Neutral Citation Number: [2022] EWHC 2839 (Comm)

Case No: CL-2020-000398

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**COMMERCIAL COURT (KBD)**

Royal Courts of Justice. Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14/11/2022

**Before** :

**MR RICHARD SALTER KC**
Sitting as a Deputy Judge of the High Court

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**Between :**

**ABT AUTO INVESTMENTS LIMITED** **Claimant**
**- and -**
**(1) AAPICO INVESTMENT PTE LIMITED**
**(2) AAPICO HITECH PUBLIC COMPANY LIMITED**
**(3) SAKTHI GLOBAL AUTO HOLDINGS LIMITED** **Defendant**

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**Mr Paul Downes KC and Mr Joseph Sullivan** (instructed by **Clyde & Co LLP**) for the **Claimant**
**Mr Tom Smith KC and Mr Ryan Perkins** (instructed by **Baker & McKenzie LLP**) for the **Defendant**

Hearing dates: 18, 19, 20, 21, 25, 26, 27, 28 July 2022

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# Approved Judgment

**I direct that 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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**This judgment was handed down remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30am on Monday 14 November 2022**

**MR SALTER KC:**

## (A) Introduction

1. On 18 August 2019, the First and Second Defendants, as chargees, enforced a Share Charge granted by the Claimant, as chargor, by appropriating the shares in the Third Defendant which were the subject of that charge. In this action, the Claimant alleges that the valuation placed on the shares by the First and Second Defendants did not comply with the requirements of the Share Charge and/or of The Financial Collateral Arrangements (No 2) Regulations 2003 ("**the FCARs**")[1] and represented a very significant under-valuation. The Claimant accordingly says that the purported appropriation was invalid, and that the Claimant therefore remains the beneficial owner of the shares. Alternatively, the Claimant asks the Court itself to determine the value which the First and Second Defendants should have put on the shares, had the valuation been carried out "in a commercially reasonable manner" in accordance with Regulation 18(1) of the FCARs. Among the issues raised in this action are interesting and difficult questions as to the practical application of that concept and as to the effect, in that context, of provisions designed to create a contractual estoppel.

## (B) Background

2. The essential background facts were not in dispute.

3. The Claimant ("**ABT Auto**") is a holding company which is part of the Sakthi group. The Sakthi group was founded in 1921 by the grandfather of Dr Manickam Mahalingam ("**Dr Mahalingam**"), the director of ABT Auto who has given evidence on its behalf in this action.

4. In about 2000 the automotive foundry part of the Sakthi group's business was hived off into a separate company, Sakthi Auto Components Ltd ("**SACL**"). In about 2004, SACL began supplying steering knuckles to General Motors ("**GM**") and expanded its production capacity through factories (inter alia) in China, Portugal ("**Sakthi Portugal**"), and the USA.

5. The Sakthi group's expansion into the USA led to the creation of a new company, Sakthi Auto Group USA Inc ("**SAGUSA**"). In 2012, SAGUSA entered into a joint venture ("**the Chinese Joint Venture**") with a Chinese company, Bethel Automotive Safety Systems Co Limited ("**Weihei China**"), with a view to satisfying increased demand from GM. The terms of this were eventually set out in an agreement dated 16 February 2019 ("**the Chinese JV Agreement**"). The joint-venture was carried out through two new companies, Weihei Bethel Sakthi Automotive Safety Systems Co Ltd ("**WBS**") (owned 49% by SAGUSA, 51% by Weihei China) and Weihei Bethel Sakthi Automotive Co Ltd ("**Sakthi Bethel**") (owned 51% by SAGUSA and 49% by Weihei

[1] SI 2003 No 3226, as amended.

China) (together "**the Chinese Subsidiaries**"). In very broad and simplified outline, WBS produced steering knuckle castings for SAGUSA in China, which SAGUSA then machined in the USA before on-sale as finished products to GM.

6. The First Defendant ("**Aapico Investment**") is a company registered in Singapore. The Second Defendant ("**Aapico Hitech**") is registered in Thailand. Aapico Investment and Aapico Hitech (together "**Aapico**") are both members of the Aapico group of companies, the founder and president of which is Mr Yeap Swee Chuan ("**Mr Yeap**").

7. In about 2017, SACL and the Aapico group began the joint venture which forms the background to the present dispute. The Third Defendant ("**SGAH**") was formed to be the joint-venture company. The shares in SGAH were to be held as to 74.9% by ABT Auto, as to 24.1% by Aapico Hitech and as to 1% by Aapico Investment.

8. SGAH was to become the owner of SAGUSA and the owner of a 70% interest in SACL. Both shareholdings were to be contributed by ABT Auto. The Aapico group's contribution to the joint venture was to be financial, in the form of USD 50m in equity and USD 50m by way of loan, secured (inter alia) by guarantees given by Dr Mahalingam and by ABT Auto.

9. The arrangements between the parties were set out in a suite of documents, each dated 25 May 2017. These included a loan agreement between Aapico Investment and SGAH ("**the 2017 Loan Agreement**").

10. By the first half of 2018, SAGUSA was experiencing financial problems. These are attributed by Dr Mahalingam primarily to thefts of castings and to technical production issues and by Mr Yeap primarily to mismanagement. Aapico agreed to provide an injection of USD 65m. USD 25m of that injection was in the form of equity capital, taking Aapico's shareholding in SGAH to 49.9%. The balance of USD 40m was in the form of a loan from Aapico Hitech, on the terms of an amended and restated loan agreement dated 29 September 2018 ("**the 2018 Loan Agreement**"). This loan was again secured by guarantees, including guarantees given by Dr Mahalingam and by ABT Auto. On this occasion, ABT Auto also provided a charge dated 1 October 2018 ("**the Share Charge**") over its shares in SGAH ("**the Charged Shares**"), to secure the amounts due both under the 2017 Loan Agreement and under the 2018 Loan Agreement.

11. Regrettably, this further investment did not resolve SAGUSA's financial difficulties.

12. Other parts of the Sakthi group were also experiencing financial difficulties at about this time. In April 2017 Oxy Capital had lent EUR 25m to Sakthi Portugal. This loan was to settle earlier loans from Indian banks and was secured by a pledge over the share capital of Sakthi Portugal. On 9 November 2018, Oxy Capital served notices of default giving the borrower 30 days to rectify the position.

13. In about November 2018, Mr Yeap secured a further USD 27-28m by way of funding for SAGUSA and stepped in as the acting CEO of the SAGUSA operation. Unfortunately, significant sums of money had become due to WBS in respect of the supply of castings to SAGUSA, for which WBS and Weihei China then began pressing strongly for payment.

14. On 15 January 2019, SGAH failed to make the interest payment of USD 815,556 due under the 2017 Loan Agreement.

15. On about 22 January 2019, Dr Mahalingam and Mr Yeap signed a Memorandum of Understanding ("**the 22 January MOU**") designed to solve the financial difficulties of the joint venture. The terms of the 22 January MOU were never implemented. In his evidence, Dr Mahalingam attributed this to Aapico's failure to make the further investments which it had promised in the 22 January MOU to make by 25 January 2019. Dr Yeap, in his evidence, attributed this to the failure of Dr Mahalingam's lawyers to engage with the drafts put forward by Aapico's lawyers, and said that the date of 25 January was there simply to placate GM (to whom the 22 January MOU was to be shown) and that none of the parties expected the further investment to be made before the formal documentation was completed.

16. SAGUSA had a revolving credit facility with the Huntington National Bank ("**Huntington**"). In March 2019, Huntington raised concerns that SAGUSA was nearing the credit limit of the facility and, on 27 March 2019, submitted an application (supported by Aapico and eventually by General Motors) to put SAGUSA into receivership.

17. On 31 March 2019, SGAH failed to make the repayment of USD 14m plus interest due under the 2018 Loan Agreement.

18. Between 2 and 5 April 2019, Aapico sent four notices of default to SGAH. On 10 April 2019, Aapico sent notices of acceleration to ABT, declaring both loans to be repayable on demand.

19. On 16 May 2019, Huntington's application was granted, and a receiver was appointed over SAGUSA's business.

20. On 13 August 2019, Aapico made demands on SGAH for immediate repayment of the sums due under the 2017 Loan Agreement (USD 58,089,506) and the 2018 Loan Agreement (USD 44,688,260). SGAH did not repay any part of that total of USD 102,777,766 ("**the Debt**").

21. On 14 August 2019, Aapico demanded payment of the Debt from ABT Auto under its guarantees. ABT Auto did not make payment in response to that demand and so, on 15 August 2019, Aapico gave notice purporting to exercise the power under clause 9.3 of

the Share Charge to appropriate the Charged Shares. In that notice, Aapico ascribed a value of USD 27m to the Charged Shares. That figure was based on a valuation dated 31 July 2019 of ABT's 50.01% shareholding in SGAH ("**the FTI Valuation**") carried out at Aapico's request by FTI Consulting ("**FTI**").

22. By this time, Sakthi Portugal had still not repaid the sums due to Oxy Capital. On 20 September 2019, Oxy Capital served an acceleration notice calling in the full sum due under the loan agreement together with penalties for default. On 21 October 2019, Oxy Capital enforced its share pledge, and transferred the shares in Sakthi Portugal to Aapico in return for a payment of EUR 24.5m.

23. On 11 December 2019, Aapico commenced a SIAC arbitration ("**the SIAC Arbitration**") against Dr Mahalingam under his guarantees.

24. The Claim Form in the present action was issued on 26 June 2020, challenging (inter alia) the validity of Aapico's appropriation of the Charged Shares and of the value which Aapico had ascribed to them.

25. On 21 December 2021, the Tribunal in the SIAC Arbitration issued a partial award. This stated (in substance) that the Tribunal was unable to determine the amount owed by Dr Mahalingam to Aapico until the challenges made in the present action had been resolved.

## (C) The terms of the Share Charge relating to appropriation

26. It is not in dispute between the parties that SGAH was in default of its obligations under the 2017 Loan Agreement and the 2018 Loan Agreement on 13 August 2019, and that Aapico was accordingly entitled to make the demands described above on SGAH and on ABT Auto. Nor is it in dispute that, in consequence, Aapico was entitled to enforce the Share Charge.

27. What is in dispute, however, is Aapico's right to carry out that enforcement by way of appropriation of the Charged Shares, either at all or by reference to the USD 27m FTI Valuation of the Charged Shares.

28. The right of appropriation is provided for in clause 9.3 the Share Charge, the terms of which are as follows:

> **9.3 Right of appropriation**
>
> **(a) This clause applies to the extent that:**
>
> **(i) the Charged Property referred to in it constitutes Financial Collateral; and**

**(ii) this Charge and the obligations of the Chargor under it constitute a Security Financial Collateral Arrangement (as defined in the Regulations)**

**(b) The Chargees or any Receiver or Delegate may, by giving written notice to the Chargor upon, and at any time after, the date the Security created under this Charge has become enforceable, appropriate all or any Charged Property in or towards payment or discharge of the Secured Liabilities, subject always to Regulation 18 of the Regulations.**

**(c) The value of any Charged Property shall be determined by the Chargees and, for this purpose, the parties agree that the value of any Charged Property shall be, in the case of any Shares, the market value of such shares determined by the Chargees by reference to a public index or independent valuation or if neither such option is available or reasonably practicable given the then current circumstances, such other process as the Chargees may select.**

**(d) The Chargor agrees that the method of valuation provided for in this Clause is commercially reasonable for the purposes of the Regulations**

29. Clause 1.1 of the Share Charge defines "the Regulations" as meaning the FCARs,

> **.. or equivalent legislation in any applicable jurisdiction bringing into effect Directive 2002/47/EC on financial collateral arrangements, and "Regulation" means any of them.**

## (D) The FCARs

### *(D1) Introduction*

30. Clause 9.3(b) of the Share Charge expressly states that Aapico's right to appropriate the Charged Shares is "subject always to Regulation 18" of the FCARs. In order to put into context the submissions about the proper interpretation and effect of this phrase which were made by Mr Paul Downes KC, who appeared on behalf of ABT Auto, it is necessary first to explain a little of the background to these regulations.

31. The FCARs implemented in UK law Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements ("**the FCD**"). As explained by the Privy Council in *Çukurova Finance International Limited v Alfa Telecom Turkey Limited*[2] ("***Çukurova No 1***"), the purpose of the FCD was:

[2] [2009] UKPC 19, [2010] 1 All ER (Comm) 1173 at [13].

> **.. .. to improve the integration, efficiency and stability of financial markets by simplifying enforcement procedures, eliminating or reducing difficulties arising from the insolvency laws of different Member States, and eliminating re-characterisation of repurchase arrangements (repos) as merely security interests ..**

32. To that end, the FCD required Member States to change their laws (to the extent necessary) so as to ensure that security over various forms of "financial collateral" – originally, in very broad terms, money in a bank or other account and shares and bonds[3] – should be treated throughout the EU both consistently and, in many respects, more favourably than security over other assets.

33. Article 1(3) of the FCD permitted Member States to limit the scope of its implementation to financial collateral arrangements where both the collateral taker and the collateral provider are one of the types of public sector bodies, central banks, financial institutions, central counterparties, settlement agents and clearing houses specified in Article 1(2)(a)-(d) of the FCD – that is (broadly) to limit the scope to arrangements between participants in the wholesale financial markets. However, in implementing the FCD, the UK (in company with 9 other Member States) extended the scope so as to apply whenever both parties are non-natural persons (including unincorporated firms, partnerships, and other bodies with legal personality other than individuals).

34. The FCARs introduced into UK law the EU law concept of a 'financial collateral arrangement'. In relation to such financial collateral arrangements the FCARs, as required by the FCD, disapplied or modified some of the central provisions of English law relating to formalities, and disapplied or modified various significant provisions of English insolvency law. In relation to the remedies available to the secured party under such arrangements ('the collateral taker'), the FCARs recognised or formalised the concept of security by title transfer ('title transfer financial collateral arrangements'[4])

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[3] The definition of 'financial collateral' in the FCD was expanded by Directive 2009/44/EC to include 'credit claims'. Under Art 4(a) of the FCD (as amended), 'financial collateral' "must consist of cash or financial instruments or credit claims". Article 2(1)(d) defines 'cash' as "money credited to an account in any currency, or similar claims for the repayment of money, such as money market deposits". Article 2(1)(e) defines 'financial instruments' as "shares in companies and other securities equivalent to shares in companies and bonds and other forms of debt instruments if these are negotiable on the capital market, and any other securities which are normally dealt in and which give the right to acquire any such shares, bonds or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment), including units in collective investment undertakings, money market instruments and claims relating to or rights in or in respect of any of the foregoing". Article 2(1)(o) defines 'credit claims' as "pecuniary claims arising out of an agreement whereby a credit institution, as defined in Article 4(1) of Directive 2006/48/EC, including the institutions listed in Article 2 of that Directive, grants credit in the form of a loan".

[4] Defined in Regulation 3(1) to mean "an agreement or arrangement, including a repurchase agreement, evidenced in writing, where (a) the purpose of the agreement or arrangement is to secure or otherwise cover the relevant financial obligations owed to the collateral-taker; (b) the collateral-provider transfers legal and beneficial ownership in financial collateral to a collateral-taker on terms that when the relevant financial obligations are discharged the collateral-taker must transfer legal and beneficial ownership of

and, in relation to certain other forms of security ('security financial collateral arrangements'[5]), introduced or confirmed the validity of 'right of use' provisions providing for the collateral taker to use or dispose of the collateral as if full ownership of the collateral had been transferred from the 'collateral provider' to the collateral taker under the arrangement, subject only to an obligation to return 'equivalent' collateral.

### *(D2) The remedy of appropriation*

35. In relation to such security financial collateral arrangements (ie those not initially involving outright transfer of title to the collateral taker) the FCARs also introduced into English law the remedy of 'appropriation'. The FCD, in Article 4(3), permitted Member States which did not already allow appropriation not to recognise it. However, no Member State took advantage of this opt-out. It is common ground between the parties that the Share Charge constituted a 'security financial collateral arrangement' for the purposes of the FCARs.

36. Regulations 17 and 18 of the FCARs, which deal with appropriation, provide as follows:

> **Appropriation of financial collateral under a security financial collateral arrangement**
>
> **17(1) Where a security interest is created or arises under a security financial collateral arrangement on terms that include a power for the collateral-taker to appropriate the financial collateral, the collateral-taker may exercise that power in accordance with the terms of the security financial collateral arrangement, without any order for foreclosure from the courts (and whether or not the remedy of foreclosure would be available).**
>
> **17(2) Upon the exercise by the collateral-taker of the power to appropriate the financial collateral, the equity of redemption of the collateral-provider shall be extinguished and all legal and beneficial interest of the collateral-provider in the financial collateral shall vest in the collateral taker**
>
> **Duty to value collateral and account for any difference in value on appropriation**

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equivalent financial collateral to the collateral-provider; and (c) the collateral-provider and the collateral-taker are both non-natural persons".

