minimal steps which the licensee had taken were not enough to support an estoppel defence. In the very least you would need words or conduct to establish that the variation was valid notwithstanding its informality, not just the purported substantive variation itself. (*Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24)

Notices of claim: satisfying contractual requirements

The Court of Appeal has upheld an earlier High Court decision that a buyer's alleged warranty and tax covenant claims under an SPA were barred because letters served on the sellers did not meet the requirements for valid notices of claim under the seller limitations in the SPA.

B had acquired two companies and their subsidiaries from S. The alleged claims related to tax exposures of a Brazilian subsidiary in relation to inter-company arrangements and a Philippines subsidiary in relation to withholding tax payments on invoices. The issue was whether letters which B served on S complied with the claims notification requirements in the sale and purchase agreement (SPA). The seller limitations in the SPA said: S would not be liable for a claim unless B had given notice of it setting out "*reasonable details of the Claim, including the grounds on which it is based and the Purchaser's good faith estimate of the amount of the Claim*". B served two letters which purported to be notices of claim but only referred generically to "tax warranties", "general warranties" and "the tax covenant", without specifying particular warranties or provisions of the tax covenant it alleged were breached. The Court of Appeal dismissed the appeal and upheld the High Court decision that these failed to satisfy the SPA's requirements for valid notices of claim, because they did not identify the particular warranties and provisions of the tax covenant on which the claims were based. This was not enough, because the requirement to specify the "*grounds on which [the claim] is based*" meant that the legal basis of the claim had to be identified. Whilst the phrases "tax warranties", "general warranties" and "tax covenant" would have included the relevant warranties and other provisions, they were alone insufficient because they also encompassed a multitude of other possibilities. These conclusions were also consistent with the importance of certainty. The Court of Appeal also denied that the seller limitations should be construed narrowly in B's favour, as the language used led to the conclusion that B had to specify the material warranties or other provisions the subject of the claims. (*Teoco UK Limited v Aircom Jersey 4 Limited and another* [2018] EWCA Civ 23)

Key lessons

- **Strict construction of buyer's obligations under seller limitations**: The judgment highlights to buyers that they can expect a strict construction of their notification obligations under the seller limitations in an SPA.
- **Contra proferentem rule less relevant**: The judgment is also in line with other recent case law that the historic "contra proferentem" rule, requiring an exclusion clause to be interpreted against the party relying on it, now has limited place in commercial contracts between parties of equal bargaining power, and is only relevant in this context where the wording is ambiguous.

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Contractual interpretation and valid termination of licence agreement on disclosure in breach of confidentiality clause

The Court of Appeal has dealt with some issues of contractual interpretation and also decided that a licence agreement had been validly terminated on disclosure to a third party in breach of a confidentiality clause, where the agreement conferred an express termination right in these circumstances.

Company C went into administration. C entered into one SPA with X for the sale of assets of two of its divisions, and a second SPA ten days later with Y, for the sale of the rest of its divisions. X and Y were both new companies formed by former directors of C. Each SPA covered the sale of intellectual property rights (IPR) used in the business, but the

Key lessons

- **Express termination provisions**: What matters is what the parties have said about when an agreement can be terminated. Where a contract clearly sets this out, the court will uphold their bargain.
- **Supremacy of natural language**: The judgment reaffirms that commercial common sense should not be used to undermine the natural meaning of the language used.
- **Implication of terms**: The test for implying a term is whether it is needed to give business efficacy to the contract, not whether it fits the business purposes of a particular party.

