Neutral Citation Number: [2021] EWHC 2544 (Comm)

Case No: CC-2021-CDF-000003

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN WALES
CIRCUIT COMMERCIAL COURT (QBD)

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 24 September 2021

Before:

HIS HONOUR JUDGE KEYSER QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

(1) RICHARD LORD **(2) IAN DAVIES**	**Claimants**
- and -	
(1) MAVEN WEALTH GROUP LIMITED **(2) LESLIE JAMES CANTLAY** **(3) WESLEY LLOYD BERNARD NIXON** **(4) ADAM EDWARD SKETCHLEY** **(5) TONY SPAIN** **(6) INDEPENDENT WEALTH PLANNERS UK LIMITED**	**Defendants**

- -
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Hugh Sims QC and **James Hannant** (instructed by **Harrison Clark Rickerbys Limited**) for the **Claimants**
Henry King QC (instructed by **Squire Patton Boggs (UK) LLP**) for the **Defendants**

Hearing date: 15 September 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HIS HONOUR JUDGE KEYSER QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10.30 a.m. on 24 September 2021.

JUDGE KEYSER QC:

1. This is my judgment upon issues concerning the proper interpretation of the Articles of Association of the first defendant, Maven Wealth Group Limited ("MWGL"). The issues are raised by a Part 8 claim commenced by the claimants, Mr Richard Lord and Mr Ian Davies, on 20 May 2021. In accordance with the agreement of the parties, by an order dated 29 May 2021 I directed that the issues concerning the interpretation of the Articles of Association and all related declaratory and injunctive relief be tried and that the remaining issues in the case be stayed with liberty to restore.

2. I am grateful to Mr Sims QC and Mr Hannant, counsel for the claimants, and to Mr King QC, counsel for the defendants, for their helpful written and oral submissions.

The Background

3. MWGL was incorporated on 30 June 2016 and is engaged in the business of providing financial advisory services. The current directors of the company are the second, third, fourth and fifth defendants (together, "the Director Defendants"). The majority shareholder in MWGL is the sixth defendant, Independent Wealth Planners UK Limited ("IWP"). MWGL is the sole shareholder in Maven Wealth Management Limited ("MWML").

4. The claimants are minority shareholders in MWGL. Formerly, they were majority shareholders in MWGL and directors both of MWGL and of MWML; they were also employees of MWML. By a Share Purchase Agreement dated 1 August 2019 they sold their A and C ordinary shares respectively in MWGL to IWP, retaining only their B ordinary shares ("B shares"). However, they remained directors of MWGL and MWML and employees of MWML.

5. Two other documents were executed on the same date as the Share Purchase Agreement: (1) new Articles of Association of MWGL ("the Articles"); (2) a Call Option and Shareholders Agreement ("COSA"), which was made between IWP as "the Buyer", the claimants and one other person (the fourth defendant) as "the Sellers" and MWGL as "the Company". On 28 January 2020 the Articles were amended by unanimous agreement of the members, and a Deed of Variation was executed in respect of COSA. Further references in this judgment will be to the texts of the Articles and of COSA as amended.

6. On 3 April 2020 the claimants were removed as directors of MWGL and MWML and were suspended from their employment with MWML. On 18 June 2020 they were dismissed from that employment on the grounds of gross misconduct. The lawfulness of those dismissals is disputed and is currently the subject of claims for unfair dismissal before the Employment Tribunal.

7. It is common ground between the parties: (1) that the dismissal of the claimants from their employment with MWML, whether lawful or not, constituted a "Transfer Event" for the purposes of the Articles of MWGL; (2) that, by giving notice to MWGL that it was treating their dismissal as a Transfer Event, IWP as the majority shareholder became entitled to require the claimants to transfer their B shares to the other members

at a price determined in accordance with the Articles; (3) that IWP gave valid notice for that purpose by a letter dated 18 February 2021 to MWGL; and (4) that the price for the B shares is to be determined by reference to their "Fair Value" as defined by the Articles—whether the price be the Fair Value itself or only a proportion of it. The issue before me concerns the construction of the provisions that determine the processes by which the shares are to be valued.

The Articles of Association

8. Article 7 of the Articles is headed "Compulsory Transfers". The relevant provisions of Article 7.1 are as follows:

> "[I]n this article 7 each of the following shall be a Transfer Event in relation to a Member holding B shares:
>
> 7.1.1 in the case of an individual Member:
>
> …
>
> (i) that Member, being an employee or director of, or a consultant to, a Group Company, ceasing to be such an employee, director or consultant … where the Member does not remain or immediately become an employee or director of, or a consultant to, another Group Company …"
>
> and in any such case … a Member Majority [that is, a majority shareholder] notifying the Company within 5 years of the occurrence of such event … that such event is a Transfer Event in relation to that Member for the purposes of this article 7."

Article 7.2 provides:

> "Upon a Member Majority notifying the Company that an event is a Transfer Event in respect of a Member in accordance with article 7.1, the Relevant Member and any other person holding Compulsory Transfer Shares shall be deemed to have served a Transfer Notice (a Compulsory Transfer Notice) in respect of all the Compulsory Transfer Shares held from time to time by each of them respectively. …"

9. The dismissal of the claimants from their employment with MWML was a "Transfer Event" under Article 7.1.1(i). IWP's letter of 18 February 2021 was valid notice under Article 7.2 and entitles it to require the transfer of the claimants' B shares in MWGL ("Compulsory Transfer Shares").