[5] Defined in Regulation 3(1) to mean "an agreement or arrangement, evidenced in writing, where (a) the purpose of the agreement or arrangement is to secure the relevant financial obligations owed to the collateral-taker; (b) the collateral-provider creates or there arises a security interest in financial collateral to secure those obligations; (c) the financial collateral is delivered, transferred, held, registered or otherwise designated so as to be in the possession or under the control of the collateral-taker or a person acting on its behalf; any right of the collateral-provider to substitute financial collateral of the same or greater value or withdraw excess financial collateral or to collect the proceeds of credit claims until further notice shall not prevent the financial collateral being in the possession or under the control of the collateral-taker; and (d) the collateral-provider and the collateral-taker are both non-natural persons".

> **18(1) Where a collateral-taker exercises a power contained in a security financial collateral arrangement to appropriate the financial collateral the collateral-taker must value the financial collateral in accordance with the terms of the arrangement and in any event in a commercially reasonable manner.**
>
> **18(2) Where a collateral-taker exercises such a power and the value of the financial collateral appropriated differs from the amount of the relevant financial obligations, then as the case may be, either—**
>
> **(a) the collateral-taker must account to the collateral-provider for the amount by which the value of the financial collateral exceeds the relevant financial obligations; or**
>
> **(b) the collateral-provider will remain liable to the collateral-taker for any amount whereby the value of the financial collateral is less than the relevant financial obligations.**

37. Appropriation in accordance with these provisions is:

> **.. a self-help remedy available to a collateral-taker so long as the [security financial collateral arrangement] provides for it, and also contains provisions for valuation.**
>
> **If the power of appropriation is exercised the collateral-taker takes the collateral as his own property, at its value under the agreed mechanism, subject (if that value exceeds the secured debt) to a liability to pay the excess to the collateral-provider, and with a claim for the balance of the debt if the value is less than the secured debt ..** [6]

38. As has been noted by Joanna Benjamin and Felicity Maher[7]:

> **.. The original European Commission proposal for the [FCD] did not include appropriation as a method of enforcing financial collateral. This was because it was not recognized in the legal systems of all Member States. It was feared that its introduction solely in respect of financial collateral arrangements could give rise to uncertainty in those states where it was not recognized. Appropriation was introduced by the European Parliament in its report on the Commission's proposal ..**
>
> **.. The justification for the inclusion of appropriation was two-fold. Provided the terms and valuation had been agreed in advance in the financial collateral arrangement, it was thought that appropriation was in the interests of financial stability. And it was thought that it may not be in the interests of collateral takers to realize collateral by sale at times of instability in the financial markets. To deal with the fears of uncertainty, the European Council subsequently recommended the inclusion, in what is**

[6] *Çukurova No 1* (fn 2 above) at [13].
[7] Joanna Benjamin and Felicity Maher 'Lessons from Çukurova' [2008] CMLJ 126 at 133.

> **now Article 4(3), of an option not to recognize appropriation. However, no Member State made use of this option ..**

39. As was noted by the Privy Council in *Çukurova No 1*[8], the drafting of Regulation 17 of the FCARs appears to have reflected the Treasury's view that, in the UK, appropriation was already a self-help remedy known to the law. That may well have been right in certain circumstances in relation to financial collateral in the form of 'cash'. Outside insolvency[9], English law has long recognised or conferred certain self-help rights of set-off or combination of accounts in relation to money obligations. However, the definition of 'financial collateral' in the FCD[10] and in the FCARs is not limited to 'cash' but from the very beginning has included 'financial instruments', defined in turn so as to include, inter alia, 'shares in companies and other securities equivalent to shares in companies'[11].

40. In relation to these non-money forms of collateral, the notion that they could be appropriated by the unilateral act of the collateral-taker was a novel concept in the law of England and Wales. The "traditional (but now obsolescent) English remedy of foreclosure" [12], to which appropriation has sometimes been compared, is not a self-help remedy. As the Privy Council noted in a further instalment of the *Çukurova* litigation, *Çukurova Finance International Ltd and another v Alfa Telecom Turkey Ltd (Nos 3 to 5)* [13] ("***Çukurova No 2***"*)*, foreclosure (because it involves the extinction of the equity of redemption) can only be achieved by order of the Court[14], and the Court can instead order a sale: see the Law of Property Act 1925 s 91(2). In any event, "appropriation is much closer to sale than it is to foreclosure. Appropriation is in effect a sale by the collateral-taker to himself, at a price determined by an agreed valuation process"[15]. Prior to the FCARs, such an action would have been ineffective as against the mortgagor, as contravening the strict rule that a mortgagee exercising his power of sale

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8 *Çukurova No 1* (fn 2 above) at [11] and [14].

9 The right of set off provided for in company insolvency by the Insolvency Rules 2016 rr 14.24 (administration) and 14.25 (winding-up) (previously r 4.90 of the Insolvency Rules 1986) is automatic and mandatory and is therefore not a self-help remedy: see *Stein v Blake* [1996] AC 243 at 253, per Lord Hoffmann, and *Re BCCI SA (No 8)* [1998] AC 214 at 223, per Lord Hoffmann.

10 See fn 3 above.

11 When the FCARs were enacted in 2003, Regulation 3(1) defined 'financial instruments' as "(a) shares in companies and other securities equivalent to shares in companies; (b) bonds and other forms of instruments giving rise to or acknowledging indebtedness if these are tradeable on the capital market; and (c) any other securities which are normally dealt in and which give the right to acquire any such shares, bonds, instruments or other securities by subscription, purchase or exchange or which give rise to a cash settlement (excluding instruments of payment); and includes units of a collective investment scheme within the meaning of the Financial Services and Markets Act 2000, eligible debt securities within the meaning of the Uncertificated Securities Regulations 2001, money market instruments, claims relating to or rights in or in respect of any of the financial instruments included in this definition and any rights, privileges or benefits attached to or arising from any such financial instruments".

12 *Çukurova No 1* (fn 2 above) at [13].

13 [2013] UKPC 25, [2016] AC 923 at [77]

14 "Foreclosure is done by order of the court, not by any person": *Re Farnol, Eades, Irvine & Co* [1915] 1 Ch 22 at 24, per Warrington J.

15 *Çukurova No 1* (fn 2 above) at [27]

cannot purchase the property on his own account[16]. Any term purporting to confer such a power on a mortgagee would in any event have been void as a clog on the equity of redemption[17].

41. Article 4(1) of the FCD (reflected in Regulation 18(2) of the FCARs) requires Member States to ensure that on the occurrence of an enforcement event, the collateral taker shall be able to realise the collateral, in the case of cash:

> **.. by setting off the amount against or applying it in discharge of the relevant financial obligations**

and, in the case of financial instruments (including shares):

> **.. by setting off their value against, or applying their value in discharge of, the relevant financial obligations ..**

42. In most normal circumstances, ascertaining the value of financial instruments in relation to which there is an available and liquid market should be straightforward: and those involved in the wholesale financial markets will not generally take unlisted and illiquid shares in private companies as financial collateral, since such shares cannot readily be realised. However, although bonds and other forms of debt instruments only qualify as 'financial instruments' if they are "negotiable on the capital markets", and certain other securities qualify only if they are "normally dealt in", no such limitation is expressed either in the FCD or the FCARs in relation to 'shares in companies'. Mr Downes did not seek to argue that any limitation should be implied to the scope of that expression, and it appears on its face to include unlisted and illiquid shares in private companies as well as shares which, because they are quoted on an exchange, will generally have a readily and immediately ascertainable value[18].

43. The fact that the FCARs apply to transactions outside the wholesale financial markets and to shares which are unlisted and illiquid creates a regime which allows private companies to enter into security arrangements which provide for appropriation as a method of enforcement. That, in turn, makes it likely that cases (such as the present) will arise, in which the collateral taker has a special interest in the shares constituting the financial collateral, extending to considerations beyond their realisable value.

44. In those circumstances, the remedy of appropriation may give rise (inter alia) to two possible problems. The first is that the remedy can be used for an improper purpose. That was the allegation in *Çukurova*, where it was said that the entire transaction - and,

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16 See eg *Martinson v Clowes* (1882) 21 Ch D 857 at 860, per North J.

17 *Çukurova No 1* at [27]. See also *Jones v Morgan* [2001] EWCA Civ 995, [2001] Lloyd's Rep Bank 323 at [55], per Chadwick LJ.

18 Under the FCD Art 1(4)(b), Member States were permitted to exclude "financial collateral consisting of the collateral provider's own shares, shares in affiliated undertakings within the meaning of seventh Council Directive 83/349/EEC of 13 June 1983 on consolidated accounts, and shares in undertakings whose exclusive purpose is to own means of production that are essential for the collateral provider's business or to own real property". The UK did not adopt this exclusion.

in particular, the exercise of the power of appropriation - was part of a scheme to acquire the charged shares. It is settled law that, if enforcement of a security interest is wholly for a collateral purpose, that enforcement is void[19]. However, it is unnecessary that a mortgagee, when enforcing its security, should have "purity of purpose", that is to say that its only motive is to recover, in whole or in part, the debt secured by the mortgage[20]: and in *Çukurova No 2*[21], the Privy Council rejected the collateral provider's argument that the collateral taker's commercially-driven wish to acquire the charged shares could of itself vitiate an otherwise legitimate exercise of a right of appropriation:

> **.. The acquisition of control was a necessary incident of a permitted mode of satisfying the debt. The fact that it was an incident which was highly attractive to [the collateral taker] does not mean that the right of appropriation was exercised in bad faith.**
>
> **.. More generally, however, the Board considers that if a chargee enforces his security for the proper purpose of satisfying the debt, the mere fact that he may have additional purposes, however significant, which are collateral to that object, cannot vitiate his enforcement of the security. If the law were otherwise, the result would be that the exercise of the right to enforce the charge for its proper purpose would be indefinitely impeded because of other aspects of the chargee's state of mind which were by definition irrelevant ..**

45. The second of these problems is the difficulty of valuing the charged shares in circumstances where there is either no or a very limited third-party market for them and/or where they may nevertheless have a special value to the collateral taker.

46. There are no provisions in the FCD which expressly deal with how collateral should be valued for the purposes of appropriation, other than:

46.1 Recital (17), which states that:

> **This Directive provides for rapid and non-formalistic enforcement procedures in order to safeguard financial stability and limit contagion effects in case of a default of a party to a financial collateral arrangement. However, this Directive balances the latter objectives with the protection of the collateral provider and third parties by explicitly confirming the possibility for Member States to keep or introduce in their national legislation an *a posteriori* control which the Courts can exercise in relation to the realisation or valuation of financial collateral and the calculation of the relevant financial obligations. Such control should allow for the judicial authorities to verify that the realisation or valuation has been conducted in a commercially reasonable manner.**

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[19] See *Quennell v Maltby* [1979] 1 WLR 318 at 322H, per Lord Denning MR; *Downsview Nominees Ltd v First City Corporation Ltd* [1993] AC 295 at 312G, per Lord Templeman; and *Çukurova No 2* at [73].

[20] See eg *Meretz Investments NV v ACP Ltd* [2006] EWHC 74 (Ch) at [300] to [314].

[21] Fn 13 above at [77] – [78].

and

46.2 Article 4(6), which provides that the relevant provisions of the FCD:

**.. shall be without prejudice to any requirements under national law to the effect that the realisation or valuation of financial collateral and the calculation of the relevant financial obligations must be conducted in a commercially reasonable manner ..**

46.3 These provisions of the FCD are reflected in Regulation 18(1) of the FCARS, which requires that:

**.. the collateral-taker must value the financial collateral in accordance with the terms of the arrangement and in any event in a commercially reasonable manner ..**

47. As I shall discuss later in this judgment, neither the FCD nor the FCARs contains any description of what constitutes a "commercially reasonable manner" of realisation or valuation[22]. Nor is there any express indication in either the FCD or the FCARs about whether a "commercially reasonable manner" of valuation should reflect any special value of the collateral to the collateral taker. That interesting and difficult issue is, however, a point which I do not need to consider for the purposes of this judgment. About a month before trial, ABT Auto applied to amend its Particulars of Claim to allege for the first time (in summary) that the Charged Shares had a special value to Aapico in excess of the ordinary market value, and that that special value (which was not reflected in the FTI Valuation) should have been taken into account by any commercially reasonable valuation. That application, which was strenuously resisted by Aapico, came before HH Judge Pelling QC on 13 June 2022. HHJ Pelling refused ABT Auto's application, partly on the grounds that the proposed amendments were insufficiently particularised, but mainly because of the lateness of the application and the consequent risk to the trial date. HHJ Pelling refused permission to appeal. ABT Auto subsequently renewed its application for permission directly to the Court of Appeal. That application had not been determined as at the date of trial and it was therefore accepted by both parties that I should deal with this case on the footing that the issue of special value is not one which I need to consider. ABT Auto's application for permission to appeal was eventually refused by the Court of Appeal on 24 October 2022.

## (E) The Validity of the Appropriation

48. Against that legal background, ABT Auto's primary case was that the appropriation of the Charged Shares carried out by Aapico was invalid and therefore legally ineffective. ABT Auto put this case in two ways:

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[22] See paragraphs 74 to 84 below.

48.1 First, it asserted that clause 9.3 of the Share Charge was not effective to confer a legally valid power of appropriation, since the method of valuation for which it provided was not commercially reasonable;

48.2 Secondly, it asserted that the appropriation which Aapico purported to carry out was in any event legally ineffective because the valuation of the Charged Shares had not been carried out in a commercially reasonable manner.

49. With regard to the first of these ways of putting ABT's case on invalidity, Mr Downes submitted as follows:

49.1 As explained in paragraph 40 above, the right of appropriation contravenes two important principles of English law: (a) the rule against self-dealing, which prohibits a mortgagee from selling the mortgaged property to himself; and (b) the rule which invalidates any clog on the equity of redemption. These rules give effect to two important principles of public policy: (1) the protection of the mortgagor, who is generally the more vulnerable party; and (2) the promotion of integrity and fair dealing in connection with the realisation of security. They should therefore be disapplied only to the extent expressly required by the FCARs: and the FCARs should be interpreted restrictively so as to make only the minimum necessary derogation from those rules in the case of financial collateral arrangements.

49.2 It follows that a term of a security arrangement which purports to confer on the secured party a power of appropriation will be valid if, and only if, it strictly complies with the requirements of Regulations 17 and 18 of the FCARs.

49.3 In order to comply with Regulations 17 and 18, clause 9.3 of the Share Charge would have had to have provided for a commercially reasonable method of valuation of the Charged Shares.

49.4 Clause 9.3 did not do so, and was therefore ineffective to confer a valid power of appropriation. By providing in clause 9.3(c) that, in certain circumstances, the value of the Charged Shares should be assessed by "such other process as the Chargees may select", clause 9.3 on its face permitted the collateral taker to conduct the valuation by a method that was not commercially reasonable, for example, one that was entirely arbitrary, capricious and/or self-serving.

50. Mr Tom Smith KC, who appeared for Aapico, submitted that this way of putting ABT Auto's case was legally misconceived. In Mr Smith's submission, the only relevant requirements in the FCARs are that the terms of the financial collateral arrangement must "include a power for the collateral-taker to appropriate the financial collateral" and must provide for a method of valuation. Mr Smith also submitted that the

provisions of clause 9.3(c) were, in any event, entirely commercially reasonable, and that clause 9.4 prevented ABT Auto from contending to the contrary.

51. These (and other) submissions by Mr Downes and Mr Smith raise issues as to the correct interpretation of the FCARs. As Briggs J noted when he was considering certain other issues relating to the FCARs in the Lehman *Extended Liens* case[23]:

> **.. As national legislation implementing an EU directive, the FCARs are to be interpreted, so far as possible, in a manner consistent with the meaning and purpose of the directive ..**

and I gratefully adopt and apply the summary of the relevant interpretative principles given by Briggs J in paragraphs 56 to 58 of his judgment in the Lehman *Client Money* case[24].

> **.. the court may need to adopt a two stage approach, the first of which consists of interpreting the Directive, and the second of which consists of interpreting the domestic legislation in the light of the meaning of the Directive, thus interpreted ..**
>
> **The first stage may require reference to different language texts of the Directive, to relevant travaux préparatoires and to any relevant decisions of the ECJ ..**
>
> **At the second stage, the relevant domestic legislation must be interpreted in accordance with the following principles:**
>
> **i) it is not constrained by conventional rules of construction;**
> **ii) it does not require ambiguity in the legislative language;**
> **iii) it is not an exercise in semantics or linguistics;**
> **iv) it permits departure from the strict and literal application of the words which the legislature has elected to use;**
> **v) it permits the implication of words necessary to comply with the Community law obligations; and**
> **vi) the precise form of the words to be implied does not matter ..**
>
> **Nonetheless, the breadth of the obligation to construe in accordance with Community law obligations is constrained by the following requirements:**
>
> **(a) The ascertained meaning should “go with the grain of the legislation” and be “compatible with the underlying thrust of the legislation being construed”. It should not be inconsistent with a fundamental or cardinal feature of the legislation since this would cross the boundary between interpretation and amendment.**

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23 *Re Lehman Brothers International (Europe) (In Administration)* [2012] EWHC 2997 (Ch), [2014] 2 BCLC 295 at [76].