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drafting was unclear in relation to IPR acquired by Y under the second SPA. X subsequently agreed to licence Y some of the IPR formerly owned by C. The licence agreement gave an express termination right on breach of the confidentiality clause in the agreement. Y was acquired by a competitor of X and disclosed the licence agreement to the prospective buyer. X terminated the licence agreement. The Court of Appeal decided that X was the owner of all the IPR in the businesses sold. It denied Y's argument that, as both SPAs were made as part of the same administration, they should be read together so that each of X and Y acquired the IPR required for the parts of the business it bought. The second agreement could not be used to interpret the first agreement, because subsequent conduct of signatories and, even less, third parties after an agreement is entered into cannot affect the interpretation of that agreement. The natural language of the SPA with X did not suggest division of IPR by purpose. The Court of Appeal stated that Y's interpretation of the agreements placed too much emphasis on commercial common sense over the natural meaning of the language used. The Court of Appeal also decided that X was entitled to terminate the licence agreement. It refused to imply a term that Y could disclose the licence agreement for reasonable business purposes and that this would include disclosure to a potential buyer. This was not necessary to give business efficacy to the contract, nor so obvious that it went without saying, and so failed the test for implying a term. A sale of a business was not a necessary business purpose of the contract and, in any event, a share sale by Y's shareholders was not a business purpose of Y at all. Even if X had been prepared to agree to it, the precise limits of permission to disclose would have needed careful negotiation. (*Kason Kek-Gardner Ltd v Process Components Ltd* [2017] EWCA Civ 2132)

Rectification of SPA and disclosure letter for common mistake

The High Court rectified an SPA and related disclosure letter to reflect the parties' common intention that two properties, which were not owned by the target group and had been omitted from the sale, should in fact have been covered and fall within the warranted properties.

P entered into an SPA to acquire a site from various individuals to develop it. Under the SPA P bought two companies, one of which had a wholly-owned subsidiary which held options over four plots on the site. However, the site comprised six plots, where the two further plots gave access to the site and belonged to a different company which the sellers owned (X) and which was not in the target group. The SPA contained warranties as to the title to the "Properties" and that, where the relevant target company did not own them outright, it had an enforceable contractual right to acquire them. Taking into account the terms of the SPA, the disclosure letter and a data package provided to P, the High Court decided as a matter of contractual interpretation that the missing plots did not fall within the warranted properties applying the natural meaning of the language used. However, the High Court allowed the SPA and disclosure letter to be rectified, to bring the missing plots within the definition of properties and facilitate warranty claims. It decided that both the documents in the data package and the parties' correspondence during their negotiations demonstrated a common intention between P and the sellers that P would acquire all six plots. Key factors were that: the missing plots were referred to in the original information memorandum and in the ultimate data package provided to P; both P's indicative and final offers had clearly covered, and included a price for, the whole site; and the court was satisfied that the sellers understood that P intended to acquire the full site. Some specific disclosures in the disclosure letter over ownership of the missing plots were also rectified to exclude them from the disclosures and facilitate warranty claims. An appeal hearing is awaited in relation to the judgment. (*Persimmon Homes Limited v Hillier and others* [2018] EWHC 221 (Ch))

Key lessons

- **High standard of proof**: A high standard of proof must be satisfied to meet the evidential requirements for a successful rectification claim. The High Court took the view that this was satisfied in this case, and was even prepared to rectify the related disclosure letter.
- **Clear and unambiguous drafting needed**: The judgment serves as a reminder of the importance of clear and unambiguous drafting on the assets the subject of a sale and/or within the scope of warranties.

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Company law

There have been some particular cases of interest on a range of company law issues

No arguable case that parent company owed duty of care in relation to operations of subsidiaries abroad

Two recent Court of Appeal decisions have upheld earlier High Court decisions that there was no arguable case that a UK parent company owed a duty of care to third parties in relation to the operations or activities on the property of its overseas subsidiaries abroad.

In the first case, two large groups of claimants in Nigeria brought claims against UK parent company R plc and a Nigerian company in its group (S). The claimants alleged environmental damage by a joint venture operated by S in Nigeria. R was not a member of the JV but was S's ultimate holding company. It was alleged R had breached a duty of care to the claimants arising from control it had exercised over S's operations. The Court of Appeal upheld the High Court decision that there was no arguable case that R owed the claimants a duty of care by a majority (Sir Geoffrey Vos and Simon LJ, with Sales LJ dissenting). A duty of care may arise where the parent company has either taken direct responsibility for implementing a policy the adequacy of which is the subject of the claim, or controls the operations which give rise to the claim. Policies which could give rise to this include: issuing mandatory policies, standards and manuals which apply to a subsidiary; a system of supervision and oversight in implementing the parent's standards; financial control over the subsidiary in respect of spending; and a high level of direction and oversight of the subsidiary's operations. By contrast here, the parent company had just issued mandatory policies and standards to ensure conformity and best uniform practices across the operations and countries in which the group did business. These applied to all subsidiaries equally. This alone could not mean that a parent had taken control of a subsidiary's operations, such as to give rise to a duty of care in favour of anyone affected by the policies. You would need something more specific to create the necessary proximity to trigger a duty of care, such as actually enforcing the policies on the subsidiary. Application has been made for permission to appeal the judgment. (*HRH Okpabi and another v Royal Dutch Shell Plc* [2018] EWCA Civ 191)