10. Articles 7.3 and 7.4 provide as follows:

> "7.3 The Compulsory Transfer Shares shall be offered for sale in accordance with the provisions of article 5.3 as if the

> Compulsory Transfer Shares were Sale Shares except that where the relevant Transfer Event falls within the provisions of article 7.1.1(i), the Transfer Price in respect of the Compulsory Transfer Shares shall be.
>
> > 7.3.1 Where the Relevant Member is a Bad Leaver, the Bad Leaver Price; or
> >
> > 7.3.2 where the Relevant Member is a Good Leaver, their Fair Value.
>
> 7 4 Any dispute as to whether the provisions of article 8.3.1 [scil. 7.3.1] or 7.3.2 apply in relation to any Compulsory Transfer Notice shall not affect the validity of a Compulsory Transfer Notice nor shall it delay the procedure to be followed under article 5.3 in respect of such notice."

11. IWP's letter of 18 February 2021 asserted that the claimants qualified as "Bad Leavers", on account of misconduct, and that their shares should be valued according to the provisions regarding Bad Leaver Price (which is 25% of Fair Value). Consideration of the question whether the claimants are Bad Leavers has been stayed for the time being; the claimants contend that it cannot sensibly be addressed until the conclusion of the proceedings in the Employment Tribunal.

12. The reference in Articles 7.3 and 7.4 to "article 5.3" is an obvious mistake, which arose because of a failure to carry through consistently the renumbering of earlier drafts of the Articles. The relevant provisions are in Article 6.1.3 and Article 6.2.

> "6.1.3 Where a Transfer Notice is one which is deemed to have been given by virtue of any provision of these Articles (including a Compulsory Transfer Notice deemed to have been served in accordance with article 7.2):
>
> > (a) it shall relate to all the Shares registered in the name of the Seller;
> >
> > (b) it shall not contain a Total Transfer Condition,
> >
> > (c) subject to article 7.3, the Transfer Price shall be such price as may be agreed between the Seller and the Directors, with the consent of a Member Majority, within 10 Business Days of the date of service (or deemed service) of the Transfer Notice or if either no price is agreed within such period or a Member Majority directs at any time during that period, the Fair Value determined in accordance with article 6.2.2,
> >
> > (d) it shall be irrevocable; and
> >
> > (e) subject to articles 4.5 and 7.6, the Seller may retain any Sale Shares for which Buyers (as defined in article 6.5.2)

> are not found provided that the Seller shall not at any time thereafter be permitted to transfer all or any of such retained Sale Shares pursuant to article 5."
>
> "6.2.1 The Sale Shares will be offered for sale in accordance with this article 5.3 [sic] at the following price (the Transfer Price):
>
> (a) subject to the consent of a Member Majority, the Proposed Price; or
>
> (b) such other price as may be agreed between the Seller and the Directors, with the consent of a Member Majority, within 10 Business Days of the date of service (or deemed service) of the Transfer Notice; or
>
> (c) if no price is agreed pursuant to article (b) within the period specified in that article, or if a Member Majority directs at any time during that period, whichever is the lower of (i) the Proposed Price and (ii) the Fair Value.
>
> 6.2.2 If the Seller and the Directors are unable to agree on the Transfer Price in accordance with article 6.2.1(b) a Member Majority directs in accordance with article 6.2.1(c) (or article 6.1 3(c) in the case of a Transfer Notice which is deemed to have been given by virtue of any provision of these Articles), the Directors shall instruct the Expert to determine and certify the Fair Value of the Sale Shares.
>
> 6.2.3 Where in the case of a Transfer Notice which is deemed to have been given by virtue of any provision of these Articles, the Fair Value is less than the price proposed by the Directors to the Seller not less than 5 Business Days prior to receipt of the Expert's report on the Fair Value by the Company, then the Expert's fees shall be borne wholly by the Seller."

13. The present case concerns a Compulsory Transfer Notice deemed to have been given pursuant to Article 7.2. There has been no agreement as to the Transfer Price of the claimants' B shares. Therefore, subject to the question whether the Bad Leaver Price applies pursuant to Article 7.3.1, the Transfer Price is to be "the Fair Value determined in accordance with article 6.2.2": see Article 6.1.3(c). Article 6.2.2 requires the Directors to "instruct the Expert to determine and certify the Fair Value of the Sale Shares." Nothing need be said about the definitions of "Directors" and "Sale Shares", which have a straightforward meaning and application in the present case. The problems in the case arise from the definitions of "Expert" and "Fair Value" and their relationship regarding the valuation of shares that are subject of a Compulsory Transfer Notice.

14. Article 1.1 defines "Expert" to mean "the expert identified and engaged in accordance with article 22". Article 22 provides as follows:

"22.1 Where these Articles provide for any matter or dispute to be determined by the Expert, such matter or dispute shall be referred at the request of any Member to the Auditors provided that in the circumstances referred to in article 22.2 such matter or dispute shall be referred to an independent chartered accountant nominated in writing for this purpose by a Member Majority.

22.2 The circumstances referred to in article 22.1 are:

22.2.1 where the Auditors are unable or unwilling to act in connection with the relevant reference; or

22.2.2 where, within 10 Business Days of a Member requesting that a matter or dispute be referred for determination under this article 22, a Member Majority directs in writing that instead of being referred to the Auditors the relevant matter or dispute shall be referred to the independent chartered accountant nominated by a Member Majority in their direction for this purpose.

22.3 The Expert shall be engaged on terms agreed between the relevant Expert and the Directors with the consent of a Member Majority, provided that if such terms are not so agreed within 10 Business Days of the Expert being instructed, the Expert shall be engaged on such terms as may be agreed between the Expert and a Member Majority (acting reasonably). For the purposes of agreeing the terms of the Expert's engagement pursuant to this article 22.3, the Directors or a Member Majority (as the case may be) shall act as agent for the Company and each relevant Member.

22.4 The Company and any relevant Members shall supply the Expert with any information which he may reasonably request in connection with his determination. The Company and any relevant Members shall be entitled to make written submissions to the Expert provided that a copy of any such written submissions is also simultaneously delivered to the other relevant parties. The Expert shall give due weight to any such written submission which is received by the Expert within such time limit as he may determine and have notified to the relevant parties.