24 *Re Lehman Brothers International (Europe) (In Administration)* [2009] EWHC 3228 (Ch) [2010] 2 BCLC 301 (reversed in part, without affecting this issue, [2010] EWCA Civ 917 and [2012] UKSC 6).

> **(b) The exercise of the interpretative obligation cannot require the court to make decisions for which it is not equipped, or give rise to important practical repercussions which the court is not equipped to evaluate.**

In the event, neither side has sought to rely in relation to the FCD upon the discrepancies between the different language texts of Article 4[25], the travaux préparatoires, or any relevant decisions of the CJEU.

52. The arguments in the present case also raise issues as to the correct interpretation of the Share Charge. The principles of interpretation which I should apply to that document were not in dispute. They have been elucidated in the familiar line of decisions of the House of Lords and the Supreme Court, beginning with *Investors Compensation Scheme Ltd v West Bromwich Building Society*[26] and culminating (at least for the time being) in *Wood v Capita Insurance Services Ltd*[27]. In *Trillium (Prime) Property GP Limited v Elmfield Road Limited*[28] Lewison LJ said of these authorities that he would:

> **.. not attempt to distil or paraphrase that learning. As Lord Hodge said at [9], the legal profession has sufficient judicial statements of that nature ..**

I propose respectfully to adopt the same approach.

53. I broadly accept much of the thrust of the first two submissions made by Mr Downes, at least to this extent. As a matter of English law, the remedy of appropriation is available only in the circumstances provided for in the FCARs. The remedy will not be available where the contract does not constitute a security financial collateral arrangement - for example, because the asset provided as security does not fall within one of the categories of financial collateral, or because one of the parties is an individual. Even in the case of a security financial collateral arrangement, the remedy will not be available unless the terms of the arrangement so provide, and also provide (in the case of financial instruments and credit claims) for the method of valuation. That last requirement is not itself expressly stated in the FCARs but is implicit in Regulation 18(1) when interpreted in the light of Article 4(2)(b) of the FCD[29].

54. However, for reasons which I shall explain later in this judgment, I do not accept that it would be right to complicate the "rapid and non-formalistic enforcement procedures"

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25 See Grziadei, 'Financial Collateral Arrangements: Directive 2002/47/EC and the Many Faces of Reasonableness' (2012) 17 Unif L Rev 497, which discusses the discrepancies both among the different language texts of Article 4 of the FCD, and among the national texts implementing it, but concludes that "No matter how different the texts of the Directive on the point of what "reasonableness" is to be, reference to the concept in this context will not raise any question for the European Court of Justice to answer on the basis of Article 267 TFEU".

26 [1998] 1 WLR 896, HL

27 [2017] UKSC 24, [2017] AC 1173.

28 [2018] EWCA Civ 1556 at [9].

29 Article 4(2) of the FCD provides that "Appropriation is possible only if: (a) this has been agreed by the parties in the security financial collateral arrangement; and (b) the parties have agreed in the security financial collateral arrangement on the valuation of the financial instruments and the credit claims".

provided for by the FCD and implemented in the FCARs by reference to the pre-existing principles of the English law of mortgage. In my judgment, Mr Downes' third submission (although supported by an observation in *The Law of Security* that the wording of Regulation 18(1) "implies that the valuation process laid down by the agreement must be commercially reasonable"[30]) overstates the position.

55. Regulation 18(1) imposes two cumulative requirements on the collateral taker when valuing the financial collateral for the purposes of exercising a right of appropriation. The valuation must be carried out both (1) in accordance with the terms of the arrangement; and (2) in a commercially reasonable manner. It follows that the terms of the arrangement must provide for the method of valuation and that method must *permit* the valuation to be carried out in a commercially reasonable manner, otherwise the second of these requirements could not be satisfied. It does not, however, follow that Regulation 18(1) requires the terms of the arrangement to exclude the possibility of any non-compliant manner of valuation. All that is required is that the valuation in fact carried out is done in a commercially reasonable manner and that that commercially reasonable manner is one that is permitted by – ie, is "in accordance with" - the terms of the arrangement.

56. Perhaps more importantly, I do not accept Mr Downes' fourth submission. Clause 9.3 on its face gives the collateral taker a discretion as to the method of valuation if no public index or independent valuation "is available or reasonably practicable given the then current circumstances". However, it does not follow that the collateral taker is thereby permitted, as Mr Downes suggests, to act in an arbitrary or unreasonable manner in choosing the method. The power of appropriation conferred on the collateral taker by clause 9.3(b) of the Share Charge is expressly "subject always to Regulation 18 of the Regulations". When clause 9.3 is read as a whole, it is therefore in my judgment implicit that the valuation methods which clause 9.3(c) permits the collateral taker to choose must, in this case, be ones which conform to the requirements of Regulation 18(1). If that be right, no further restrictive implication is necessary. If, however, that were wrong, then on the true interpretation of clause 9.3 the collateral taker's contractual discretion as to the method of valuation would (in the well-known words of Rix LJ) be "limited, as a matter of necessary implication, by .. the need for the absence of arbitrariness, capriciousness, perversity and irrationality"[31]. The collateral provider is therefore protected by the terms of the Share Charge against the sort of abuse of discretion posited by Mr Downes.

57. It follows that, in my judgment, clause 9.3 sufficiently complies with the requirements of the FCARs to confer upon Aapico a legally valid power of appropriation.

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30 Beale, Bridge, Gullifer and Lomnicka, *The Law of Security and Title-Based Financing* (3rd edn, OUP 2018) ("***the Law of Security***") at [18-33].

31 *Socimer International Bank Ltd (In Liquidation) v Standard Bank London Ltd (No.2)* [2008] EWCA Civ 116, [2008] Bus. LR 1304 at [66].

58. That conclusion is sufficient to dispose of this first way in which ABT Auto puts its case as to the invalidity of the appropriation. It is therefore not necessary for me to deal at length with Mr Smith's alternative argument on behalf of Aapico, that clause 9.3(d) gives rise to a contractual estoppel preventing ABT Auto from disputing the commercial reasonableness of clause 9.3(c). However, in case this matter goes further, it is right that I should deal briefly with the arguments that were made.

59. As Lewison LJ said in *First Tower Trustees Ltd v CDS (Superstores International) Ltd*[32], it is now firmly established, at least at the level of the Court of Appeal and below, that:

> **.. parties can bind themselves by contract to accept a particular state of affairs even if they know that state of affairs to be untrue. This is a particular form of estoppel which has been given the label "contractual estoppel". Unlike most forms of estoppel it requires no proof of reliance other than entry into the contract itself ..**

In clause 9.3(d), ABT Auto has agreed that the method of valuation provided for in clause 9.3(c) is commercially reasonable for the purposes of the Regulations. In Mr Smith's submission, that contractual agreement is sufficient to prevent ABT Auto from now disputing that conclusion.

60. Mr Smith, in his submissions, drew a distinction between the method of valuation and the manner of valuation. In Mr Smith's submission, the FCD and the FCARs require the parties to agree the method of valuation in the financial collateral arrangement, and there is nothing either in the FCD or the FCARs to prevent such an agreement from taking effect according to its terms. In that connection, Mr Smith drew my attention to the observations of the Privy Council in *Çukurova No 2*[33], where counsel for the collateral provider suggested in argument that the agreed basis of valuation specified in the charge was not commercially reasonable because it made no allowance for any control premium, and the Privy Council (while not deciding the point) expressed "scepticism that the concluding nine words of regulation 18 could over-ride this agreed basis". Mr Smith contrasted the agreed method with the manner of valuation, which Regulation 18(1) expressly requires must be "commercially reasonable". In Mr Smith's submission, if the parties can agree the method of valuation in this way, they can also agree that that method is commercially reasonable for the purposes of Regulation 18(1).

61. If Mr Smith were right in these submissions, Regulation 18(1) would not require the method of valuation (as opposed to the manner of valuation according to that method) to be a commercially reasonable one. In those circumstances the agreement on the commercial reasonableness of the chosen method in clause 9.3(d) would be unnecessary. It therefore seems clear that the person who drafted the Share Charge

32 [2018] EWCA Civ 1396; [2019] 1 WLR 637, at [47].
33 Fn 13 above at [125].

considered it at least possible that Regulation 18(1) requires all aspects of the valuation, including the method chosen, to be commercially reasonable.

62. In my judgment, Mr Smith's submissions mischaracterise the effect of the FCD and the FCARs. The division between an unreviewable method and a reviewable manner is not one which can easily be derived from Recital 17 and Article 4(6) of the FCD or from Regulation 18(1). The purpose of these provisions, as is made clear in Recital 17, is (inter alia) to protect the collateral provider "in relation to the realisation or valuation of financial collateral and the calculation of the relevant financial obligations". In my judgment, these provisions are concerned with the entirety of the process, not just with the manner of carrying out a previously agreed method of valuation, however one-sided and however likely to produce a commercially unreasonable result that method might be. Otherwise, Article 4(6), as implemented in Regulation 18(1), would not fully achieve the protective purpose identified in Recital 17. In those circumstances, it might be thought necessary (as Mr Downes argued) for domestic law to supply the kinds of additional protection for the collateral provider that have been developed over the years in the English law of mortgage[34]. That could add an undesirable layer of uncertainty and complexity.

63. Of course, an important evidential factor in determining what is "commercially reasonable" in any given case will often be the terms which the parties (if of equal bargaining power) have agreed. That, it seems to me, is at least one possible explanation of the "scepticism" expressed by the Privy Council in the passage relied on by Mr Smith. Regulation 18(1) nevertheless expressly requires commercial reasonableness "in any event". That, in my judgment, is consistent with the provisions of the FCD which refer to "the valuation", and not just those aspects of it which are not prescribed by the terms of the arrangement, being conducted in a commercially reasonable manner.

64. Writing extra-judicially about contractual estoppel, Cockerill J has referred to "a worrying lack of certainty about the boundaries of the doctrine"[35]. Given that lack of certainty, I hesitate to suggest that public policy must inevitably provide one such boundary. Even so, it is well established that, where a statutory protection is designed to serve broad public purposes, "public policy would require that the right be treated as mandatory and not be waivable by the party for whose benefit it operates"[36]. In my

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34 Cf the suggestion by Professor Louise Gullifer in *Goode and Gullifer on Legal Problems of Credit and Security* (7th edn, Sweet & Maxwell, 2022) at [6-77] that a test of "unconscionability" might be deployed in this context: "[T]he valuation must be done according to the terms of the arrangement, but in any event in a commercially reasonable manner. This obviously raises the question of what would be seen as commercially reasonable by the courts, but it is likely that a valuation process agreed in advance by the parties would be seen as such *unless it was unconscionable*" (emphasis added). In the equivalent passage in *The Law of Security* at [18-33], Professor Gullifer refers to "clear unconscionability" as being required before a court would be likely to intervene in the case of a "detailed valuation process .. agreed in advance by the commercial parties".

35 Dame Sarah Cockerill, 'Contractual estoppel - the case for coherent principles' [2022] JBL 189 at 193.

36 Beale et al, *Chitty on Contracts* (34th edn, Sweet & Maxwell 2021) at [18-060].

judgment, the requirements of Regulation 18(1) are designed, in this context, to serve the broad protective objectives of public policy identified in Recital 17. In those circumstances, it seems to me that the law should not permit the parties to contract out of those requirements, whether directly or indirectly through a contractual estoppel. The editors of The *Law of Security* record an observation by Professor Sir Roy Goode KC that "it is unlikely that a court would allow parties to contract completely out of the statutory provision [in Regulation 18(1)] for reasonableness"[37]. I respectfully agree. In my judgment, ABT Auto is not precluded by clause 9.3(d) from contending that the method of valuation prescribed by clause 9.3(c) is not a commercially reasonable one. Since, however, I have already rejected that contention on its merits, that conclusion is of little assistance to ABT Auto.

65. I now turn to the second way in which ABT Auto puts its case as to the invalidity of the appropriation. Mr Downes' argument proceeded by the following stages. In his submission:

65.1 Compliance with the FCARs is essential to the validity of any appropriation.

65.2 Regulation 17 requires a power of appropriation to be exercised in accordance with the terms of the security financial collateral arrangement - in the present case, the Share Charge.

65.3 Clause 9.3(b) of the Share Charge makes the power of appropriation "subject always to Regulation 18".

65.4 Clause 9.3(c) prescribes the method of valuation. Given the terms of clause 9.3, the valuation in the present case had to satisfy 5 requirements:

65.4.1 First, clause 9.3(c) provides that "The value of any Charged Property appropriated in accordance with this Clause shall be determined by the Chargees". That means that overall responsibility for the valuation rested with Aapico. Even though Aapico retained FTI to carry out the valuation, Aapico remained responsible for any shortcomings of FTI.

65.4.2 Secondly, clause 9.3(c) provides that the value of the Charged Shares shall be "the market value of such Shares". That means that the valuation had to be of the "market value" (which is a term of art).

65.4.3 Thirdly, clause 9.3(c) requires that market value to be "determined by the Charge by reference to" inter-alia "a[n] .. independent valuation". That means that FTI had to be independent and had to act independently

37 *The Law of Security* (fn 30 above) at [18-33].

of Aapico in conducting the valuation and in determining the market value.

65.4.4 Fourthly, as required by Regulation 18(1) the valuation had to be conducted in a commercially reasonable manner.

65.4.5 Fifthly, either as an incident of the requirement in Regulation 18(1) or as a matter of necessary implication, the valuation had to be conducted in good faith.

65.5 If the valuation in fact carried out did not comply with these requirements, then it was not carried out in accordance with the terms of the Share Charge (which, in turn, incorporated the requirements of Regulation 18(1)).

65.6 If the valuation was not carried out in accordance with the terms of the Share Charge, it did not comply with Regulation 17 and accordingly was not valid.

66. I accept much of the first three of these submissions. As I have said in paragraph 53 above, the remedy of appropriation is available only in the circumstances provided for in the FCARs. As I shall explain later in this judgment, I also accept at least some aspects of Mr Downes' fourth submission. I do not, however, accept the remainder of Mr Downes' submissions, whose overall logic seems to me to be based on a misunderstanding of Regulations 17 and 18 and to confuse the requirements for a valid appropriation with those for a valid valuation.

67. Regulation 17 is concerned with validating contractual powers of appropriation. As explained in paragraph 40 above such powers would, but for Regulation 17, have been void as clogs on the equity of redemption. Any attempt to exercise such powers would also have been ineffective as contravening the rule against self-dealing. Regulation 17(1) validates such powers in relation to security financial arrangements by providing that the collateral taker may, as a self-help remedy and without any court order, exercise that power in accordance with the terms of the arrangement. Regulation 17(2) then provides for the consequences of the exercise of such a power, including the extinguishment of the equity of redemption - something which, in the case of foreclosure, would have required an order from the court.

68. Regulation 17 is not concerned with valuation, but with the right to exercise the power of appropriation. That right is part of the "rapid and non-formalistic enforcement procedures" introduced by the FCD, whose purpose is "to safeguard financial stability and to limit contagion effects in case of the default of a party to a financial collateral arrangement". In my judgment, it would be entirely contrary to the intent of the FCD (and therefore to the intent of the FCARs) to constrain the exercise of that power by the sort of detailed requirements put forward by Mr Downes.

69. Valuation is dealt with in the following regulation, Regulation 18. Recital 17 to the FCD makes expressly clear that the control permitted by Article 4(6) is "*a posteriori*" – that is, *ex post* or after the event. The requirement in Regulation 18(1) for the valuation to be conducted in a commercially reasonable manner is an aspect of the "*a posteriori*" control permitted by Article 4(6) and permits the court to review the valuation after the event. Compliance with this requirement is therefore not a pre-condition to an effective appropriation. Non-compliance does not invalidate the appropriation but may lead to the non-compliant valuation subsequently being set aside. Any other conclusion would inevitably lead to uncertainty as to the ownership of the collateral, something which would be wholly unacceptable in the (often fast-moving) financial markets, and therefore very unlikely to have been intended to be the effect of these provisions of the FCD and the FCARs

70. I bear in mind that, in *Çukurova No 2*[38] the Privy Council granted an order for relief from forfeiture to the collateral provider, and that the effect of that order was, after the event, to reverse the appropriation. However, that decision seems to me to be entirely consistent with the view which I have just expressed. Relief from forfeiture is a discretionary remedy, which presupposes the *prima facie* validity of the provision and (where relevant) its exercise, and which will only be granted where the interests of third parties who may have acted in good faith on the basis of the original forfeiture can be adequately protected: see eg *Vauxhall Motors Ltd v Manchester Ship Canal Co Ltd*[39] and *Keshwala v Bhalsod*[40]. If the original forfeiture had not been a valid one, there would have been no need for an order granting relief from it.