Key lessons

- **Test applied from past case law**: The judgment applies the test from past case law to determine whether the parent had assumed responsibility to the third party, taking into account whether the damage was foreseeable, there was sufficient proximity between the parties and it was fair, just and reasonable to impose a duty.
- **Separate operations**: It remains advisable for parent companies to run subsidiaries as separate operations, and issue group policies to all subsidiaries equally, to minimise the risk of assuming responsibility to third parties for a subsidiary's operations or activities.

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In the second case, the Court of Appeal decided that it was not arguable that U Plc owed a duty of care to protect employees and local residents on a tea plantation owned and operated by its Kenyan subsidiary (K) from violence from third parties following a presidential election. It had been argued that U had assumed a duty of care by giving relevant advice to K about how it should manage risk in respect of political unrest and violence in Kenya. The Court of Appeal decided that there was no good arguable claim against U on this basis. The evidence showed that K did not receive advice on these matters and that it understood it was responsible itself for devising its own risk management policy. (*AAA and others v Unilever Plc and another* [2018] EWCA Civ 1532)

Invalid solvency statement for private company reduction of capital and directors' breach of duty

A private company's pre-liquidation reduction of capital to £1 supported by solvency statement, and subsequent payment of a £21m dividend, were void because the director signing the solvency statement had not properly considered whether the company would be able to pay its debts as they fell due over the next twelve months. The directors were also in breach of duty for wrongful payment of the dividend.

A private company (C) carried out a reduction of capital by solvency statement. C was non-trading, but had two trading subsidiaries (R and E). C reduced its capital to £1, cancelled its share premium account and capital reserve and paid a dividend of £21.3 million to its holding company (H), to be satisfied by the transfer of R and E and various credit and debit balances. These were transferred to company A. Two of C's directors held significant shareholdings in both A and H. C remained tenant of leasehold property. C's ability to pay the rent largely depended on licence fee income from occupiers of the property, which included R, E and a past subsidiary of H. C could not meet its liabilities under the lease and went into liquidation little over a year later. The court decided the solvency statement was void because the director signing it (D) should have asked himself whether C could pay its debts at the date of the statement and would continue to be able to do so as they fell due over the next 12 months. Instead, he had focused on whether H and another of its subsidiaries (S) could do so. Payments and assets to which C was not legally entitled could not be taken into account. Resources of H and S were irrelevant, because they were not assets to which C was entitled and D should not have set store on the hope of financial support from other companies. D was also in breach of duty in signing the solvency statement in these circumstances. It would have been enough if D had honestly formed the opinions stated, provided that he had applied the correct test in doing so. C's finance director was in breach of his statutory duty to exercise reasonable care, skill and diligence as well as the duty to promote the success of the company, even though he had resigned just before the capital reduction was considered and the solvency statement made, because he had been involved in setting up the arrangements without protecting C's interests. His duties as director had extended to the foreseeable consequences of the actions he took. A third director, who had been appointed after the solvency statement was made but before the dividend was paid and the restructuring transactions concluded, was also in breach of duty. He had participated in the resolutions to implement the transactions without satisfying himself that they were in C's interests. (*LRH Services Limited v Trew and others* [2018] EWHC 600 (Ch))

Key lessons

- **Unlawful transactions and severe consequences**: The judgment highlights the severe consequences of an invalid solvency statement – transactions pursuant to it are unlawful, and the directors were personally liable to the company for the full amount of the assets unlawfully paid away.
- **Solvency statement requirements**: It is a useful judgment which discusses in detail the requirements for a valid solvency statement to support a private company reduction of capital.