22.5 The decision of the Expert (who shall be deemed to act as an expert and not as an arbitrator) shall, save in the event of fraud or manifest error, be final and binding on the Company and the Members.

22.6 The cost of any reference to the Expert shall be borne as directed in the relevant article or, where no such direction is given by the party or parties named by the Expert (taking into

> account the conduct of the parties and the merits of their respective arguments in relation to any matters in dispute) or. where no such party is named by the Expert, equally by the parties concerned."

15. Article 1.1 defines "Fair Value" to have "the meaning given in the Members' Agreement". It is common ground that "the Members' Agreement" is COSA.

The Call Option and Shareholder Agreement (COSA)

16. The definition of "Fair Value" in clause 1 of COSA is at the root of the issue in the present case. It reads:

> "*Fair Value:* an amount determined in accordance with Schedule 2 as at the date of the relevant Exercise Notice as being equal to:
>
> > (Company Group EBITDA x Group Multiple) – Debt x Relevant Proportion".

The definition therefore sets out both a formula for determining Fair Value and a procedure ("determined in accordance with Schedule 2") for carrying out the determination. The other terms in the definition of Fair Value are defined as follows:

> "*Exercise Notice:* a notice exercising a Call Option in accordance with clause 2.5 or clause 2.16 (as the case may be) or the Put Option in accordance with clause 3".
>
> "*Company Group EBITDA* means, for the purposes of determining Fair Value or the Early Option Price following service of (and for the purposes of) an Exercise Notice, the consolidated earnings before interest, tax, depreciation and amortisation for the Company's Group as shown in the most recent Reference Accounts approved by the Company's board prior to the date of service of the Exercise Notice (the Exercise Date) or, where no Reference Accounts have been approved, or the most recent Reference Accounts relate to a period which ended more than 12 months before the Exercise Date, as shown in a consolidated financial statement for the Company's Group approved by the Company's board and prepared on the same basis as the Reference Accounts from the most recent annual statutory accounts of each member of the Company's Group approved by the Company's board made up to the month end immediately prior to the Exercise Date and prepared on the same basis as the Reference Accounts …" (I need not set out the further detail in the definition.)
>
> "*Group Multiple:* such multiple as would reasonably be applied to the ebitda of the Buyer's Group [i.e. IWP and its subsidiaries or holding companies] to determine the value of the Buyer's

> Group in relation to a bona fide sale of the entire issued share capital of the same on arm's length terms".
>
> "*Debt:* the amount in pounds sterling of the borrowings and other financial indebtedness in the nature of borrowing (whether by way of overdraft, loan, bond, forward sale or purchase agreement or any other transaction having the commercial effect of borrowing and including all outstanding, accrued or due interest on such items for the Final Quarter, and any termination or repayment-related fees) of the Company's Group, which was advanced with Special Consent for the purposes of Acquisitions, plus an amount equal to the aggregate subscription price (including any premium) paid by any member of the Buyer's Group for the allotment of Deferred Shares and any other shares in the capital of any subsidiary of the Company from time to time".
>
> "*Relevant Proportion:* the proportion (expressed as a percentage) of the entire issued share capital of the Company held by the relevant Seller on the date the Exercise Notice is served".

17. Clause 2 of COSA is headed "Call Options". The definitions in clause 1 and the provisions of clause 2 show that there are two Call Options: "Call Option 1", in respect of a Good Leaver; and "Call Option 2", in respect of a Bad Leaver. To simplify somewhat: clause 2.4 gave to IWP an option to acquire the claimants' B shares ("Option Shares") in certain specified circumstances "for a price equal to the Call Option 1 Consideration", which was itself defined in clause 2.7 as "an amount equal to the Fair Value". Clause 2.15 gave to IWP an option to acquire those shares in different specified circumstances "for the Bad Leaver Price", which was defined in clause 1 as "an amount equal to 25% of the Fair Value". Either Call Option 1 or Call Option 2 was "exercisable by notice in writing served by the Buyer [IWP] on the relevant Seller [claimant] during the Call Option Period:" clauses 2.5 and 2.16 respectively. The Call Option Period was, in effect, a period of 12 months from the event giving IWP the right to exercise the Call Option. Clause 2.3 provided:

> "2.3 The Call Options shall lapse upon the completion of the sale and purchase of the Option Shares following the service of a Compulsory Transfer Notice (as such term is defined in the Articles) in respect of such Option Shares."

18. Clause 3 of COSA is headed "Put Option". The clause had the effect that each Seller (for present purposes, each claimant) had a right to require the Buyer (IWP) to buy his Option Shares for a price equal to the "Put Option Consideration", which was defined in clause 3.4 as being for most purposes "an amount equal to the Fair Value" but for one specific purpose (not relevant here) the "Early Option Price". The Put Option was exercisable by notice in writing served by the relevant Seller on the Buyer during the Put Option Period: clause 3.2.

19. Clauses 2 and 3 contained the following identical provision (clause 2.8 in respect of Call Option 1, clause 2.20 in respect of Call Option 2, and clause 3.5 in respect of a Put Option):

> "Following service of an Exercise Notice, the Company shall immediately instruct the Auditors to provide a draft determination of the Fair Value pursuant to the provisions of Schedule 2. The parties shall provide all such assistance, documentation and other information to the Auditors (or any Expert appointed in accordance with Schedule 2) as may be considered necessary and shall use their respective best endeavours to procure that the Auditors determine the Fair Value as soon as reasonably practicable."

20. Clause 20.7 provides:

> "This agreement, the Articles and the documents entered into or to be entered into pursuant to the terms of this agreement, constitute the entire agreement between the parties with respect to all matters referred to in this agreement, without prejudice to the continuing effect of the Share Purchase Agreement. This agreement supersedes and extinguishes all previous agreements between the parties relating to such matters, other than in relation to any fraud or fraudulent misrepresentation."