71. In his submissions, Mr Downes placed great emphasis upon the concluding words of clause 9.3(b), "subject always to Regulation 18 of the Regulations". He argued that these words in the Share Charge made compliance with the requirement in Regulation 18(1) a contractually mandated precondition to an effective appropriation. I do not accept that argument. If, as I have held, non-compliance with Regulation 18(1) does not itself invalidate an appropriation, it does not seem to me that the hypothetical "reasonable person" would consider that this contractual provision making the power of appropriation "subject always to Regulation 18 of the Regulations" was intended to have that effect. That does not seem to me to be either the literal or the most commercially sensible interpretation of the concluding words of clause 9.3(b) of the Share Charge.

72. It follows, in my judgment, that the appropriation itself was not invalid. I therefore reject this aspect of ABT Auto's case.

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38 Fn 13 above at [77] – [78].
39 [2019] UKSC 46, [2020] AC 1161 at [17] to [34], per Lord Briggs JSC.
40 [2021] EWCA Civ 492, [2021] 1 WLR 4004 at [59] to [66], per Nugee LJ.

## (F) Were the Charged Shares valued in a commercially reasonable manner?

### *(F1) Introduction*

73. That, however, is by no means the end of ABT Auto's claim. It was common ground between the parties that, were I to come to the conclusion that the Charged Shares had not been valued in accordance with the requirements of Regulation 18(1), it would be open to me to follow the approach taken in the *LBSF v National Power* case (discussed in paragraphs 77 to 81 below), to set aside that valuation, to substitute the Court's own valuation, and to make such consequential orders as might be appropriate in those circumstances. As a matter of legal analysis it seems to me that, on the facts of the present case, the same practical result could be achieved by treating any failure to comply with Regulation 18(1) as a breach of the terms of Clause 9.3 of the Share Charge and awarding damages: but it will not always be the case, as here, that the provisions of Regulation 18(1) are expressly incorporated as contractual terms of the arrangement.

74. Regulation 18(1) required Aapico to "value the financial collateral in accordance with the terms of the arrangement and in any event in a commercially reasonable manner". As I have already observed, neither the FCD nor the FCARs gives any express indication of what is required to make a valuation "in a commercially reasonable manner" and there appears to be no authority, in this or any other jurisdiction, directly in point[41]. By way of analogy, however, both sides referred me to two recent cases from rather different contexts: *Barclays Bank plc v Unicredit Bank AG*[42], and *Lehman Brothers Special Financing Inc v National Power Corp*[43].

75. The first of these, *Barclays Bank plc v Unicredit Bank AG* was concerned with the terms of the credit default swaps at the heart of a synthetic securitisation. Those terms permitted Unicredit to terminate the swaps in certain specified events, two of which nevertheless required Barclays' prior consent to the proposed termination, "such consent to be determined by [Barclays] in a commercially reasonable manner". One of the relevant events had occurred which would otherwise have entitled Unicredit to terminate, but Barclays had refused to consent to the proposed termination. The issue before the court was whether Barclays' decision to refuse consent had been "determined .. in a commercially reasonable manner". At first instance, the judge decided in favour of Barclays, and that decision was upheld by the Court of Appeal.

76. The facts of that case are some distance from those of the present one. However, Longmore LJ (with whom Patten and Christopher Clarke LJJ agreed) said this:

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41 For a discussion of the issues, see G. Yeowart and R. Parsons, *Yeowart and Parsons on the Law of Financial Collateral* (Cheltenham: Edward Elgar Publishing, 2016) ) ("*Yeowart and Parsons*") at [12.92] to [12.99]. Cf the similar requirements in sections 9-610(b) and 9-627 of the UCC and Article VII(3) of the 2007 Luxembourg Protocol to the Convention on International Interests in Mobile Equipment on Matters specific to Railway Rolling Stock.

42 [2014] EWCA Civ 302, [2014] 2 All ER (Comm) 115.

43 [2018] EWHC 487 (Comm), [2019] 1 All ER (Comm) 1027.

> **[15] It is the manner of the determination which must be commercially reasonable; it does not follow that the outcome has to be commercially reasonable although, if it is not, that would no doubt cause one to look critically at the manner of the determination ..**
>
> **..**
>
> **[19] It is not easy to express a test for commercial reasonableness for the purpose of this (let alone any other) contract ..**
>
> **..**
>
> **[21] .. I do not think it useful to construe the words in this contract by reference to their use in other contexts, nor do I think it by any means inevitable that the construction put on the words in this case will necessarily apply in those other contexts, which may anyway use slightly different words ..**

77. The second of these cases, *LBSF v National Power*, was concerned with the calculation of the Close-out Amount under the 2002 ISDA Master Agreement. The definition of "Close-out Amount" in section 14 of that Master Agreement includes the following:

> **.. Any Close-out Amount will be determined by the Determining Party (or its agent), which will act in good faith and use commercially reasonable procedures in order to produce a commercially reasonable result. ..**[44]

78. Robin Knowles J noted that:

> **.. Reasonableness as a concept may be deployed in a contract to require from a decision maker either rationality or entirely objective criteria of reasonableness: .. The former is often described as analogous to *Wednesbury* unreasonableness (that is, in an ISDA Master Agreement context 'a determination which no reasonable non-defaulting party could come to': *Fondazione Enasarco v Lehman Bros Finance SA* [2015] EWHC 1307 (Ch) at [53] per David Richards J (as he then was)). Reasonable care, reasonable price and reasonable time are often given as examples of the latter ..**

79. Distinguishing cases such as *Socimer*[45] and *Braganza*[46], Robin Knowles J attached importance to the fact that this was an express contractual wording, observing that:

> **[66] .. It should not readily be accepted that the different, and express, wording in the present case has an effect that is the same as the term (requiring rationality) that the court would imply when the parties to a contract did no more than place a discretion in the hands of a contracting party ..**

[44] Cf s 1.2.2 of the 2021 ISDA Interest Rate Derivatives Definitions in relation to the obligations of the Calculation Agent.

[45] *Socimer International Bank Ltd (In Liquidation) v Standard Bank London Ltd (No.2)* (fn 31 above).

[46] *Braganza v BP Shipping Ltd* [2015] UKSC 17, [2015] 1 WLR 1661

> **[67] On the wording of a particular contract and in context the choice of decision maker may to some degree inform the conclusion about the nature of the decision making intended by the parties .. And whatever the nature of the decision making there is room for respect to be accorded to the decision of the contracting party by whom the parties have agreed a matter should be decided ..**
>
> **[68] However the choice to make a party to the contract the decision maker does not, in my judgment, compel a conclusion that 'reasonableness' is deployed to mean rationality. It will depend on the wording and the context. The question of the nature of the decision making required by the parties to a contract is not the same as the question of the parties' choice of decision maker. The fact that the role of decision maker may place a party in a position of conflict of interest does not mean that 'reasonableness' can only mean rationality; the contract parties will have chosen to accept the conflict of interest. And conflict of interest is no less an issue if rationality is required ..**
>
> **..**
>
> **[79] Both rationality and (wholly objective) 'reasonableness' allow for a result that falls within a range. So here, even using the concept of (wholly objective) reasonableness a number of results may be commercially reasonable. On the other hand, the fact that there is a range does not mean that the Determining Party can simply take the result that suits it best at one end of the range ..**

80. In *Lehman Bros International (Europe) (in administration) v Lehman Bros Finance SA*[47] Briggs J (as he then was) had previously held that the relevant provisions of the 2002 ISDA Master Agreement:

> **.. clearly impose[] two objective standards. The first is that the procedures used should be commercially reasonable and the second is that the result produced should also be commercially reasonable. Plainly, that leaves a bracket or range both of procedures and results within which the Determining Party may choose, even if the court, carrying out the exercise itself, might have come to a different conclusion. It nonetheless imposes an objective standard which, if for example the Determining Party refused to determine a Close-out Amount at all, could be applied by the court itself, for example on the application of the other party ..**

81. Having considered that case, and the submissions of the parties, Robin Knowles J eventually concluded that

> **[81] Taking all of the above into account, in my view, the 2002 ISDA Master Agreement requires the Determining Party to use procedures that are, objectively, commercially reasonable in order to produce, objectively, a**

[47] [2012] EWHC 1072 (Ch) at [82].

**commercially reasonable result. If it does not do this the court or a tribunal will.**

82. I accept the submission of Mr Smith that the wording of Regulation 18(1) is distinguishable from the wording considered by Briggs J and Robin Knowles J, in that Regulation 18(1) says nothing about the result. However, in my judgment, each of the cases to which I have been referred provides valuable insights. In particular, each case emphasises the need to consider the particular words of the relevant provision in the particular context (both contextual and commercial) in which they are used, and the danger of interpreting one provision in a particular context by reference to a different provision in a different context.

83. The relevant context here is that of the FCD and the FCARs, which I have already discussed in paragraphs 67 to 69 above. In giving effect to Regulation 18(1), the court's task is to review, after the event, a valuation of financial collateral carried out by the collateral taker in the context of the "rapid and non-formalistic enforcement procedures" provided for in the FCD and the FCARs, in order to ensure for "the protection of the collateral provider and third parties" that that valuation has been conducted in a commercially reasonable manner.

84. Having regard to that context, and to the wording of the FCD and the FCARs, I have come to the following conclusions relevant to the present case about what Regulation 18(1) requires:

84.1 First, the clear words of Regulation 18(1) place the duty of valuation on the collateral-taker. That means that it is the collateral taker that is responsible in law for the valuation, even if (as here) it has used a third-party valuer. If the third-party valuer has not carried out the valuation in a commercially reasonable manner, the valuation will not have been carried out in a commercially reasonable manner and the collateral taker cannot say that it has been, simply on the basis that the collateral taker itself has acted reasonably in retaining an apparently competent third party to do the work. If the position were otherwise, Regulation 18(1) would not adequately protect the collateral provider from incompetence or wrongdoing on the part of the third-party valuer, against whom the collateral provider is unlikely to have any direct contractual rights or remedies.

84.2 Second, it is the way in which the valuation is made which must be commercially reasonable. It does not necessarily follow that the result itself must be a commercially reasonable one. Nevertheless, if the value produced is less than could reasonably be expected, that may of itself be evidence that the manner of valuation has not been commercially reasonable. Conversely, a commercially reasonable result may indicate (in the absence of evidence to the contrary) that that result has been arrived at in a commercially reasonable

manner. Furthermore, if the valuation result reached by an approach which is not commercially reasonable is the same as that which a commercially reasonable approach would have reached, there may be no point in setting aside the original valuation only to substitute an identical figure.

84.3 Third, the requirement for the valuation to be made in a commercially reasonable manner imports an objective standard. The subjective view of the collateral taker (or of its third party valuer) about what is commercially reasonable is irrelevant. As the recitals to the FCD make clear, its primary concern is with the financial markets. In that context, the word "commercially" indicates that the standard to be applied is that of reasonable participants in the relevant financial market. In other contexts, the manner of valuation must be one which conforms in that context to what Steyn LJ (as he then was) referred to as "the reasonable expectations of sensible businessmen"[48].

84.4 Fourth, the question of what, in any given case, is commercially reasonable is fact-sensitive. Depending upon the nature of the collateral and the circumstances of the case, there may perhaps be only one commercially reasonable manner of valuation. For example, where the financial collateral consists of traded securities listed on a single exchange, the only commercially reasonable approach to valuing those securities might perhaps be to do so by reference to the publicly quoted price of those securities on that exchange[49]. In other cases, however, several approaches to valuation may all be commercially reasonable. It will depend, in each case, on the particular facts.

84.5 Fifth, in the context of the valuation required to be made on appropriation, there is no separate and independent requirement for the collateral taker to act in good faith, and no room for the implication of any of the equitable or other duties associated with the law of mortgage in English law. Recital 17 and Article 4 (6) of the FCD show that the limited "requirements under national law" there referred to are the only domestic law constraints permitted to the "rapid and non-formalistic enforcement procedures" provided for in Article 4. The statutory requirement in the case of a financial collateral arrangement is therefore simply that the valuation must be made "in accordance with the terms of the arrangement and in any event in a commercially reasonable manner" - no more, no less.

84.6 Nevertheless, the process of valuation is not one in which it will normally be commercially reasonable for the valuing party to have primary regard to its own

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48 *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 at 27; *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194 at 196.

49 Even then, there might be a choice between the closing price on the preceding business day or on the date of appropriation, something which might perhaps be determined (subject to commercial reasonableness) by the terms of the arrangement: see *Yeowart and Parsons* at [12-94].

commercial interests. The valuation of financial collateral for these purposes is essentially an objective exercise. Except in those rare cases in which the collateral taker is the only possible buyer, valuation will not normally involve the sort of commercial decision in which any consideration of the valuer's own commercial interests is legitimate. It follows that, even in cases where there is a range of approaches that could potentially be regarded as commercially reasonable, the collateral taker cannot deliberately adopt the approach which produces the lowest valuation or which otherwise suits it best. It must still act overall in a way which is commercially reasonable in the sense just described.

### *(F2) The FTI Valuation*

85. Against that legal background, I now turn to consider the FTI Valuation on which Aapico has relied.

86. FTI's valuation dated 31 July 2019 was carried out pursuant to a letter of engagement dated 5 July 2019. The FTI Valuation is a detailed and closely reasoned one. It is 42 pages long and has a further 31 pages of Appendices. A sufficient outline for present purposes of the valuation approach adopted by FTI can nevertheless be gained from the 8-page "Executive Summary" with which it begins.

87. At the valuation date, SGAH's operations were carried on in three broad geographical divisions:

87.1 "**Sakthi India**", which comprised SACL and Sakthi Auto Ancillary Private Limited ("**SAAPL**");

87.2 **"Sakthi Europe"**, which was owned by SACL and which consisted of several holding companies and the two operating companies which formed Sakthi Portugal, Sakthi Portugal SA and Sakthi Portugal SP21 SA; and

87.3 **SAGUSA** which had its own US operations and which was the participant in the Chinese Joint Venture.

88. The "Executive Summary" begins with a "Group Overview". This explains that the subject of the valuation, SGAH, is a holding company and that the valuation therefore incorporates valuations of SGAH's subsidiary companies as described above.