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Directors' duties and creditors' interests duty

The High Court decided that two directors who had caused a private company, which subsequently went into liquidation, to adopt a scheme to avoid tax on their remuneration and applied three credit entries against their loan accounts with the company, had breached their duty to take into account the interests of the company's creditors in an insolvency or near insolvency situation.

The company (C) was wholly-owned by its two directors. The directors did not have an employment contract with C. Instead, they awarded themselves significant management fees under loan accounts. Certain credits were made to the directors' loan accounts without approval as shareholders, in breach of C's articles of association. These required directors' remuneration to be determined by the company by ordinary resolution, which had not happened. C's liquidators (L) alleged that the directors were in breach of duty in procuring the transactions and the High Court decided in favour of the liquidators. The shareholders' unanimous consent principle, that a company's shareholders can by their unanimous consent bind the company to any act within its capacity, was

Key lessons

- **Creditors' interests duty**: As this had been triggered, the directors were not free to take action which put at real (rather than remote) risk the creditors' chances of being paid.
- **Unanimous consent principle**: It is clear that the shareholders' unanimous consent principle does not apply once the creditors' interests duty is triggered; breach of the creditors' interests duty cannot be ratified by shareholders.

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not relevant, because the directors had not applied their mind to approving the transactions. In any event, the unanimous consent principle did not apply because C was insolvent, meaning that the creditors' interests duty applied instead and had been breached. Breach of this duty cannot be ratified by shareholders. The effect was that the directors were not free to take action which put creditors at real risk of not being paid without first having considered creditors' interests rather than those of the company. Whilst ordinarily directors' statutory duty to promote the success of the company is subjective, it becomes an objective test in certain situations, such as where the interests of creditors are paramount or a significant interest (for example, a large creditor) has been overlooked. The objective test applied here, namely, whether an intelligent or honest person in the position of a director could reasonably have believed that the credits were in creditors' best interests. That test had not been satisfied. The directors had also breached their statutory duty to exercise their powers for a proper purpose and committed misfeasance under the UK Insolvency Act 1986. (*Ball (Liquidator of PV Solar Solutions Ltd) v Hughes* [2017] EWHC 3228 (Ch))

Cross-border merger rules applied and no artificial device

The Court of Appeal has allowed a cross-border merger, overturning the earlier High Court decision that the presence of a single non-UK (Dutch) company in the arrangement had just been a device and that there was no true cross-border merger taking place.

It was proposed in this case that all of the UK companies, along with one Dutch company (BV) within the relevant group, should merge into UK company C through a merger by absorption. BV, the only non-UK EEA company in the proposed merger, was a dormant company, had never traded and had no relevant assets, liabilities, employees or other obligations. Under the Companies (Cross-Border Mergers) Regulations 2007 (Regulations), to qualify as a "merger by absorption" there must be an operation where one or more transferor companies is dissolved without going into liquidation and transfers all its assets and liabilities to an existing transferee company, involving a merger of at least one UK company and one EEA company. The Court of Appeal decided that the proposed transaction qualified as a cross-border merger falling within the scope of the Regulations and the underlying directive on cross-border mergers (Directive). The cross-border merger regime was created to promote freedom of establishment. There is nothing in either the Directive or the Regulations to allow a court to reject a proposed merger on the basis that it lacks what it regards as a true cross-border element, nor for any reason other than objectives of protecting the interests of members, creditors and employees (at merger review and final approval stages). Indeed, it would be a material restriction on the right of freedom of establishment if the UK cross-border mergers regime impeded a company in another member state from participating in a cross-border merger where it was a foreign subsidiary of a UK company which had operations on a smaller scale or was dormant, compared to a merger involving a more substantial foreign subsidiary. The court acknowledged that corporate groups often undertake cross-border mergers to reorganise their affairs so as to achieve cost savings and minimise tax. That was not an abuse of law. Corporate groups needed legal certainty, which militated in favour of giving the Directive's provisions a straightforward interpretation according to their natural meaning. (*Re Easynet Global Services Limited* [2018] EWCA Civ 10)

Key lessons

- **Flexibility**: Companies have wide flexibility when structuring a transaction as a cross-border merger under the Regulations. A cross-border element is not required beyond the requirement to involve at least one non-UK EEA company and one UK company.
- **Commercial objectives**: Purely commercial objectives in adopting this structure are not an obstacle to implementing a cross-border merger.