21. Clause 20.15 provides:

> "Except as otherwise provided by this agreement, if there is a conflict between the terms of this agreement and the provisions of the Articles (or the articles of association of any of the Buyer's Group) the terms of this agreement shall prevail on all the parties."

22. Schedule 2, headed "Valuation", is lengthy and I shall not set it out in full here. Paragraph 1 contains definitions; the most relevant one for present purposes is the definition of "Expert" as "the person appointed in accordance with paragraph 3 of this Schedule to resolve any dispute as to the Fair Value or Early Option Price (or any component thereof)". Those two matters—Fair Value, and Early Option Price—are, of course, the relevant matters of valuation for assessing the price under clause 2 or clause 3.

23. Paragraph 2 of Schedule 2 is headed "Determining Fair Value or Early Option Price". The starting point of the entire process is set out in paragraph 2.1:

> "As soon as practicable and in any event no later than 60 Business Days after the date on which the Auditors are required to determine the Fair Value or the Early Option Price (as applicable) in accordance with clauses 2 and 3 (as applicable) the Buyer [i.e. IWP] shall procure that the Auditors shall prepare and deliver to the relevant Seller(s) for review drafts of the Auditors determination of the Fair Value and/or the Early Option

> Price draw up in accordance with the provisions of this Schedule (together the 'Draft Documents')."

The scheme of the remainder of paragraph 2 is broadly as follows. The relevant Sellers have a certain period in which they are to have access to the books, records and working papers underlying the Draft Documents "and such books and records of the Company as [they] may reasonably require for the purpose of reviewing the Draft Documents": paragraph 2.3. At the end of that period they are required to notify the Buyer of any matters on which they disagree with the Draft Documents. The parties are then required to seek to resolve the issues by agreement. If they cannot do so, either party may serve a written notice requiring that the dispute be referred for expert determination in accordance with paragraph 3.

24. Paragraph 3 of Schedule 2 is headed "Expert determination". Paragraph 3.1 requires the parties to "use all reasonable endeavours to reach agreement regarding the identity of the person to be appointed as the Expert and to agree terms of appointment with the Expert." If the parties cannot agree on these matters, either party may ask the President of the Institute of Chartered Accountants to determine them. The parties are required to co-operate with the Expert and provide the Expert with such assistance and documents as he or she may reasonably require. The Expert has a general discretion over the procedure he or she will adopt (clause 3.6); however,

> "3.5 The parties shall be entitled to make submissions to the Expert including oral submissions and each party shall, with reasonable promptness, supply the other parties with all such information and access to its documentation, books and records as the other parties may reasonably require in order to make a submission to the Expert in accordance with this paragraph."

Paragraph 3.9 corresponds to Article 20.5 but reflects the different context:

> "3.9 The Expert shall act as an expert and not as an arbitrator. Save in the event of manifest error or fraud:
>
> > 3.9.1 the Expert's determination of any matters referred under this Schedule shall be final and binding on the parties; and
> >
> > 3.9.2 the Draft Documents, subject to any adjustments, corrections or modifications that are necessary to give effect to the Expert's determination, shall constitute a binding determination of Fair Value or the Early Option Price (as applicable) and stated in the Fair Value Statement or the Early Option Price Statement (as applicable)."

How the Dispute Arose

25. Although I am dealing with what are essentially construction issues on a Part 8 claim and a detailed exploration of the facts is neither necessary nor appropriate, it is helpful to understand how the current dispute arose and what might be its practical significance.

26. On 18 February 2021, as I have said, IWP wrote to the MWGL, notifying them of a Transfer Event under Article 7.1 and requesting that they treat the letter as a Compulsory Transfer Notice under Article 7.2.

27. On 29 March 2021 MWGL's solicitors, Squire Patton Boggs ("SPB"), told Ms Vikki Wall of Haberman Ilett that IWP had confirmed that it would like her to carry out the valuation exercise. After a conversation with Mr James Hunter, IWP's Chief Financial Officer, on 1 April 2021 Ms Wall sent to him and SPB a draft engagement letter and two potential timetables for them to consider: the first timetable provided for written submissions to be made within a short timescale but gave an opportunity to make further submissions after receipt of a draft expert determination; the second timetable did not give that opportunity for further submissions but proceeded directly to expert determination after receipt of the initial submissions. IWP confirmed that it wanted the second of the timetables to be adopted.

28. On 6 April 2021 the letter of engagement was signed on behalf of Haberman Ilett and on behalf of the directors of MWGL "acting in their capacity as agent for MWGL and each relevant Member" and, as the letter also indicated, "with the consent of a Member Majority" (i.e. IWP). The letter of engagement included the following passages:

> "You agree that the Expert Determination process is not an arbitration or adjudication within the meaning of any statute.
>
> We are not bound by the rules of evidence and may, at our sole discretion, receive and take into consideration any information submitted to us by any Party in such manner as we see fit and may give such weight to it as we consider appropriate.
>
> *Procedure and timetable*
>
> We will carry out the work to prepare the Expert Determination using reasonable skill and care.
>
> We will set out the settled procedure and timetable in a separate document, and may amend both procedure and timetable at our discretion.
>
> In addition to the settled procedure, we may at any stage hold a meeting, telephone conference, or video conference with all Parties who wish to participate, but not with one or more Parties in the absence of any other who wishes to participate, to clarify any issues and make such procedural orders as we consider necessary for the fair and expeditious assessment of the dispute.
>
> We may allow or require further evidence, including asking questions, and requiring the submission of documents or other information in a party's possession or control."