89. As part of that "Group Overview", under the heading "Financials Overview", FTI states the following:

> **Over the period FY 16 – LTM (Mar 19) the Group has delivered revenue growth, however, EBITDA has materially decreased and net debt has materially increased:**

- **EDITDA has fallen from USD 52m in FY16 to USD 14m on an LTM (Mar 19) basis. This decline in earnings appears to be attributable to operational challenges resulting from: (i) rising raw material cost; (ii) growing product rejection rates in US due to poor quality manufacturing moulds; (iii) market pressures in Europe as a result of increased regulation around diesel vehicles; and (iv) poor capital expenditure strategies**

- **Net debt has increased from USD 131m to USD 268m. We understand that this increase in debt is attributable, at least in part, to the funding required for capacity expansion and to cover operational cash requirements**

90. The "Group Overview" notes Aapico's USD 165m investment in the group, now represented by 49.99% of SGAH's equity and USD 90m under the 2017 Loan Agreement and the 2018 Loan Agreement. It also notes the following "recent corporate events":

- **Aapico is in the process of appropriating the shares in SGAH it does not already own through a UK legal process. This valuation report has been prepared in connection with this appropriation process.**

- **A receiver has been appointed over SAGUSA. We understand that key stakeholders are working in a consensual manner to deliver a funding solution for SAGUSA in order to enable it to continue to trade as a going concern**

91. Page 2 of the "Executive Summary" then gives a "Valuation Overview". Under the heading "Valuation Approach", FTI states:

> **We have valued the Group on a bottom-up basis, considering the value of the Group's operations at a divisional level. We consider this granular approach appropriate given complexities in the Group's legal and financial structure ..**
>
> **We have relied on multiples analysis as (i) this is an approach commonly used to value assets in this sector and (ii) appropriate forecasts to prepare a DCF analysis are not available ..**
>
> **In terms of financials, we have used historical EBITDA. We consider that a potential purchaser would likely focus on historical performance as it captures the recent deterioration in trading across most of the Group's divisions and the forecasts are arguably outdated in a number of instances ..**

92. Under the heading "Multiple Benchmarks", FTI references a chart of "EV/EBITDA multiple benchmarks arising from our comparator and precedent transaction analysis", and then goes on to state:

> **Our view is that these benchmarks are supportive of a valuation for the Group's divisions of 5.0x – 7.0x EBITDA. We consider it reasonable to value the Group's regional operations at the same multiple: (i) our quoted comparator and precedent transaction analysis indicates that benchmarks in the different regions are priced on comparable multiples, (ii) our review of the AAPICO investment literature which indicates that they did not appear to seek to apply different multiples to the different regions when valuing SGAH in 2017; and (iii) our market knowledge arising from discussions with a private equity firm on their approach to a valuation of a comparable asset to the Group**

93. Page 3 of the "Executive Summary" contains FTI's "Valuation Conclusion".

> **Our valuation of SGAH's equity is nil .. In summary:**
>
> > **<u>SACL valuation</u>: SACL is an Indian manufacturer of automotive parts which owns 52% of SAPL, another Indian manufacturer of automotive parts, and 100% of Orlandofin BV, the holding company for the Group's European operations. The SACL operating companies have over the period FY 16 – LTM (Mar 19) delivered revenue growth, but experienced modest declines in profitability.**
> >
> > **The value we attribute to SGAH's 77% stake is USD 42m – USD 69m, based on valuing the operations at 5.0x – 7.0x historical EBITDA and accounting for net debt positions as at March 2019 as a divisional level..**
> >
> > **<u>SAGUSA valuation</u>: We assign zero value to SAGUSA's equity. This is because: (i) SAGUSA has seen consistent declines in earnings in recent years and [is] currently loss-making (LTM (Mar 19) EBITDA: USD (12)m) and (ii) SAGUSA has a significant net debt position (Mar 19 net debt: USD 69m) and a material funding requirement (USD 36m estimated through to the year end).**
>
> **The above analysis indicates that the value attributable to SGAH from its equity positions in SACL and SAGUSA is USD 42m – USD 69M. As this is less than the level of SGAH's net debt (which relates to the Aapico loan) of USD 95M (as at March 2019), we conclude that there is no value in SGAH's equity. Given these valuation conclusions, we assign a nominal value of USD 1 to 50.01% of SGAH's equity.**

94. FTI then goes on to consider the position, disregarding the Aapico loans:

> **.. [I]f the loan Aapico provided to SGAH did not exist ..**

> **The value of 100% of SGAH's equity would be USD 42m – USD 69m. The value based on the mid-point of our multiple range, which we consider reflects the most reasonable/accurate multiple for the purposes of valuing SGAH would be USD 55m.**
>
> **The value of 50.01% of SGAH's equity would be USD 21m – USD 35m. The value based on the midpoint of our multiple range, which we consider reflects the most reasonable/accurate multiple for the purposes of valuing SGAH, would be USD 27m. These figures have been arrived at by multiplying the value for a 100% stake by 50.01%.**

95. As stated in paragraph 21 above, it was this final figure of USD 27m - i.e. 50.01% of the midpoint of FTI's valuation bracket for the equity in SGAH, disregarding the loans made by Aapico - which was used by Aapico as its valuation in connection with the appropriation of the Charged Shares.

96. The remaining part of the "Executive Summary" deals with "Selected Valuation Issues", and provides further explanation of FTI's approach. In particular, FTI explains in this section that:

    96.1 The basis of valuation adopted was that of a "fair market value".

    > **.. The valuation has also been performed based on the following: (i) the valuation is on a stand-alone basis which excludes the value of any synergies from which a potential purchaser might benefit, (ii) the valuation is on a non-distressed sale basis and (iii) the valuation assumes that there is no impact on value arising from an acquisition of the Group or the current legal processes being pursued (e.g. the appropriation process in the UK and the receivership process in the US) ..**

    96.2 FTI relied upon to a large extent on information provided by Aapico:

    > **.. We have relied on information provided to us by AAPICO and we have not had access to the management teams of any SGAH operating company. The information AAPICO was able to provide to us primarily related to the limited information provided to them as a minority shareholder of SGAH. As AAPICO is not directly involved in the day-to-day operations of SGAH, their ability to answer questions we had on the financial information provided to us was limited ..**

    The information in fact relied on by FTI and its sources are set out in detail on Page 9 of the "Executive Summary" and in Appendix D.

    96.3 FTI placed limited weight for the purposes of its valuation on the various forecasts and business plans drawn up by the operating divisions:

> **.. for the following reasons:**
>
> - **The forecasts are typically dated and do not appear to reflect the recent deterioration in trading ..**
> - **The business plans appear high-level and there is very limited explanation provided to explain forecast trends.**
> - **We have not had access to local management in order to develop an understanding of trends embedded in the forecasts.**
> - **Management have typically had poor budgeting accuracy ..**

FTI had instead priced the divisions based on historical financial information because it "would expect a potential purchaser to adopt a similar approach".

96.4 FTI relied upon a multiples analysis and did not undertake a Discounted Cash Flow ("**DCF**") analysis:

> **.. for two reasons: (i) we have a number of concerns around the reliability of the forecasts .. and (ii) the business plans only incorporate P&L forecasts not cash flows items such as capex and working capital absorption which are required to perform a DCF analysis ..**

96.5 For the purposes of the valuation, FTI assumed that SAGUSA and the Chinese Joint Venture were operationally linked. FTI therefore valued the two together.

96.6 FTI had considered the alternative approach of (i) valuing SAGUSA on a liquidation basis and (ii) separately assigning value to the Joint Venture income (approximately USD 10m pa). FTI did not adopt that approach for a number of reasons: (i) it was outside the scope of the valuation exercise to perform a liquidation analysis of SAGUSA, particularly given that the realisable value of SAGUSA's assets could well be lower than their book value, and that secured and other preferential claims could exceed liquidation proceeds; (ii) the operational interdependency between SAGUSA and the Chinese Joint Venture meant that the current level of joint venture income might not be maintained in the event of a liquidation of SAGUSA; and (iii):

> **..We have discussed this approach with AAPICO and they have indicated that they do not consider this a realistic scenario ..**

### *(F3) ABT Auto's case*

97. The pleaded case of ABT Auto makes many complaints, both as to the conduct of Aapico in connection with the FTI Valuation and as to the valuation approach adopted by FTI. Doing my best to summarise a somewhat diffuse pleading, it appears to be ABT Auto's pleaded case that:

97.1 To the extent that clause 9.3 of the Share Charge gave Aapico any discretion in the determination of market value, it was an implied term of the Share Charge (and/or was a requirement imposed in equity) that that discretion had to be exercised for a proper purpose, taking into account all relevant considerations and discounting all irrelevant considerations, in good faith and not arbitrarily or capriciously.

97.2 Further or alternatively, where Aapico decides that the valuation under clause 9.3 of the Share Charge is (as here) to be determined by reference to an independent valuation, that clause requires (on its true interpretation or by way of necessary implication) that the independent valuation concerned should be:

97.2.1 A valuation by a valuer who was independent from Aapico;

97.2.2 A valuation by a valuer with appropriate expertise, knowledge and experience of the industries and geographic areas in which the company and its subsidiaries subject of the valuation operate;

97.2.3 A valuation pursuant to instructions containing all the information about SAGH and its subsidiaries which Aapico possessed or could reasonably discover and which the valuer could reasonably require;

97.2.4 A valuation carried out using an objective test to fairly assess the market;

97.2.5 A valuation which actively considered a range of valuation methods and applied the method (or combination of methods) which, in the valuer's professional opinion, was the most appropriate;

97.2.6 A valuation in which any principles, assumptions, estimates, parameters and adjustments adopted (including, if applicable, discount rates, multiples and premia) were selected on an objectively justifiable basis;

97.2.7 A valuation which reached a conclusion which was within a commercially reasonable range;

97.2.8 A valuation which was not vitiated by fraud or manifest error.

97.3 The valuation in fact caried out did not comply with those obligations, in one or more of the following respects:

97.3.1 Aapico failed to provide FTI with the necessary information:

97.3.1.1 Aapico failed to provide FTI with access to the management of SGAH or the local management of SGAH's subsidiaries (except

in relation to Sakthi Portugal SA, which was only provided after FTI had completed its fieldwork).

97.3.1.2 Aapico failed to provide FTI with the relevant business plans, in particular:

97.3.1.2.1. The business plan for Sakthi Portugal/SP21 dated February 2019;

97.3.1.2.2. The business plan for SGAH prepared and sent by Mr Kumar (SGAH's then CEO) to Mr Yeap on 9 February 2018;

97.3.1.2.3. The reports sent by Mr Kannan to Mr Nathasiri of Aapico on 18 December 2018

97.3.1.2.4. Any of the business plans which included information regarding CAPEX or working capital.

97.3.1.3 Aapico failed to provide FTI with Aapico Hitech's financial statements and/or with the underlying documents and information relevant to the value of SGAH shown in those statements:

97.3.1.3.1. Aapico Hitech's financial statements of 31 March 2019 in which it valued its 49.99% stake in SGAH at 2.152 million Thai Baht (from which a value of approximately USD 135.6m for the whole of SGAH, without minority considerations, can be derived).

97.3.1.3.2. Aapico Hitech's financial statements of 31 December 2018, which provided a valuation of 2.007 million Thai Baht (USD 128.5m) or its financial statements of 31 June 2019 which provided valuations of 2,140 million Thai Baht (USD 139.5m).

97.3.1.3.3. Aapico Hitech's financial statements of 30 June 2019. Although these were not signed until 14 August 2019, Aapico Hitech could and should have informed FTI that they were being produced and asked FTI to delay its report until the statements were available, alternatively should have provided them to FTI as soon as it was possible to do so to enable FTI

to consider whether to change its valuation in light of the information set out in that document.

97.3.1.4 Aapico failed to provide FTI with the Mazars Valuation Report dated 20 February 2019 which valued Sakthi Portugal SA and Sakthi Portugal SP21 SA collectively (on a DCF basis) at approximately €115m as at 31 December 2018.

97.3.1.5 Aapico provided only limited answers to the questions put to it by FTI Consulting. If Aapico was unable to answer any of FTI's questions or to answer any such questions fully, it should have asked ABT Auto to provide or procure the answers to questions it was unable to answer, or full answers to the questions it was unable to answer fully.

97.3.1.6 Aapico failed accurately to instruct FTI as to the true interdependence between the Chinese Subsidiaries.

97.3.2 The valuation did not properly consider the full range of valuation methods:

97.3.2.1 FTI was unable to apply the DCF Method in circumstances where it had not been provided with proper and complete instructions and information; alternatively,

97.3.2.2 FTI unreasonably discounted the application of the DCF Method in relation to the companies which were going concerns.

97.3.2.3 Application of the DCF Method to those companies would have resulted in the attribution of substantially higher value to the Shares than the valuation provided by FTI.

97.3.3 The valuation was not carried out using an objective test to fairly assess the market. In particular:

97.3.3.1 The failure to use the DCF method of valuation was not objectively justifiable;

97.3.3.2 FTI valued SAGUSA using the factually incorrect assumption that the Chinese Subsidiaries were each operationally dependent upon SAGUSA.

97.4 The valuation did not produce a result within a commercially justifiable range:

97.4.1 FTI concluded that (excluding the debt owed to Aapico) the whole of SGAH was worth only USD 53.89m and the Charged Shares were worth only USD 27m.

97.4.2 In fact, the true market value of the whole of SGAH was approximately USD 180.1m and the Charged Shares were worth approximately USD 90.1m.

97.4.3 The valuation was in any event vitiated by manifest error. FTI's attribution of a nil value to the Chinese Subsidiaries was a manifest error. Sakthi China was worth USD 119.8m.

97.5 Aapico acted in bad faith in relation to the valuation and/or did not operate clause 9.3(c) in a commercially reasonable manner, in that:

97.5.1 Aapico well knew that the information which it had failed to provide to FTI was information which would be relevant to the exercise of valuation and which would, for the most part, caused FTI to attribute a higher valuation to SGAH and so to the Charged Shares;

97.5.2 Aapico well knew that:

97.5.2.1 The valuation provided by FTI was significantly lower than the valuation in Aapico Hitech's own financial statements;

97.5.2.2 FTI's valuation of Sakthi Portugal SA and Sakthi Portugal SP21 was significantly lower than the Mazars valuation (on a DCF basis) of approximately €115m as at 31 December 2018 and that the difference was not reasonably explicable by anything that had happened in the interim;

97.5.2.3 The attribution by FTI of a nil valuation to the Chinese Subsidiaries was obviously incorrect;

97.5.2.4 FTI's valuation had been prepared without access to the necessary information and documents;

97.5.2.5 In consequence, FTI's valuation was inaccurate and significantly understated the value of the Charged Shares.

97.5.3 Aapico nevertheless relied on and adopted the FTI valuation for the purposes of its purported appropriation of the Charged Shares.

98. The conclusions which I have reached in section F1 (paragraphs 73 to 84) above concerning the limited and specific requirements of clause 9.3 of the Share Charge and Regulation 18(1) of the FCARs mean that much of the structure of this pleaded case is, in my judgment, misconceived because it is based on an erroneous and considerably over-complicated view of those requirements.

99. It nevertheless remains necessary for me to consider the factual complaints identified in paragraphs 97.3 to 97.5 above in order to determine (to the extent that those complaints are made out on the facts) whether those matters establish that Aapico did not discharge its obligation to value the Charged Shares "in accordance with the terms of the arrangement and in any event in a commercially reasonable manner".

100. These factual complaints seem to me to fall into two broad groups:

100.1 Aapico's lack of objectivity: Aapico did not approach the task of valuation in an objective and commercially reasonable manner, but with a view to producing the lowest possible valuation. In particular:

100.1.1 It failed to provide FTI with the necessary information to enable it carry out its valuation in a commercially reasonable manner.

100.1.2 It instructed and/or encouraged FTI to arrive at the lowest possible result.

100.1.3 It adopted and relied on the FTI valuation in circumstances where Aapico knew that it was unduly favourable to Aapico because of Aapico's own conduct

100.2 FTI's valuation methodology: FTI, in turn, failed to carry out the valuation exercise in a commercially reasonable manner in that, in particular, FTI:

100.2.1 Carried out the valuation exercise knowing that the information available to it was inadequate to produce a reliable valuation;

100.2.2 Failed to use the DCF method of valuation based on the forecasts and business plans drawn up by the operating divisions;

100.2.3 Valued on the basis of "Fair Market Value" rather than at "Market Value";

100.2.4 Assumed that the Chinese Subsidiaries were each operationally dependent upon SAGUSA, and consequently attributed a nil value to the Chinese Subsidiaries.

### *(F4) The Expert Evidence*

101. Expert evidence was given on behalf of ABT Auto by Mr Sat Plaha. Mr Plaha is a partner in the national Forensic Accounting and Valuation practice of BDO LLP and co-head of BDO's M&A Forensic services practice. He produced reports dated 4 March 2022 and 22 April 2022. Mr Plaha's final adjusted valuation for SGAH as a whole (disregarding the Aapico loans) was USD 180.1m, giving a value for ABT Auto's 50.01% shareholding of USD 90.1m.

102. On behalf of Aapico, the expert evidence was provided by Mr Daniel Ryan, a Managing Director at and head of the London office of Berkeley Research Group (UK) Ltd. Mr Ryan's reports were also dated 4 March 2022 and 22 April 2022. His final adjusted valuation of ABT Auto's 50.01% shareholding was USD 20.6m.

103. The two experts produced a Joint Memorandum dated 11th April following their meeting by video link on 28 March 2022. As directed, that Joint Memorandum helpfully set out a schedule of the matters on which they were agreed and those about which they did not agree.

104. There was very little difference between the valuation conclusions arrived at by Mr Plaha and Mr Ryan in relation to Sakthi India. In relation to Sakthi Europe, Mr Plaha's conclusion was that SGAH's shareholding should have been valued at USD 4.45m. Mr Ryan valued SGAH's shareholding at zero. In relation to SAGUSA itself, Mr Plaha valued SGAH's shareholding at USD 0.4m, while Mr Ryan again valued it at zero. The most significant point of difference between Mr Plaha's valuation conclusions and those of Mr Ryan was in relation to the Chinese Joint Venture, to which Mr Plaha attributed a revised value of some USD 126.3m (of which ABT Auto's share would be 63.16m), and to which Mr Ryan (like FTI) attributed a nil valuation.

105. As section 2.13 of the Joint Memorandum makes clear, a significant cause of this major difference was the difference in the instructions received by the experts in relation to the effect for the purposes of Article 50 of the Chinese JV Agreement of the appointment on 16 May 2019 of a receiver over SAGUSA's business. Mr Plaha was, in effect, instructed to assume that Article 50 was not engaged. Mr Ryan, by contrast, was instructed to assume that it was, and that that article accordingly gave Weihei China the right to buy SAGUSA's shares in the Chinese Joint Venture for their Net Asset Value ("**NAV**"). The experts agreed that the NAV of USD 23.3m shown in the last audited financial statements would, in those circumstances, provide a cap on the value SAGUSA could expect to realise from the sale of shares. The effect on valuation of these events and of these and other provisions of the Chinese JV Agreement is therefore a relevant issue to which I shall return later in this judgment.