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Listed companies

Two rulings by the court and the FCA respectively are of particular interest to listed companies

Order to make mandatory offer at below market price

The Scottish Court of Session ordered a shareholder to make a mandatory cash takeover offer for Rangers International Football Club Plc (R) under Rule 9 of the UK Takeover Code, even though the offer price was below market value, on the Takeover Panel's application to enforce compliance with an earlier ruling of the UK Takeover Appeal Board (TAB).

The TAB had previously ruled that a shareholder, K, had acted in concert both with other individuals and with a company connected to his family trust (N) in the acquisition of shares in R which had taken their collective holding over 30%. The TAB had ordered K, as principal member of the concert party, to make a mandatory Rule 9 cash offer at the acquisition price of 20p per share, even though the current share price was 25p and there was no financial benefit to shareholders. When the offer was not made, the Takeover Panel applied for a court order pursuant to its statutory enforcement right under section 955 of the UK Companies Act 2006 to compel K to make the mandatory offer. K argued that he should not be required to make the offer both because he had insufficient funds to do so and that the proposed order would not serve any purpose as shareholders would not benefit financially. The court rejected these arguments and granted the order to compel K to make a mandatory cash takeover offer for R. The court said it was not concerned with a review of the TAB ruling or an appeal against it. The court would rarely decide against enforcing such a ruling. In the least there would need to have been a material change in circumstances, such as insolvency of the offeror or a third party offer being made. K's argument that he had insufficient funds was an irrelevant consideration. In any event, K had known both that a mandatory offer would be required and what his financial position was when the shares in R were originally acquired by the concert party. The court found that not to grant the application on the basis of K's alleged impecuniosity would materially undermine the workings of the Panel and allow parties to arrange their affairs in a way to circumvent the requirements of the Code on mandatory offers. It would also undermine the Code principle of fair treatment of shareholders so that they can decide for themselves on the merits of a bid. In any event, the discrepancy here between offer price and current market value was not great and was not necessarily decisive, particularly as shareholders in a football club could be driven by non-economic considerations. (*Panel on Takeovers and Mergers v David King* [2018] CSIH 30 (28 February 2018))

Key lessons

- **Fair treatment of shareholders**: The case confirms the Panel's commitment to ensuring fair treatment of shareholders under the UK Takeover Code.
- **Determination by shareholders**: Mandatory offers are fundamental to fairness by giving shareholders the chance to sell where control has shifted, even where the offer may be unlikely to be taken up.
- **Enforcement ability through court order**: This is the first use of the Panel's right to obtain a court order to enforce its powers (here, to compel the mandatory offer).

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FCA fine for failing to inform market of inside information

The UK Financial Conduct authority (FCA) published a final notice fining an AIM-quoted closed-ended investment company for failing to inform the market as soon as possible of inside information as required by Article 17(1) of the Market Abuse Regulation (MAR).

A self-managed closed-ended investment company (T), traded on AIM, had a 10.1% shareholding in S which T valued at US$3.35 million. This investment was subject to a drag-along provision which was triggered as part of a takeover by B. On 12 July 2016 T had been notified that several of S's major shareholders intended to trigger the drag-along clause, requiring T to sell its shares in S for no initial consideration, but with the possibility of receiving deferred consideration in the future that was considerably less than T's valuation.

Key lessons

- **Prompt disclosure of inside information**: This case emphasizes the need for issuers to promptly disclose inside information and to have processes in place to identify inside information. Misunderstanding the commercial reality of a transaction is no excuse. The case also highlights the importance of prompt consultation with the nomad.
- **First enforcement action against AIM company**: The case is the first enforcement action taken by the FCA against an AIM company for failing to meet its obligations under MAR to promptly disclose inside information.