29. On 7 April 2021 the claimants received an email from Ms Wall:

> "I refer to the Articles of MWGL. The capitalised terms used but not defined in this letter have the meaning given to them in the Articles.
>
> I, Vikki Wall, of Haberman Ilett UK Ltd, have been nominated by a Member Majority pursuant to article 22.1 as an independent chartered accountant to act as Expert in relation to a determination of 'Fair Value' to be carried out pursuant to article 6.2.2 (the 'Expert Determination'), further to a Compulsory Transfer Notice submitted to MWGL by a Member Majority on 18 February 2021.
>
> I, Vikki Wall, of Haberman Ilett UK Ltd, have been engaged by the Directors of MWGL, acting in their capacity as agent for MWGL and each relevant Member pursuant to article 22.3 in respect of the Expert Determination.
>
> Please note that pursuant to article 22.4, as a relevant Member, you are entitled to make written submissions to me in relation to the Expert Determination, provided that a copy of any such written submissions is also simultaneously delivered to the other relevant parties. I will give due weight to any such written submission received by us by no later than 4pm on the date falling 5 Business Days from the date of this email. Submissions received after that deadline will not be considered unless otherwise agreed in writing."

30. On 12 April 2021 the claimants' solicitors, Harrison Clark Rickerbys ("HCR"), sent a letter to Ms Wall by email. The letter said that the claimants did not accept the validity of Ms Wall's appointment, because the procedure for determining Fair Value as set out in Schedule 2 to COSA had not been followed. The following extract gives the tenor of the contents.

> "We note that it cannot be said that the parties have been unable to agree on the Transfer Price unless and until the provisions of Schedule 2 to the COSA have been followed, which they have not in this case. It follows that any appointment is premature and invalid.
>
> The appointment is also invalid because the parties would then need to follow the expert appointment procedure under paragraph 3 of Schedule 2 to the COSA. We note that there is some conflict in the appointment process in that respect between the appointment provisions under article 22 and paragraph 3 of Schedule 2. Clause 20.15 states that where there is a conflict between the provisions of the Articles and the COSA then the COSA prevails. It would appear that the Company and IWP appear to have overlooked this and treated this as an ordinary expert appointment and determination under Article 22 without

> considering the provisions of Schedule 2, as it required for a determination of Fair Value."

31. HCR also sent a second letter to Ms Wall on 12 April 2021; it was marked "Without Prejudice", but that simply meant that it did not involve any concession contrary to the terms of HCR's Open Letter. This second letter asked Ms Wall to direct that the determination be stayed until there was agreement on a fair process substantially in accordance with Schedule 2 to COSA, and it repeated the claimants' refusal to agree to the process indicated in Ms Wall's email of 7 April 2021.

32. Copies of both of HCR's letters were also sent to SPB.

33. On 14 April 2021 SPB wrote on behalf of MWGL and IWP to Ms Wall regarding HCR's Open Letter. They said that the attack on the validity of her appointment was "fundamentally misguided", that the engagement was properly pursuant to Article 22, and that in the definition of "Fair Value" in COSA "it [was] plainly the formula … that [was] imported into the Articles":

> "It is absurd to suggest that the dispute resolution provisions of Schedule 2 of the COSA are imported wholesale into the Articles such as to override the expert determination mechanism otherwise laid down by article 22. That would be entirely at odds with the clear words of article 6.2.2, article 22 and the Expert definition noted above."

The letter concluded:

> "We note that pursuant to article 22.3 you have been engaged by the Directors of MWGL with the consent of IWP as Member Majority. Pursuant to article 22.4, Messrs Lord and Davies are entitled as Members of MWGL to make written submissions to you, and you are required to give those submissions due weight. However, there is no basis for the suggestion by HCR that you should take no further steps in relation to your appointment until all Members agree that your appointment is valid. On the contrary, having accepted the engagement, you are duty bound to proceed with your determination in accordance with the timetable that you have laid out. We invite you to confirm that you will do so."

34. On 15 April 2021 Ms Wall forwarded SPB's letter to HCR by an email that said:

> "In accordance with the instructions received in the attached letter of 14 April 2021 and the terms of my engagement by the directors of MWGL acting in their capacity as agent for MWGL and each relevant Member, and on the basis of their direction, I am continuing with the determination of 'Fair Value' pursuant to the Articles of MWGL."

35. The respective solicitors then entered into direct correspondence with each other. I shall not recite the details of that correspondence. A letter from SPB on 27 April 2021

stated that by 21 April 2021 Ms Wall had been provided only with the Articles and COSA but no other documentation and that she had since been given some information regarding comparable multiples. The letter continued: "The necessary accounts for Ms Wall's determination are being prepared and will be provided to her, and shared with you, shortly." A paragraph later in the letter said:

> "Finally, our client has already agreed to be transparent by providing to your clients a copy of all the information given to Ms Wall. There is no obligation on them to do so. However, we see no good reason to grant your clients access to documentation, books and records of MW. Ms Wall will ask for that access if she considers it necessary for her work as independent expert."

That paragraph continued to represent the sticking point between the parties: the claimants insisted on their right to be provided with documents they said they reasonably required, and the defendants maintained that it was for the expert to decide what documents she required for her determination, though it accepted that those documents would be provided to the claimants. The correspondence shows no substantial movement from these positions.

36. On 20 May 2021 the claimants filed a Part 8 claim form and an application for an interim injunction. The application was listed for hearing on 2 June 2021, but on 29 May 2021 I made an order by consent for an expedited trial of the claimants' claim for declarations as to the proper interpretation of the Articles and the proper procedure for valuing their shares, together with all necessary injunctive and declaratory relief. The order recorded the acceptance of undertakings by the defendants that they would immediately instruct Ms Wall to cease further work on the valuation of the shares and that they would not instruct her to carry out further work in that regard without giving seven days' prior written notice to the claimants.

Summary of the Issues

37. The primary issue is a short one as to construction.

- The claimants contend that the correct procedure for the valuation of their B shares is found in Schedule 2 to COSA. They say that this follows directly from the definition of Fair Value in Article 1 and in clause 1 of COSA, from the need for the contractual documents to be read together (clause 20.7 of COSA) and from the conflict resolution provision in clause 20.15 of COSA. They also say that this construction accords with commercial common sense, because it is the detailed provisions in Schedule 2 that enable them to engage meaningfully with the valuation process.