106. Both experts gave oral evidence and were cross examined. It seemed to me that both experts, in their answers to questions, had a tendency to stray into advocacy for the case

of the party which had instructed them. Both, however, demonstrated that they had the relevant knowledge and experience required to express views on the issues covered by them and both, in my judgment, were doing their best to assist the court. In choosing between the experts' competing views, it is therefore necessary for me to examine those views on their individual merits, unaffected by the greater authority or persuasiveness of either of the experts.

### *(F5) The factual witnesses*

107. The sole factual witness for ABT Auto was Dr Mahalingam. My impression of Dr Mahalingam was that he was a sometimes over-optimistic, essentially honest, but forgetful witness who, quite understandably, was not master of the detail. At several points in his cross-examination, Mr Smith was able to show that Dr Mahalingam's detailed recollection was faulty.

108. Dr Mahalingam was not involved in any aspect of the valuation carried out by FTI. His evidence as to the history of SGAH involved (in summary) accepting that SGAH had had a long history of severe financial difficulties, particularly in relation to SAGUSA, but asserting that it was at heart a profitable business, whose fortunes could be turned round by proper management, because it had a good product and large-scale customers for that product. He accepted that Aapico had been entitled to appropriate the Charged Shares, but believed that the FTI Valuation represented a gross undervalue:

> **.. We're not really protesting their action in appropriation. We are protesting the valuation ..**

Dr Mahalingam's view of the value of SGAH was that, at the time of the appropriation, it was worth over USD 300m. He therefore thought that even Mr Plaha's valuation was significantly too low:

> **.. I'm not happy with what my expert said. I'm certainly not happy with the valuation that they did ..**

109. On behalf of Aapico, the principal evidence was given by Mr Yeap. His evidence relevant to the valuation (in summary) was he himself had had very little involvement in the valuation exercise, but had rather left matters to his subordinates, to whom he had given instructions to supply FTI with whatever they needed. His answers in cross-examination seemed sometimes to be heavily coloured by his desire to justify Aapico's and FTI's actions. They also showed that he too was no longer master of the detail.

110. Ms Yeap Xin Rhu, Ms Kannika Kongsubsopa and Mr Ramachandran Balasubramanian also gave evidence on behalf of Aapico Ms Yeap is the Chief Financial Officer and Company Secretary of Aapico Hitech. Her evidence was that she was not involved in the selection of FTI for the purpose of valuing the Charged Shares but, when she was informed of it, she instructed Ms Kongsubsopa to liaise with FTI to provide the

documents and information requested by FTI and to be their primary contact at Aapico. Ms Kongsubsopa is the Senior Financial Controller at Aapico Hitech. Her evidence was that Ms Yeap had instructed her to provide all the information requested by FTI. Most of the information was in a folder called "Sun" on a shared drive, but that she sometimes had had to ask her colleagues for material that was not on the "Sun" drive. Mr Balasubramanian is a Financial Coordinator at Aapico Hitech. Most of his evidence concerned the deteriorating financial position of SAGUSA.

111. Mr Downes did not challenge that Ms Yeap, Ms Kongsubsopa and Mr Balasubamanian were all honest witnesses who were doing their best to help the Court.

112. Aapico did not call any witnesses from FTI and did not, in its evidence, offer any explanation for its decision not to do so. Mr Downes, accordingly, invited me to draw the following adverse inferences: (1) that witnesses from FTI would have supported ABT Auto's case that FTI was acting on instructions from Aapico to produce the lowest possible valuation and so were not acting independently; and (2) that witnesses from FTI would have supported ABT Auto's case that, by valuing the Charged Shares at "Fair Market Value" they were departing from the requirement in clause 9.3 of the Share Charge to value the Charged Shares at their "Market Value".

113. The principles which should generally guide a court in deciding when drawing an adverse inference might be appropriate against a party who could call a potentially relevant witness but fails to do so were summarised by Brooke LJ in *Wisniewski v Central Manchester Health Authority*[50]. Essentially an adverse inference can be drawn where there is a case to answer; the witness could have been expected to give material evidence; and there is no credible evidence given for not calling him[51]. In such circumstances, the absence of evidence *may* entitle a court to draw an adverse inference but does not require it to do so. The drawing of an inference depends on an appreciation of all the evidence[52].

114. In the present case, that evidence of course includes the FTI Valuation itself. That is a long and detailed report, which explains both the methodology employed and the reasons for that methodology. Neither of the experts expressed the view that they were unable to understand how and why FTI had arrived at its conclusions. To say that there is no evidence from FTI is therefore to give only a partial picture.

115. As for the first of the specific inferences which Mr Downes invites me to draw, the written communications from Aapico to FTI were in evidence (though not those in relation to which privilege was claimed as a result of the involvement of Aapico's solicitors): and Mr Yeap was cross-examined about those communications. In the

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50 [1998] PIQR 324 at 340; *Prest v Petrodel Resources Ltd* [2013] UKSC 34, [2013] 2 AC 415 at [44], per Lord Sumption JSC.

51 *Efobi v Royal Mail Group Ltd* [2019] EWCA Civ 18, [2019] 2 All ER 917 at [32], per Sir Patrick Elias.

52 *Ras Al Khaimah Investment Authority v Azima* [2021] EWCA Civ 349 at [74].

circumstances, it does not seem to me to be appropriate to draw any specific adverse inference simply from the fact that no one from FTI was called to give oral evidence about what communications were received and about the extent to which FTI's valuation was influenced by those communications. The information on which FTI in fact relied, and the use in fact made by FTI of that information, is apparent from the face of the FTI Valuation. As to the second proposed inference, that was a matter which was fully explored with the expert witnesses. Again, in my judgment, live evidence from a witness from FTI could have added little or nothing that was helpful to the court and no adverse inference is appropriate.

116. In this connection it is also important to note that, although it is pleaded that Aapico acted in bad faith, there is no pleaded allegation that FTI itself did not act in good faith as an independent valuer or that the FTI valuation lacked objectivity. I did not stop Mr Downes from suggesting in cross-examination of Aapico's witnesses that FTI was not independent, because I was interested to hear whether their answers might shed some light on Aapico's own conduct. That does not, however, mean that any case on the basis that FTI did not act in good faith as an independent valuer is presently open to ABT Auto.

117. The absence of such a pleaded case, in my judgment, precludes any suggestion that Aapico's omission to call any witness from FTI should result in the drawing of adverse inferences as to the extent to which FTI allowed itself wrongly to be influenced by Aapico.

### *(F6) Findings of fact and analysis.*

118. It has become a commonplace of judgments in commercial cases such as this to emphasise the importance of the contemporary documents[53]. As Leggatt J (as he then was) observed in *Gestmin SGPS SA v Credit Suisse (UK) Ltd*[54]:

> **.. the best approach for a judge to adopt in the trial of a commercial case is .. to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts ..**

As Leggatt J went on to say, this does not mean that oral testimony serves no useful purpose: and it is clear that a proper awareness of the fallibility of human memory cannot relieve the court from the judicial task of making findings of fact based upon *all* of the evidence[55]. However, in a case such as the present, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities

53 *Simetra Global Assets Ltd v Ikon Finance Ltd* [2019] EWCA Civ 1413, [2019] 4 WLR 112 at [48], per Males LJ.
54 [2013] EWHC 3560 (Comm), [2020] 1 CLC 428 at [22].
55 *Kogan v Martin* [2019] EWCA Civ 1645, [2020] FSR 3 at [88], per Floyd LJ

will, in my judgment, usually be a better guide to the truth than even the most confident recollections of the witnesses[56]. That remains so, even though most of the relevant events here took place only about 3 years prior to trial.

119. Directing myself in accordance with that guidance, I make the following findings of fact. I propose to divide these findings of fact into the two groups identified in paragraph 100 above, reflecting the two themes of ABT Auto's complaints about the manner of valuation

(F6.1) Aapico's alleged lack of objectivity

120. I begin with ABT Auto's complaints about Aapico's alleged lack of objectivity, and how that is said to have manifested itself in Aapico's conduct in relation to the valuation.

*(F6.1.1) Failure to provide information*

121. ABT Auto's first complaint (in substance) is that Aapico, knowing that FTI was relying almost exclusively on information provided to FTI by Aapico, did not provide FTI with the information which would have been needed for FTI to have carried out the valuation fairly and therefore in a commercially reasonable manner.

122. As I have already explained, the task of providing documents and information to FTI was delegated to Ms Kongsubsopa. Ms Kongsubsopa was first asked to assist by Ms Yeap on 30 May 2019, who emailed her an "Initial Information Request List" from FTI. Ms Kongsubsopa was not in contact with the FTI team at that point, and so initially provided responsive documents to Aapico's lawyers, Baker McKenzie, for them to pass on to FTI.

123. On 3 June 2019, Mr Chad Griffin of FTI sent a "revised draft engagement letter" by email to Mr Yeap. This included, as an appendix, what Mr Griffin described as FTI's "valuation focused information requirements". Mr Yeap replied by return email:

> **Take note it is not possible for us to provide you all the information that you need as we do not run the company**
> **We will endeavour to send you as much as what we have**
> **We have provided quite some info to Baker [McKenzie] already**
> **Can you be more specific and narrow the list to what more you need**
> **AM tomorrow our time my team will provide the items you need minus what we have provided**

Mr Griffin's response was as follows:

> **I understand the difficulty regarding information, and we also need to assess quickly whether there will be sufficient information for us to do a reliable valuation exercise.**

56 Cf the classic statement of Robert Goff LJ in *The Ocean Frost* [1985] 1 Lloyd's Rep 1 at 57.

> **The historical management accounts for the target are the highest priority. I suggest a call would be helpful though once you have worked out what from the list will be available from your records**

124. On the following day, 4 June 2019, Mr Yeap forwarded Mr Griffin's email and its attached list to Ms Kongsubsopa, saying "Please handle". Ms Kongsubsopa understood that this second list of "information requirements" from FTI (which was longer) superseded the first.

125. At the outset of the valuation exercise, Mr Yeap, Ms Yeap and Ms Kongsubsopa had a conference call with the FTI team to discuss the information they had requested and to explain the limitations of the information which Aapico had available to it. Thereafter, within those limitations, Ms Kongsubsopa did her best to provide as much material as she could find. FTI set up a data room to store the information relevant to the valuation exercise and Ms Kongsubsopa provided most of the requested information via that data room, though some documents were also sent by email.

126. During the course of the valuation exercise, Ms Kongsubsopa had a number of calls with FTI to discuss the information that she had provided, and to discuss what other information might be available.

127. Most of the relevant information in Aapico's possession was stored in the "Sun" folder on the shared drive. However, if Ms Kongsubsopa could not find the documentation there, she asked her colleagues (with whom she shared an office) for assistance.

128. I have no doubt that Mr Yeap was keen that FTI should produce a low valuation of the Charged Shares. I equally have no doubt that FTI was aware that Aapico desired a low valuation. That would have been obvious to FTI (as it would have been to any valuer in FTI's situation) from the context in which FTI was being instructed to produce a valuation. Having observed Mr Yeap give his evidence, I also have little doubt that he would have made the strength of his desire for such a low valuation apparent to FTI.

129. Mr Yeap was, however, also keen that the valuation produced by FTI should be proof against challenge. By way of illustration, on 17 June 2019 he sent an email to FTI asking when their valuation report would be completed. FTI responded, explaining that that it would take another 2-3 weeks. There was then the following email exchange between Mr Yeap and FTI:

    129.1 From Mr Yeap:

    > **.. Thank you. Earliest is best as we have decided to take over. We have been kind and slow. Our opposition look at that as our weakness. Now that we have sacked them from the board, they are fighting back and we are facing some litigation. We want to put the**

> **lid tightly on the can asap. Trust you understand our impatience now ..**

129.2 From Mr Griffin of FTI:

> **.. Completely understood. We'll move as fast as possible. Part of the time is review and we need to make sure though in face of litigation risk that the valuation is as robust as possible ..**

130. I am satisfied on the basis of all the evidence that I have seen and heard that neither Mr Yeap, nor anyone else at Aapico placed any limits on the information which Ms Kongsubsopa was permitted to provide to FTI. There is simply no evidence that anyone at Aapico placed any limits on the information and documents which FTI could request, and no suggestion in the FTI Valuation itself that any important requests for information made by FTI were refused or ignored. There is, however, positive evidence from Ms Kongsubsopa, which I accept, that she was instructed to provide FTI with whatever they asked for.

131. Ms Kongsubsopa herself saw her task as being to identify the most up-to-date versions of the information requested by FTI, and to provide to them whatever information was available to her. She left it to FTI to identify what was needed and to come back to her to ask for anything further. FTI itself plainly considered that it had sufficient information to produce a reliable valuation.

132. With regard to the specific documents that ABT Auto has pleaded were not provided to FTI:

132.1 Ms Kongsubsopa did not provide the business plan for Sakthi Portugal/SP21 dated February 2019, but provided instead the more up-to-date plan prepared in July 2019;

132.2 Ms Kongsubsopa was not aware of the business plan for SGAH prepared and sent by Mr Kumar (SGAH's then CEO) to Mr Yeap on 9 February 2018, and so did not send that document to FTI. She did however provide to FTI the most recent versions of the business plans or predictions that she had for each of the entities in the group, which were those produced for a meeting between the CEOs and CFOs of SGAH's subsidiaries which took place in November 2018.

132.3 In relation to the reports sent by Mr Kannan to Ms Nathasiri of Aapico on 18 December 2018, Ms Kongsubsopa provided the "Performance Report Template" to FTI via the data room. She did not provide the accompanying monthly report for SACL dated September 2018 but provided instead the later equivalent version from December 2018 (which was the most recent version available to her).

132.4 Ms Kongsubsopa provided business plans for Sakthi Portugal, and for SACL, SAAPL and WBS, each of which contained some details of actual and forecasted CAPEX and actual working capital.

132.5 Ms Kongsubsopa did not provide FTI with Aapico Hitech's financial statements for the quarters ending 31 December 2018, 31 March 2019 and 30 June 2019. Nor did she provide FTI with the documents and information which caused Aapico Hitech to record the valuations for SGAH set out in those financial statements. FTI did not specifically request those financial statements, which were in any event publicly available.

133. EY Office Ltd in Thailand ("**EY**") were the auditors of Aapico Hitech. In paragraph 2.20 of their Joint Memorandum, the experts note (and I therefore find) that Aapico provided DCF valuations of the companies in the SGAH Group to EY in March 2019 but did not provide those valuations to FTI. However, the experts also record their opinion that the "carrying amount" of SGAH shown in the Aapico Hitech financial statements is not consistent with a market value basis of valuation. As Ms Kongsubsopa explained, Aapico Hitech did not carry out a new valuation each quarter, but rather adjusted the value shown in the financial statements to reflect Aapico Hitech's share of the loss incurred in that quarter and to reflect any exchange fluctuations between the USD and the THB.

134. In all the circumstances, it does not seem to me that Aapico's omission to provide FTI with Aapico Hitech's financial statements, or the supporting documents, or with the particular DCF valuations to which I have referred, either establishes of itself or indicates that the valuation was not done in a commercially reasonable manner. The pleaded suggestion that Aapico was under some sort of obligation to delay its appropriation until further information relevant to valuation was available is, in my judgment, legally misconceived.

135. Another of the documents which ABT Auto complains was not supplied to FTI is the valuation report dated 20 February 2019 ("**the Mazars Valuation Report**") on Sakthi Portugal which was prepared by the well-known firm of accountants, Mazars. This valued Sakthi Portugal SA and Sakthi Portugal SP21 SA collectively (on a DCF basis) at approximately €115m as at 31 December 2018.

136. The list sent by FTI on 3 June 2019 had specifically requested (amongst other things):

> **.. Any valuation reports on the Company (or principal divisions) .. received in the last five years, including underlying analysis where available ..**

Despite this, Ms Kongsubsopa did not provide FTI with a copy of the Mazars Valuation Report.

137. Ms Kongsubsopa did, however, supply FTI with the individual and consolidated financial statements for Sakthi Portugal, SP21 and Sakthi Services for the years 2017, 2018 and Q1 2019, and with up-to-date forecasts prepared by the Portuguese management team for the period 2019 to 2024.

138. On 11 February 2020, Santi Rattansiriwongwut of EY sent an email to one of Ms Kongsubsopa's colleagues, Ms Pocharee Busrathepkul, asking her to provide information and supporting documents in connection with EY's preliminary review of a DCF valuation of the entities in the Sakthi group. Ms Busrathepkul replied on 14 February 2020, attaching a copy of the Mazars Valuation Report, and saying:

> **Please find attached Mazar's report for your reference. This is highly confidential. Please be advised that the valuation of Portugal [is] based on Mazars' report .. For Portugal, we already informed K.Vijit that all information are derived from Mazars report**

139. As Mr Downes submitted, two things are plain from this exchange of emails:

139.1 First, that a copy of the Mazars Valuation Report was in the possession of Ms Kongsubsopa's colleague, Ms Busrathepkul, in February 2020, six months after the FTI Valuation;

139.2 Second, that Aapico Hitech was content even at that time to rely upon the Mazars Valuation Report (rather than the relevant section of the later FTI Valuation) to support the valuation of Sakthi Portugal in connection with Aapico Hitech's own accounts.