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Following execution of the SPA on 28 July and completion of the transfer of T's shareholding on 10 August, B and S both issued press releases on 11 August which did not refer to T and were not issued via a regulatory communications channel. T did not release an announcement. T's share price subsequently began to rise, resulting in a 38% increase over two days. This coincided with online bulletin board speculation over the amount of consideration T would receive. It prompted enquiries from the London Stock Exchange, to which T responded that it did not hold inside information, was unaware of any reason for the price rise and had not sold its shares in S (based on a misunderstanding of the SPA). Following investigations by T's nomad, T issued an announcement on 24 August that it had received no consideration for the shares and could not determine whether it would receive any future consideration. T's share price fell by 13% on the day of the announcement. The FCA found that T had breached Article 17(1) of MAR because it had not informed the public as soon as possible after 12 July of inside information that directly concerned it. The information that it had at that date was of a precise nature for the purposes of MAR, as it was specific enough to enable a conclusion that a possible effect of the transaction with B would be a negative effect on T's share price. Had this information been made public it would have had a significant effect on price. The FCA emphasized that prompt disclosure of inside information is vital for maintaining investor confidence in the integrity of the financial markets. T's breach of Article 17(1) of MAR had created a false market in its shares and the investors who had traded in its shares in the relevant period had done so on the basis of materially incomplete information. The FCA increased the fine from £8,617 to £100,000 in order to achieve a deterrent effect, reduced to £70,000 for early settlement. (*FCA Final Notice, Tejoori Limited*, 13 December 2017)

Good faith

A recent case has looked again at contractual duties of good faith and the relationship between contracting parties

Breach of implied duty of good faith in oral joint venture agreement

The High Court implied a duty of good faith into an oral joint venture agreement and decided that a shareholder had breached this in obtaining his joint venture partner's consent to enter into agreements for demerger and repayment of capital contributions. The partner had also been induced to enter into the agreements by duress.

Two individuals, K and S, entered into an oral agreement whereby S invested in K's business as an equal shareholder. The business ran into severe financial difficulties and S invested additional funds, increasing his share to 70%. S and his representatives decided that S should not support the business any more and should instead separate his interest from that of K. They decided to restructure the business and provide for K to repay part of S's capital contribution. Following meetings, correspondence and alleged threats of physical violence, K entered into a framework agreement (which provided for the demerger of the business, as a result of which S would hold the key assets) and a promissory note (by which K agreed to repay S's capital contribution in annual instalments). Further, while these arrangements were under discussion, S had privately been negotiating to sell his interests in the business to a third party. S sued K for non-payment of sums owed under the agreements. The High Court decided that neither party was entitled to recover any money from the other, on the basis both that the agreements had been entered into as a result of duress and breach of a contractual duty of good faith which S owed K. Whilst accepting that fiduciary duties could in principle arise between parties to a joint venture, the court decided S had not owed K fiduciary duties in this case. Their relationship was a purely commercial one in which S was entitled to decide whether to invest further on the basis of his own judgments of what would be in his own best interests. S had not undertaken to act for or on behalf of K in any way. However, Leggatt J decided that the parties' joint venture was a classic example of a "relational contract" into which a duty of good faith should be implied. S had breached this by agreeing or entering into negotiations to sell his interest, or part of his interest, to a third party without informing his joint venture partner and using his position as shareholder to obtain a financial benefit for himself at the expense of that partner. The parties' collaboration had been formed and conducted on the basis of a personal friendship and involved greater mutual trust than is inherent in an ordinary contractual bargain between shareholders in a company. (*Al Nehayan v Kent* [2018] EWHC 333 (Comm))

Key lessons

- **Narrow application**: The facts were unusual here in that overt bad faith and duress were exercised and the joint venture agreement was oral only. The court was influenced by the close relationship between the parties and the lack of a written joint venture agreement.
- **Express provisions needed**: The case highlights the importance of having express properly-formulated written arrangements between joint venture shareholders on funding, exit, resolution of deadlock and share transfer requirements.

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