- The defendants contend that the shares are to be valued in accordance with Article 22 of the Articles, as required by the definition of "Expert" in Article 1.1 and by the provisions of Article 22 itself. The purpose of the reference to the definition of "Fair Value" in COSA is to identify the formula for determining the price, not the mechanism for that determination. The provisions

for expert determination in Article 22 are unexceptional and give rise to no problems of commercial common sense.

38. The secondary issue arises only if the defendants are correct and the valuation procedure is governed by Article 22.

- In that event, the claimants contend that the procedure should in substance follow that in Schedule 2 to COSA, on the basis either of the implication of necessary terms into the Article 22 procedure or of the Director Defendants' obligations as agents of, among others, the claimants.

- The defendants contend that there is no proper basis for the implication of terms mirroring those of Schedule 2. In oral submissions, Mr King accepted that the claimants were entitled to receive copies of any documents provided to the Expert—he explained this on the basis that in dealing with the Expert the Directors acted as agents for all parties—but he did not accept that the claimants were entitled to decide on what documents they were to receive.

39. This very short summary of the parties' competing contentions does not, of course, do justice to counsel's thoughtfully developed submissions, but I think it gives the gist of their positions.

The Construction Issue

Principles of construction

40. The construction of a written contract is an exercise in the interpretation of a text. No text exists in a vacuum; all have a context. "No one has ever made an acontextual statement. There is always some context to any utterance, however meagre": *per* Lord Hoffmann in *Kirin-Amgen Inc v Hoechst Marion Roussel Ltd* [2004] UKHL 46, [2005] 1 All ER 667, at [64]. The immediate context of a particular provision of a written contract is the entire text of the contract. The wider context is the circumstances in which the text was agreed, or the "factual matrix". The aim of the interpretative task is to give to the contract "the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed": *per* Lord Bingham of Cornhill delivering the judgment of the Judicial Committee of the Privy Council in *Dairy Containers Ltd v Tasman Orient CV* [2004] UKPC 22, [2005] 1 WLR 215, at [12].

41. These general principles of contractual construction have been explained and refined in some detail in recent cases, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619; and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173. Among helpful and convenient summaries of the principles I mention that of Carr LJ in *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645, at [17]-[19], and the remarks of Leggatt LJ in *Minera Las Bambas SA v Glencore Queensland Ltd* [2019] EWCA Civ 972, where he said at [20]:

> "The principles of English law which the court must apply in interpreting the relevant contractual provisions are not in dispute. They have most recently been summarised by the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at paras 10-14. In short, the court's task is to ascertain the objective meaning of the relevant contractual language. This requires the court to consider the ordinary meaning of the words used, in the context of the contract as a whole and any relevant factual background. Where there are rival interpretations, the court should also consider their commercial consequences and which interpretation is more consistent with business common sense. The relative weight to be given to these various factors depends on the circumstances. As a general rule, it may be appropriate to place more emphasis on textual analysis when interpreting a detailed and professionally drafted contract such as we are concerned with in this case, and to pay more regard to context where the contract is brief, informal and drafted without skilled professional assistance. But even in the case of a detailed and professionally drafted contract, the parties may not for a variety of reasons achieve a clear and coherent text and considerations of context and commercial common sense may assume more importance."

42. In the present case, two particular passages in the recent Supreme Court judgments are useful to have in mind, because they focus on the relationship between text and context in the interpretative process. First, in *Arnold v Britton* Lord Neuberger of Abbotsbury PSC identified a number of factors that were important in that case; I mention only the first four:

> "17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (e.g. in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.
>
> 18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing

> from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.
>
> 19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. …
>
> 20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

43. Second, in *Wood v Capita Insurance Services Ltd* Lord Hodge JSC said this:

> "10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. …
>
> 11. Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the *Rainy Sky* case [2011] 1 WLR 2900, para 21f. In the *Arnold* case [2015] AC 1619 all of the judgments confirmed the approach in the *Rainy Sky* case: Lord Neuberger of Abbotsbury PSC, paras 13-14; Lord Hodge JSC,

para 76; and Lord Carnwath JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the *Rainy Sky* case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the *Rainy Sky* case, para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299, paras 13, 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the *Arnold* case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the *Arnold* case, para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571, para 12, per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each.

13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement.

> There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type. The iterative process, of which Lord Mance JSC spoke in *Sigma Finance Corpn* [2010] 1All ER 571, para 12, assists the lawyer or judge to ascertain the objective meaning of disputed provisions."

44. One further point deserves mention. As is clear from the facts and is recognised in clause 20.7 of COSA, the Articles and COSA comprise a single transaction and, though each is a separate contract, are to be construed together. See generally Lewison, *The Interpretation of Contracts,* 7th edition, at paragraphs 3.06 – 3.08.

Discussion of the construction issue

45. In my judgment, the defendants are correct as to the construction issue. The only basis on which one might find a genuine conflict between the provisions of the Articles and COSA, rather than some fairly unimportant untidiness, is by approaching the construction exercise in the spirit of literalism that has for many years rightly been deprecated. Clause 20.15 of COSA is not engaged.

46. Upon IWP notifying MWGL of the Transfer Event by the letter of 18 February 2021, the claimants were deemed to have served a Compulsory Transfer Notice in respect of their shares: Article 7.2. Those shares were then to be offered for sale "in accordance with the provisions of article [6.1.3] as if the Compulsory Transfer Shares were Sale Shares", save that the price was to be either Fair Value or 25% of Fair Value: Article 7.3. A dispute as to whether the price is Fair Value or 25% of Fair Value "[shall not] delay the procedure to be followed under article [6.1.3] in respect of such notice": Article 7.4. Where no agreement has been reached as to the price to be paid for the shares, "the Directors shall instruct the Expert to determine and certify the Fair Value of the Sale Shares": Article 6.2.2. The "Expert" is "the expert identified and engaged in accordance with Article 22": Article 1.1. Article 22, which is set out fully above, provides for determination either by the Auditors or, in certain circumstances including a direction by the Member Majority, an independent chartered accountant. The scheme of these provisions seems to me to be perfectly clear.