140. Ms Kongsubsopa's evidence (which I accept) was that, at the time of the valuation exercise, she was not aware of the existence of the Mazars' Valuation Report, which was why she did not supply it to FTI. She first received a copy on 2 August 2019, after FTI had issued their final valuation.

141. Mr Downes nevertheless invited me to find: (a) that Ms Kongsubsopa's colleagues were aware of the existence of the Mazars' Valuation Report; (b) that Ms Kongsubsopa asked her colleagues for any information that she could not find herself and, knowing that FTI had asked for valuation reports, would have asked her colleagues to provide any that were not available; and, accordingly, that (c) those colleagues (none of whom was called as a witness) deliberately (and presumably on the instructions of Mr Yeap or Ms Yeap) withheld the Mazars' Valuation Report from Ms Kongsubsopa, so that it would not be passed on to FTI.

142. In my judgment, that is not the most probable inference from the evidence. Ms Kongsubsopa's evidence was that she made requests to her colleagues for specific items which she could not find. Being unaware of the existence of the Mazars Valuation

Report, she did not specifically ask for it. That circumstance, and not some deliberate attempt to withhold information, is the reason why Ms Kongsubsopa did not have the Mazars' Valuation Report and so did not pass it on to FTI. As I have already found in paragraph 128 above, no one at Aapico placed any limits on the information which Ms Kongsubsopa was permitted to provide to FTI.

143. In their Joint Memorandum, the experts record that neither of them has used the Mazars Valuation Report as a source of inputs for their own valuation calculations. The experts also note that the February 2020 exchange of correspondence with EY (referred to in paragraph 138 above) was in the context of "impairment testing", and that neither of them has relied upon the consequent "impairment testing" results in arriving at their valuations.

144. Taking all these considerations into account, I have come to the conclusion that Aapico's (as I have found, inadvertent) omission to provide FTI with the Mazars' Valuation does not of itself establish or indicate that the valuation was not done in a commercially reasonable manner.

145. Finally, ABT Auto complains that Aapico did not put FTI in touch with the management of SGAH and its subsidiaries. Aapico does not dispute much of the factual basis of that complaint. The FTI Valuation records that "we have not had access to the management teams of any SGAH operating company", although it states in a footnote that "After we had completed our fieldwork, we were provided with access to the Sakthi Europe management team".

146. It was Mr Yeap who made the decision not to make arrangements for FTI to have discussions with the management of Sakthi India or SAGUSA. Mr Yeap's explanation (which I accept) was that, by the relevant time, relations had broken down and he was concerned that Dr Mahalingham and his team could obstruct the appropriation process. He denied the suggestion put to him in cross-examination that his decision was motivated by a desire to keep FTI away from Dr Mahalingam, for fear that Dr Mahalingam would "talk up" the future of the business and its prospects, and thus increase the value. I accept that denial, which seems to me to make practical and commercial sense. By the relevant time, the interests of ABT Auto and of Aapico were no longer aligned, and Aapico was pursuing a strategy which was intended to protect Aapico's own interests and was adverse to the interests of the Sakthi group. It would have made no commercial sense for Aapico to have shared that strategy with Dr Mahalingam.

147. In their Joint Memorandum, the experts note their agreement that, all else being equal, it is preferable to be able to discuss business performance and outlook with management when preparing a valuation. They also note, however, that not having access to management does not necessarily preclude a valuer from conducting a market valuation, as long as the valuer is provided with adequate information and

documentation to do so. In the present case, neither expert had access to management in the course of preparing their valuation analysis for the court.

148. Taking all these matters into consideration, I have once more concluded that Aapico's omission to make arrangements for FTI to have discussions with the management of Sakthi India or SAGUSA (and the delay in arranging access to the management of Sakthi Portugal) does not of itself establish or indicate that the valuation was not done in a commercially reasonable manner.

*(F6.1.2 Instructing and/or encouraging FTI to arrive at the lowest possible result*

149. ABT Auto's next and related complaint is that Aapico did not provide FTI with even-handed instructions but rather acted with a view to obtaining as low a valuation as it could persuade FTI to provide.

150. One aspect of this complaint relates to the instructions given by Aapico to FTI in relation to the operational interdependence of SAGUSA and the Chinese Joint Venture. The facts, as I find them, are as follows:

150.1 On 15 July 2019. Mr Yeap, Ms Yeap, Ms Kongsubsopa, Ms Busrathepkul and others in the Aapico finance team held a telephone conference with FTI. In the course of that telephone conference, FTI asked for further information about the Chinese Joint Venture. In particular, FTI asked for further information about the relationship between SAGUSA and the Chinese Joint Venture.

150.2 On 16 July 2019, the following day, Mr Yeap sent an email to Ms Kongsubsopa (copied to the others from Aapico who were on the call). That email was headed "Relationship of SAGUSA and Bethel Sakthi China (BSC) and read as follows:

1. **China was set up as a JV with SAGUSA. SAGUSA received large orders from GM in the USA but it has no aluminium casting machines. Therefore, SAGUSA had a TA to support BSC. It sent engineers to assist to start aluminium knuckles casting in China. Initially 100 percent of castings to SAGUSA came from BSC. Machining all done in SAGUSA and send to customers. Today about 50 percent of raw castings still come from China. SAGUSA has installed many casting machines and able to support about 50 percent of castings made locally.**

2. **Valuation - Based on Ebitda.**

   **As discussed yesterday this is the most appropriate way. Combined SAGUSA and BSC has zero value**

3. **Valuation - Based on closing SAGUSA and selling its assets to pay all its debts.**

> > **Not a possible scenario. If that happens, GM production will be affected as SAGUSA will not be able to produce knuckles for the GM pickups - the most profitable programme for GM. It is likely GM will buy the plant to be able to get knuckles and protect their business then allow SAGUSA to close.**
> >
> > **Even if the assets are sold still not able to pay for the debts.**
> >
> > **Also BSC will lose about $10 million export casting business per month. Even if they can send the casting, SAGUSA is now closed and GM could not get its supplies.**
> >
> > **So keeping SAGUSA alive and continuing to buy casting is from China is the only way forward.**
> >
> > **Of course SAGUSA can add more casting machines and finally stop buying from BSC. This would be several years ahead possibility.**
>
> **I trust this simple analysis will help FTI in its argument that Ebitda is the only valuation going forward. I am happy to reply to any queries.**

151. FTI took this information into account in preparing the FTI Valuation. As I have mentioned in paragraph 96.5 above, FTI assumed for the purposes of its valuation that SAGUSA and the Chinese Subsidiaries were operationally linked, and accordingly valued them together. As mentioned in paragraph 96.6 above, FTI also considered but rejected the idea of valuing SAGUSA on a liquidation basis and separately assigning value to the Joint Venture income, commenting that FTI had "discussed this approach with AAPICO and they have indicated that they do not consider this a realistic scenario".

152. Aapico's view that a valuation on that basis was not realistic was not, however, FTI's only reason for not adopting that approach: and it is plain from the FTI Valuation (including the detailed discussion in the "Divisional Overview" of the Chinese joint Venture on pages 32 and 33 and the contents of Appendix D on pages 72 to 74) that FTI had available to it and took into account a considerable amount of other relevant information, including relevant financial results up to March 2019 and the business plan and forecast prepared in about September 2018, in coming to its conclusions concerning the value to SGAH of SAGUSA's rights in the Chinese Joint Venture.

153. It is nevertheless clear that, in the period shortly prior to the FTI Valuation, Mr Yeap on at least 3 occasions had expressed the view that, in his opinion, SAGUSA's shares in the Chinese Subsidiaries had a significant value:

153.1 In an email which Mr Yeap sent to Dr Mahalingam on 20 December 2018, Mr Yeap objected to the provision of security over the shares in the Chinese

Subsidiaries, on the basis that the value of those shares substantially exceeded the debt in relation to which security was being sought.

153.2 On 8 January 2019, Mr Yeap sent an email in which he addressed the cash-flow crisis then facing SGAH and, in particular, its debts to WBS. That email began:

> **.. The house is still on fire after all the injection and burning faster now ..**

and later stated:

> **.. We cannot go on this way. A company out of control is like a car that lost its brakes. It must be fixed quickly .. We are fighting a war at too many fronts. Need to close all and start to have a good run**

In the course of that email, however, Mr Yeap noted that the owners of WBS were trying to put SAGUSA's shares in the Chinese Subsidiaries up for court auction, and urged against allowing that to happen on the basis that the overdue debt was only USD 5m, whereas:

> **.. Sakthi shares worth over $100 million ..**

153.3 Mr Yeap repeated this argument in an email dated 17 January 2019 which he sent to Dr Mahalingam's son, which stated that the Chinese management were:

> **.. asking lien of 100 percent of shares worth roughly $100M for supply of goods for a credit line of $10M ..**

154. Mr Yeap also accepted in cross-examination that the Chinese Subsidiaries were well-managed and that they had value as a going concern.

155. Those emails, in their context, and that evidence seems to me to be unsurprising. Mr Yeap's comments about the value of SAGUSA's share in the Chinese Subsidiaries were made while SAGUSA itself was still a going concern and at a time when Mr Yeap hoped either that it could be turned round or that it could be bought (as part of the group) as a going concern by Aapico. In my judgment, these materials do not falsify (in the way suggested by Mr Downes) the factual information provided to FTI by Dr Yeap in his email dated 16 July 2019, by which time circumstances had changed very significantly.

156. I accept Dr Mahalingam's evidence that WBS had its own customers locally in China. I also accept his evidence that, after SAGUSA's demise, WBS could eventually have supplied directly to GM the products which, under the Chinese Joint Venture, it was supplying as castings to SAGUSA for SAGUSA to sell on to GM as finished products, after machining in the USA. As recorded in the press release dated November 2019 that is what in fact happened.

157. Nevertheless, as Dr Mahalingam accepted, to do so would have required WBS to invest in adding the machinery and production capacity required to carry out the machining and other tasks previously carried out by SAGUSA. That would have taken both time and money: and Dr Mahalingam did not suggest where that investment could have come from within the SGAH Group. Whoever funded that investment would have required their own commercial terms. Any direct supply by WBS would also, of course, have required a new contract with GM, which (again as seems in fact to have happened) would no doubt have wished to make its own commercial arrangements direct with Weihei China.

158. I have carefully considered the matters put forward by Mr Plaha in paragraphs 4.67 to 4.76 of his First Report. Nevertheless, on the basis of the evidence before me, it does not seem to me to be in any way unreasonable for Dr Yeap to have expressed the opinion to FTI, and for FTI to have come to the conclusion, that SAGUSA and the Chinese Subsidiaries were operationally linked to the extent that it was appropriate to value SAGUSA and its participation in the Chinese Joint Venture as a single economic unit.

159. A second strand of ABT Auto's complaint relates to the suggestion that Aapico attempted wrongly to influence FTI to reach the lowest valuation which FTI considered to be arguable. The specific materials relied upon by ABT Auto include Mr Yeap's email dated 16 July 2019 and the other matters considered in paragraphs 150 to 153 above. ABT Auto also rely upon the following:

159.1 An email from FTI to the "Aapico team" dated 23 July 2019, which stated:

> **Please find attached the updated valuation report. This version reflects your comments from earlier today as well as comments from Baker McKenzie.**
>
> **I would appreciate it if you could provide your thoughts on page 12. On this page we outline why we believe it is reasonable to value SGAH's equity at nil today given AAPICO acquired 25% of SGAH's equity for $25m in October 2018.**
>
> **Baker McKenzie noted it would be worth discussing this point in the report and it would be helpful to know if the arguments make sense to you.**

159.2 An email from FTI to Ms Kongsubsopa and others at Aapico dated 23 July 2019, which stated:

> **Please find attached the revised slides. The changes are highlighted in red font.**
>
> **We are keen for the slide which explains the reduction in value between October 2018 and May 2019 to be as robustly argued as**

**possible. To this end, it would be helpful if you could revert on the following two points.**

**- Could you please send any AAPICO materials which outline the rationale for the investment in SGAH in October 2018 (e.g. board papers discussing the potential investment)?**

**- Were the 3 year business plans presented to you before or after your October 2018 investment? If they were presented after your investment, please could you provide us with the forecasts you had when you were considering your October 2018 investment in SGAH.**

**The more evidence we can present which communicates the deterioration in Sakthi between October 2018 and May 2019, the better. Available for a call to discuss if easier.**

**Otherwise, we are ironing out some small details with Baker Mckenzie and we should be able to release the report in final soon.**

**If in the meantime you could provide the signed management rep letter, it would be helpful.**

160. Mr Downes argues that the word "better" in the passage "The more evidence we can present which communicates the deterioration in Sakthi between October 2018 and May 2019, the better" indicates that FTI was seeking, on instructions, to arrive at the lowest justifiable valuation. Otherwise, why would FTI say that it would be "better" to have more evidence to support a low valuation?

161. In my judgment, however, that argument takes the word (and, indeed, the whole email) out of context. By this stage, FTI had arrived at its provisional views, and was seeking to have them sense-checked by its client, Aapico, which had been the primary source of the factual information on which those views had been based. As I have already found, Mr Yeap was anxious that FTI's valuation of the Charged Shares be a low one, but should also be one which was proof against challenge. FTI were also, in my judgment, keen to produce a valuation which was as well reasoned and as well supported as possible. One of the circumstances that FTI naturally needed to consider in arriving at its valuation was that Aapico itself paid USD 25m for 25% of SGAH's equity in November 2918. There is nothing inherently improper about FTI wanting to know how Aapico arrived at that implied valuation, which is what they are asking about in these emails. As for it being "better" to have more evidence, that (fairly read in context) simply reflects the fact that, the better supported FTI's conclusions were, the less they would be vulnerable to challenge.

162. Taken overall, therefore, there was, in my judgment, nothing in Aapico's conduct in relation to the valuation exercise which could properly be characterised as commercially unreasonable.

(F6.2) FTI's valuation methodology:

163. I now turn to consider the matters relevant to ABT Auto's pleaded complaints concerning FTI's valuation methodology.

164. ABT Auto's first pleaded complaint about FTI's valuation is, in essence, that FTI knew that the information available to it was inadequate to produce a reliable valuation.

165. As I have held in paragraphs 122 to 147 above, only a small number of potentially relevant documents were in fact not provided. Of those that were not provided, neither Mr Plaha nor Mr Ryan relied upon any material in the Mazars Valuation Report or in Aapico's financial statements for the purposes of their valuations. Both experts agreed that not having access to management did not preclude a valuer in conducting a market valuation: and both experts produced valuations for the court without such access.

166. In the circumstances, I accept Mr Ryan's view as recorded in paragraph 7.1 of the Joint Memorandum and in section 8.2 of his Supplemental Expert Report that:

> **.. [T]he information FTI had was sufficient to perform a valuation of the [Charged] Shares. .. [N]one of the documents identified by ABT Auto that were not provided to FTI included new information that reasonable valuer would have considered to have a material impact on the valuation FTI undertook ..**

167. ABT Auto's second pleaded complaint about FTI's valuation is that FTI failed to use the DCF method of valuation based on the forecasts and business plans drawn up by the operating divisions.

168. There are two related aspects to this complaint. The first is that FTI should in any event have used a DCF approach in relation to the operating divisions of the business other than SAGUSA. In Mr Plaha's view[57]:

> **It is preferable to use the income approach where possible, particularly when the income-generating ability of the company is critical to value (as I believe is the case with the [Charged] Shares).**

According to Mr Plaha, FTI's failure to use the DCF approach and to rely instead simply upon the market-based approach was contrary to the guidance in IVS 105 to consider more than one valuation approach.

169. The second aspect is the suggestion that FTI should have been prepared to rely upon the forecasts and business plans drawn up by the operating divisions, and should not have discounted them as unreliable.

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[57] Joint Memorandum paragraphs 4.6, 5.2 and 7.3

170. These two complaints are related, in that one of the reasons given by FTI for not using a DCF approach was that it had "a number of concerns about the reliability of the forecasts" prepared by the division.

171. The experts each identified an error in the FTI Valuation. Both on page 10 (on page 2 of the "Selected valuation issues" in the Executive summary) and on page 20 (in the "Historical forecasting accuracy" page of the Group financials overview), FTI compared a 2017 management forecast predicting a 2018 EBITDA of USD 85m, with an actual 2018 EBITDA of USD 27m. The error is that the "actual" figure is the total of the 2018 EBITDA of the divisions, whereas the prediction is for the EBITDA of the group – ie SGAH's shareholding in the divisions. The result is that the discrepancy between the prediction and the reality is a greater one than that identified by FTI.