47. The difficulty is said to arise because the issue to be determined is the Fair Value of the shares and the Articles expressly incorporate the definition of "Fair Value" in COSA, which speaks of "an amount determined in accordance with Schedule 2 …" However, to interpret the provisions in such a way that the definition of "Fair Value" contradicts the definition of "Expert", resulting in the need to resolve the contradiction either by mental gymnastics or by resort to the conflict resolution provision in clause 20.15 of COSA, strikes me as wholly unnecessary and somewhat perverse. The definition of Fair Value contains both a formula for valuation and a procedure (Schedule 2) for applying it. There is no need to suppose that, when the Articles expressly provide a procedure (Article 22) for determining Fair Value they intend, or should be taken to intend, to incorporate the quite different procedure for determination in COSA, especially when that latter procedure expressly and specifically relates to circumstances other than those concerning Compulsory Transfer Notices. The sensible reading is that

the definition is used to explain what Fair Value is, not how it is to be arrived at; as to the latter, the Articles are clear.

48. Two obvious features of Schedule 2 to COSA may be noted.

1) Schedule 2 expressly concerns the determinations required under clauses 2 and 3 of COSA. The present circumstances do not relate to clause 2 or to clause 3. Of course, Fair Value is the same amount, whether one is dealing with clauses 2 and 3 or with Compulsory Transfer Notices. But Schedule 2 does not purport to deal with any determination other than one under clause 2 or clause 3.

2) Schedule 2 does not provide in the first instance for determination by an expert. As explained above, the scheme is that there will first be a preliminary determination by the Auditors (paragraph 2); only issues arising from that stage and incapable of agreement between the parties shall be referred *in a second stage* to the Expert (paragraph 3). This is why the Expert is defined in paragraph 1 as the person appointed in accordance with paragraph 3. The Articles do not provide for this two-stage process, but simply for expert determination; and, consistently with this but not with Schedule 2 to COSA, under Article 22 the Auditors would determine the Fair Value as the Expert unless there were a reference to an independent chartered accountant.

49. For the defendants, Mr King submitted that the claimants had fallen into the trap of looking for contradictions in order to justify importing a procedure that was more to their liking than what was being proposed. That submission seems to me to be fair.

50. No consideration of commercial common sense precludes the obvious interpretation of the Articles; far less could it justify re-writing them. A provision for expert determination in accordance with Article 22 is wholly unexceptional. It does not become so by making unfavourable comparisons with Schedule 2. The question of what is required by Article 22 is a distinct matter and is considered next.

The Requirements of Article 22

51. The claimants contend that, if Article 22 applies, the procedure for determining Fair Value should nevertheless be substantially the same as under Schedule 2, on either of two bases. First, in order to give business efficacy to the Article 22 procedure, terms equivalent to paragraphs 2.3 and 3.5 of Schedule 2 to COSA should be implied into Article 22. Second, as the Director Defendants acted as agents both of the claimants and of IWP in agreeing terms of engagement with Ms Wall, they had a duty (a) not to prefer the interests of one principal to those of another and (b) to act reasonably to ensure that their principal had adequate opportunity to make submissions to Ms Wall; and this necessarily meant that they had to include provision for the claimants to make reasonable requests for access to and disclosure and production of such books and records as they might reasonably consider relevant.

52. For the reasons set out below, I hold that the correct position is as follows:

1) The claimants are not entitled to require the production to them of such books and records as they may consider reasonably necessary.

2) The claimants are entitled to see the books and records that have been provided to the Expert.

3) The claimants are entitled to a reasonable opportunity to consider the books and records provided to the Expert before making written submissions.

53. In their standard work on the subject, *Kendall on Expert Determination* (5th edition), Freedman and Farrell make the following observations (I omit the references in the footnotes):

> "12.3-1 The law lays down no set procedure for the manner in which an expert should conduct a reference. Expert determination is not a type of legal proceeding like litigation, which has a formal and highly regulated structure, nor does it have machinery for its supervision by judges as does arbitration. The expert determination clause in the parties' contract may specify the procedure to be followed, but many expert determination clauses do not. …"
>
> "12.4-1 Where the contract does not lay down a procedure the expert will have to do so. The expert may receive suggestions from the parties on which the parties agree and which the expert can adopt. …"
>
> "12.4-2 Procedure is usually discussed between the expert and the parties. This may be achieved by correspondence but a meeting may be necessary and is almost always desirable. If possible, the procedure should be agreed by the parties and the expert, but if the parties fail to reach agreement the procedure will be decided by the expert. …"
>
> "14.14-1 Questions are raised about the fairness of procedures adopted by experts. No one would argue with the general proposition that experts' procedures should be fair. Difficulties arise over how to assess whether a particular procedure followed by an expert is fair, and specifically whether the rule of natural justice requiring 'due process' applies to expert determinations. Do the procedures have to allow each side to have its say, and to know what the other side is saying, at all stages? The answer is that there are cases which refer to experts being under a duty to act fairly, but there is no general requirement that the rules of natural justice must always be followed, and there is no objective standard of fairness which must be complied with in all expert determinations. Expert determinations take place in a wide variety of contracts relating to different commercial contexts, and in each case the terms of the contract must be considered in order to decide whether, in the circumstances which have occurred, the decision of the expert is a decision made in

> accordance with the terms of the contract. The following paragraphs deal with particular kinds of unfairness which have been alleged in the cases."

54. In the present case, Article 22 provides for the manner in which the Expert is to be appointed; it also contains some limited provisions as to the manner in which the Expert is to conduct the reference. The provisions are set out in full above, and the following features may be noted:

- The terms of engagement are to be agreed between the Expert and either (a) the Directors with the consent of the Member Majority or, if they do not reach agreement promptly, (b) the Member Majority.
- If the terms are agreed between the Expert and the Member Majority, the latter must act reasonably.
- Whether it is the Directors or the Member Majority that agrees the terms of engagement with the Expert, they do so as agents for the Company and for each relevant Member.
- The Expert is to be provided with any information she may reasonably request.
- There is no provision for the Sellers (the claimants) to request and receive documentation.
- Any party may make written submissions, which must be provided to the other parties.
- The Expert must give due weight to those submissions, provided they are submitted "within such time limit as [she] may determine".

55. The claimants' contention that the detailed procedure in Schedule 2 to COSA must be implied into Article 22 is, in my judgment, without merit. In *Marks and Spencer plc v BNP Paribas Services Trust Company (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742, the Supreme Court confirmed and approved the traditional approach to the implication of terms. A term will be implied into a contract only if it is necessary to give business efficacy to the contract (in the sense that, without the term, the contract would lack commercial or practical coherence) or—which will often amount to the same thing—if the term is so obvious that it "goes without saying". Expert determination clauses do not have to contain any such procedure as is contained in Schedule 2 and can get along perfectly well without either it or indeed any express procedure; if need be, the expert can determine his or her own procedure. The fact that COSA contains a particular procedure is not a reason for implying it into the Articles, because the Articles do not incorporate the relevant provisions of COSA and make different provision in respect of expert determination.

56. The manner in which the Expert is to conduct her determination is set out in Article 22.4. Insofar as the terms of engagement agreed under Article 22.3 go beyond such matters as fees and payment and concern the manner in which the Expert is to perform her engagement, they are properly controlled both by the Directors' role as agents for

both sides concerned in the determination and by the framework contained in Article 22.4. In my view, this has certain consequences.

57. First, there is no justification for importing an entitlement on the part of the claimants to have access to documents of their choosing. The exercise is an expert determination, not an arbitral or judicial proceeding. The basic point of the exercise is to put the question of Fair Value in the hands of somebody who knows what is relevant to the determination and how to go about it. It is for her to decide what she does or does not require in order to be able to carry out her engagement. Either side may tell her what it thinks she should be looking at—there is nothing to stop them doing so—but the decision is hers.

58. Second, however, each side of the dispute is entitled to see the material that the Expert is considering. This much is now conceded by the defendants through Mr King, but for my part I would not base the entitlement, as he did, on the agency created by Article 22.3, which seems to me to relate specifically to agreement of the terms of the Expert's engagement. Rather, I would see it as an incident of the express entitlement in Article 22.4 to make written submissions. The right to make submissions necessarily implies the right to have access to the material that alone would make the submissions meaningful. This does not imply the right to choose the relevant material, for the reason already indicated. But it does mean that the parties have to know what material the Expert is considering; they have to be able to make submissions as to what she should make of that material and, if appropriate, as to any further material she ought to be looking at (though it is up to her, as the Expert, whether she agrees with any such suggestions).

59. Third, the terms on which Ms Wall was engaged preserved her ability to conduct the determination fairly and in accordance with Article 22.4, because they enabled her to alter or adjust the procedure and timetable and to receive and consider representations from either party as she considered "necessary for the fair and expeditious assessment of the dispute."

60. Fourth, however, both the terms of Ms Wall's email of 7 April 2021 and the concluding part of SPB's letter of 14 April 2021 to Ms Wall provide substance to at least part of the claimants' complaints. Written submissions under Article 22.4 were being required at a time when the claimants did not have access to any documentation on which Ms Wall could base her determination (as a matter of fact, she did not have the documentation either); therefore such submissions could hardly do more than indicate what the claimants said she should be looking at. Both Ms Wall's email and SPB's letter were, at the least, capable of giving the impression that any further submissions made after the five-day period—that is, any submissions that the claimants could make after they had access to the documents being considered by Ms Wall—might not be taken into account. Such an approach would clearly render the right to make written submissions largely nugatory. If that right is to be meaningful, it is necessary that each party should have sight of the documents that have been provided to the Expert and be given a reasonable period to consider them and prepare submissions accordingly. It would not be appropriate for me to say anything about what would be a reasonable period: that would depend on the circumstances and would be very much a matter for the judgement of the Expert.

Conclusions

61. I cannot help but think that this is an unfortunate and unnecessary dispute, to which both sides have contributed and in which a substantive outcome (that is, a determination of Fair Value) could have been achieved in the time that has been occupied with litigation.

62. The relatively straightforward position, as I hold, is as follows. The determination of the Expert is to be carried out in accordance with Article 22. The Expert must, of course, conduct the determination fairly, but there is no need to import procedural requirements not found in Article 22. Schedule 2 to COSA does not apply. It is for the Expert to decide what documentation is required for the determination of Fair Value; the parties do not have a right to require the production of documentation by the Company or to insist that the Expert consider particular documentation, though they may suggest that it should be considered. The right of any party to make written submissions to the Expert requires, if it is to be a meaningful right, that each party have access to the documentation under consideration by the Expert and have a reasonable opportunity to consider it and make submissions in the light of it. What is a reasonable opportunity is a matter for the Expert.

63. My present view is that it will suffice to make brief declarations embodying the conclusions expressed above, but that there is no need for any injunctions to be granted.

64. In this final part of the judgment, I have simply referred to "the Expert". It is no part of my function in this trial to decide whether that Expert is to be Ms Wall or some other person. But I have seen nothing to lead me to the view that Ms Wall would not be capable of providing a fair and professional determination, and the passages that I have set out from her letter of engagement provide her with the ability to conduct the determination appropriately.

65. Since receiving a draft of this judgment, the parties have agreed the appropriate order in all respects other than costs. The remaining issues as to costs shall be determined on paper after receipt of written submissions in accordance with the parties' suggested timetable.