172. Both Mr Plaha and Mr Ryan produced detailed analyses, comparing the forecasts made by management with actual performance. These did not entirely agree with each other: but for present purposes it suffices to quote Mr Plaha's conclusions[58] that:

> **.. Actual EBITDA was 48% below forecast in 2017 and 73% below forecast in 2018. Again the largest contribution to this was SAGUSA. Absent SAGUSA the variances were 26% and 33% in 2017 and 2018 respectively ..**

173. In my judgment, there was ample material available to FTI to justify its "concerns" about the reliability of the forecasts produced by the management of SGAH, as well as those produced by the divisions. Mr Plaha gives a number of explanations for the various discrepancies between forecasted and actual performance noted by FTI and by both experts. The fact, however, that those discrepancies can be explained does not make those or any later forecasts and projections themselves reliable. Overall, this was a business which had been sinking further and further into financial difficulties and which had been failing, over a significant period, to produce results that lived up to expectations. A significant degree of scepticism about the financial forecasts and projections made by management was entirely warranted.

174. I accept Mr Ryan's view that FTI's considered rejection of the DCF method did not amount to a breach of the guidance in IVS 105 (which recommends consideration, but does not require use, of more than one valuation method) [59], and that:

> **.. In general .. it is preferable to apply more than one valuation method where possible, but a DCF analysis cannot be reliably completed unless the underlying forecast of cash flows is reliable.**
>
> **In this case, FTI expressed concern about the reliability of SGAH management forecasts, noting that the group had previously underperformed significantly relative to management forecasts. Its**

58 Supplemental Report paragraph 6.11
59 Supplemental Report paragraph 2.7.5

**determination that it could not rely upon the forecasts to produce a DCF analysis appears reasonable ..**[60]

175. As to FTI's application of the market-based valuation approach, Mr Plaha had a number of detailed criticisms. Mr Ryan also disagreed with some of FTI's choices in applying its market-based methodology.

176. The issue which I have to decide, however, is not whether the approach adopted by FTI was the best possible one, but whether it was "commercially reasonable". In the present case, each of FTI, Mr Plaha and Mr Ryan has approached the complex task of valuing the Charged Shares in a different way and, in some respects, has made different choices. It is not apparent from the evidence before me that any of the choices made by FTI was wrong or inappropriate. In the circumstances, I accept Mr Ryan's conclusion that[61]:

**.. While I arrive at my conclusions using a slightly different approach, FTI's approach is relatively common in my experience of commercial valuations ..**

In other words, FTI's approach was, in this respect, a commercially reasonable one.

177. ABT Auto's third complaint is that FTI valued on the basis of "Fair Market Value" rather than at "Market Value". This complaint is explained in Mr Plaha's First Report as follows:

**4.432 FTI's letter of engagement (both the original and amended version) states that the valuation is to be performed on a fair market value basis. This is not the same as Market Value. However, I am aware that these terms are often used interchangeably by valuers. IVS does not provide its own definition of fair market value, but does cite the definition of the Organisation for Economic Co-operation and Development as: "the price a willing buyer would pay a willing seller in a transaction on the open market"**

**4.43 Again, this is consistent with some (but not all) requirements of IVS 104's definition of Market Value. In my experience, the valuation basis as defined by FTI above in paragraph 4.41 is unusual and not consistent with the IVS 104 definition of market value which I would typically expect to see as the standard practice.**

178. Mr Ryan did not agree that there was any material difference between "Fair Market Value" and "Market Value"., stating that:

**.. The Market Value standard in my view is equivalent to the Fair Market Value standard ..**[62]

60 Joint Memorandum paragraph 7.4
61 Joint Memorandum para 7.5
62 First Report para 5.2.4

179. As Mr Plaha accepted, the two terms are often used interchangeably by valuers. Indeed, at one point in his First Report, Mr Plaha himself uses the expression "fair market valuation"[63]. Mr Plaha expressed the view that "FTI's valuation was not consistent with the basis of a willing seller acting knowledgably and prudently (as is required by IVS), because FTI was not given full access to all relevant information"[64]. I have already considered and rejected that criticism. Apart from that, neither expert was able to point to any specific respect in which FTI's valuation approach departed from the IVS 104 definition of "Market Value".

180. Taking all these matters into account there is, in my judgment, nothing of substance in this point. Again, in this respect, FTI's approach was a commercially reasonable one.

181. ABT Auto's fourth complaint about FTI's valuation method is that FTI wrongly assumed that the Chinese Subsidiaries were each operationally dependent upon SAGUSA, and consequently attributed a nil value to the Chinese Subsidiaries.

182. I have already considered and rejected this criticism in the context of Aapico's 16 July 2019 email[65]. However, it is right to record a further point relating to the value of the Chinese Subsidiaries, which was taken into account by Mr Ryan (and noted by Mr Plaha) though not by FTI.

183. This point can be shortly stated. Clause 53(h) of the Chinese JV Agreement provides that the joint-venture "shall be dissolved and terminated in this Contract shall be terminated upon the occurrence of any of the following events":

> **.. if either Party enters into the proceedings of bankruptcy in accordance with applicable laws, is subject to liquidation or dissolution, or ceases to carry on business or is unable to pay its debts as they become due ..**

184. Clause 53 goes on to provide that, upon the occurrence of such an event:

> **.. Only the Party not responsible for the event may propose the termination of this Contract and dissolution of the JV. In the event of statutory bankruptcy, the liquidation committee of the Party responsible for the event as required by applicable bankruptcy law or the Party not responsible for the event may propose the termination of this Contract and dissolution of the JV.**

Clauses 54 and 55 then go on to provide that termination of the JV shall result of its liquidation and for liquidation procedures in accordance with Chinese law.

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63 See eg paragraph 3.11.
64 First Report paragraph 4.45
65 See paragraphs 150 to 158 above.

185. Clause 50 of the Chinese JV Agreement separately contains provisions relating to change of control of either party and provides that, in the event of a change of control (including a minority shareholder becoming a controlling shareholder):

> **.. then for one year after the aforesaid changes, the other Party has the exclusive right to purchase all of the equity held by the Party whose actual controller changes. The purchase price shall be determined by the audited net asset value of the JV in a most recent period multiplied with proportion of equity to be transferred ..**

186. Clause 61 of the Chinese JV Agreement provides for it to be governed by and construed in accordance with the laws of China, and clause 62 provides for disputes to be resolved by arbitration by the Shanghai International Economic and Trade Arbitration Commission. The interpretation of these provisions is therefore a matter of Chinese law.

187. On the penultimate day of the trial, after the oral evidence been concluded, ABT Auto filed a witness statement in which its solicitor, Ms Smith, sought to give evidence on some of the relevant points of Chinese law. Ms Smith herself did not claim to have any expertise in Chinese law and based her evidence on conversations with Chinese-qualified colleagues. Neither party had pleaded any assertions as to the effect of Chinese law and neither party had previously made any application under CPR 35.4 for permission to put in expert evidence of Chinese law. I was told that the correctness of the opinions reported by Ms Smith was disputed on behalf of Aapico. At that late stage, circumstances did not permit time for the service of rebuttal evidence, or for cross-examination of the original opinion-givers. In the circumstances, it did not seem to me that I could properly rely upon Ms Smith's evidence. Nor did it seem to me to be appropriate for me to rely upon the "presumption of similarity"[66] in order to assume that the relevant provisions and principles of Chinese law are the same as the equivalent provisions and principles of English law.

188. The terms of the Chinese JV Agreement were, however, properly in evidence: and it was common ground that, at the valuation date, SAGUSA was in receivership. In the absence of any admissible evidence it is not clear whether, as a matter of Chinese law, that receivership would itself have triggered clause 53(h) and thus the termination and liquidation of the Chinese Joint Venture, or whether the receivership would itself have amounted to a change of control, such as to trigger clause 50. I am simply unable, on the basis of the material presently before me, to reach any firm conclusion on these issues.

189. It is, however, clear as a matter of commercial common sense that these provisions of the Chinese JV Agreement would at the very least have severely limited the scope of what could be done with SAGUSA by the receiver (absent fresh agreement with Weihei

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[66] See *FS Cairo (Nile Plaza) LLC v Lady Brownlie* [2021] UKSC 45, [2022] AC 995 at [143] to [153], per Lord Leggatt JSC.

China) without triggering one or other of these provisions. That circumstance would have been very material to any potential purchaser of the Charged Shares in assessing the present value, if any, of the Chinese Joint Venture.

190. ABT Auto has not sought to argue that, by ignoring these provisions in its valuation conclusions, FTI did not act in a commercially reasonable manner. ABT Auto's argument has rather been that the Chinese Joint Venture should have been valued on a DCF basis separately from SAGUSA, which should have been valued (according to Mr Plaha[67]) separately on the basis of its NAV.

191. The relevance of all this, in my judgment, is simply that, in commercial reality, these provisions in the Chinese JV Agreement would have provided Weihei China with a colourable (and potentially legally valid) justification for doing any new business directly with GM, and not through the medium of the Chinese Joint Venture and the Chinese Subsidiaries. That would have been a very material factor in the mind of any potential purchaser, and so would severely have impacted the value which any such purchaser would have been prepared to put on SAGUSA's shares in the Chinese Subsidiaries for the purpose of attributing a value to the Charged Shares. In my judgment, these circumstances emphasise the effective interdependence of SAGUSA and the Chinese Subsidiaries for the purposes of valuing the Charged Shares.

192. Finally in relation to FTI's valuation methods, I was initially prepared to think that there might be something in ABT Auto's argument that this was a case in which the USD 27m valuation determined by FTI was sufficiently low that the figure might itself be an indication that the method by which it had been arrived at was not a commercially reasonable one. After all, as FTI itself noted, Aapico had paid USD 25m for 25% of SGAH's equity as recently as October 2018. As FTI also noted, Sakthi India, Sakthi Europe and the Chinese Subsidiaries historically had all seemed to be independently profitable to a greater or lesser extent; and, even in relation to SAGUSA, Mr Yeap's own evidence was that it was at least in theory capable of being turned round so as to become profitable:

> **.. I think GM had big business with SAGUSA, and if the business continue, if there's good management, there's money, any company can be turned around ..**

193. That impression however, was soon dispelled by a consideration of the detailed evidence of SGAH's position as at the valuation date. As recorded by FTI (page 12 of the FTI Valuation) the operating performance of the group had deteriorated significantly since the October 2018 transaction, and the level of debt in the business had increased. Moreover, at the valuation date, the business was under sustained and increasing pressure from its creditors. It desperately needed an injection of new capital, but there were no available sources (other than Aapico) from which that capital injection

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67 First Report paragraph 4.145

could come. By the valuation date, SAGUSA itself was already in receivership and creditors of other parts of the business had for some months been circling.

194. Historically, Aapico had been one of the primary sources of finance for the business: but it (along with other creditors) had lost patience and was looking to take full control in order to protect its own interests. Crucially, GM too had lost patience. Mr Yeap's 14 March 2019 email to his board is instructive:

> **I wish to report briefly as follow .. Huntington file default yesterday and receivership can happen as quick as Wednesday next week. A receiver will be appointed who will have full control.**
>
> **If Aapico is keen to participate need to have a lawyer to represent us to negotiate with banks and creditors. Aapico need to finance for the period of the receivership which can last up to 6 months. The figure estimated by Huron the independent financial advisor is $25 million. This amount gradually infused over the period.** ***At the end of the period there will be an auction and the total debt that the lawyer has negotiated plus our infusion will be the starting auction price. In the event we lose the auction our infusion will be repaid.***
>
> ***It is likely we win as GM will have a side agreement with only us*** **and for no resourcing and hair cut for the amount of about $23 million, they have infused into Sagusa. There will be a guarantee of no resourcing etc. This list will be discussed today. The total debt is about $60 million subject hair cut negotiations by our lawyers. Finally maybe $50 million. This means that Aapico need to be ready to have line at auction time. Today Bangkok Bank has $20 million facility and Aapico has a debt of $6 million with Sagusa.** ***A newco will be formed. It will be very clean for Aapico going this way and have 100 percent control and overall cheaper*****. Ebitda 2019 will be $2M. An amount of $10M will be non recurring. Going forward Ebitda around $11 million. And 50 percent of China will be about $10 million. We can see an Ebitda of $21 million going forwards in 2020.**[68]

195. In other words, Mr Yeap could see a significant value in SAGUSA's business if (and only if) Aapico were prepared to put further large sums of money in: but Aapico was only prepared to do that on the basis that it could cut out Sakthi, take total control, and do a deal (which it was already negotiating) directly with GM.

196. This and other evidence, taken as a whole, clearly shows that, by the valuation date, the group had lost the support both of its main customer, GM, and of its main source of capital, Aapico. In all the circumstances, including those to which that I have referred to in earlier parts of this judgment, it is scarcely surprising that the value of the Charged Shares had reduced to the very significant extent assessed by FTI.

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[68] Emphasis added.

197. In my judgment, there is therefore nothing in the figure eventually arrived at by FTI which, of itself, suggests anything commercially unreasonable in FTI's approach.

198. As I have already noted in paragraph 116 above, although it is pleaded that Aapico acted in bad faith, there is no pleaded allegation that FTI itself did not act in good faith as an independent valuer or that the FTI valuation lacked objectivity. Given the importance of reputation to professional firms such as FTI, it is nevertheless right that I should expressly record that I am satisfied, on the basis of the evidence that I have heard and seen, that any such case would in any event have failed on the facts.

## (G) Analysis and conclusions

199. Drawing all these threads together, my conclusions are therefore as follows:

### *(G1) A legally valid appropriation*

200. I do not accept ABT Auto's primary case, which was that the appropriation of the Charged Shares carried out by Aapico was invalid and therefore legally ineffective either because:

200.1 Clause 9.3 of the Share Charge was not effective to confer a legally valid power of appropriation, since the method of valuation for which it provided was not commercially reasonable; and/or because

200.2 The valuation of the Charged Shares had not been carried out in a commercially reasonable manner, which was a condition of a legally valid appropriation.

201. In my judgment:

201.1 For the reasons explained in paragraphs 49 to 57 above, clause 9.3 of the Share Charge was effective to confer on Aapico a legally valid power of appropriation (although, for the reasons outlined in paragraphs 58 to 64 above, ABT Auto was not precluded by any contractual estoppel from contending to the contrary).

201.2 For the reasons explained in paragraphs 65 to 71 above, as a matter of the correct interpretation of Clause 9.3 of the Share Charge and of Regulation 18(1) of the FCARs, a valuation complying with the requirements of Regulation 18(1) was not a requirement of a legally valid appropriation. On its true interpretation, Regulation 18(1) does not have that effect. Nor do the words "subject always to the requirements of Regulation 18" in clause 9.3 of the Share Charge make compliance with those requirements a contractual condition (precedent or subsequent) to an effective appropriation.

201.3 The primary remedy for a valuation on appropriation that does not comply with Regulation 18(1) is for the Court, after the appropriation, to set aside that valuation, to substitute a compliant one, and to make any necessary consequential orders.

### *(G2) A valuation made in accordance with the terms of the arrangement and in any event in a commercially reasonable manner*

202. Nor do I accept ABT Auto's alternative case that the valuation in fact carried out by Aapico in reliance on the FTI Valuation did not comply with the requirements of Clause 9.3 of the Share Charge and Regulation 18(1) of the FCARs:

203. In relation to the requirements of Regulation 18(1), in my judgment:

203.1 In the context of the valuation required to be made on appropriation, there is no separate and independent requirement for the collateral taker to act in good faith, and no room for the implication of any of the equitable or other duties associated with the law of mortgage in English law. The statutory requirement in the case of a financial collateral arrangement is simply that the valuation must be made "in accordance with the terms of the arrangement and in any event in a commercially reasonable manner" - no more, no less.

203.2 Nevertheless, on its true interpretation, Regulation 18(1) places the duty of valuation on the collateral-taker. The collateral-taker cannot discharge that duty simply by employing an apparently competent third-party valuer. If the third-party valuer does not carry out the valuation in a commercially reasonable manner, the requirements of Regulation 18(1) will not have been satisfied.

203.3 Regulation 18(1) requires the way in which the valuation is made to be commercially reasonable. It does not necessarily follow that the result itself must be a commercially reasonable one.

203.4 The requirement in Regulation 18(1) for the valuation to be made in a commercially reasonable manner imports an objective standard. The subjective view of the collateral taker (or of its third-party valuer) about what is commercially reasonable is irrelevant.

203.5 The question of what, in any given case, is commercially reasonable for these purposes is fact sensitive.

204. It follows that I do not accept ABT Auto's pleaded case as to the invalidity of the valuation, to the extent that that case is based upon allegations of duties (including duties of good faith) and/or legal requirements going beyond the express requirement in Regulation 18(1) that the valuation must be made "in accordance with the terms of

the arrangement and in any event in a commercially reasonable manner", as explained in paragraph 203 above: see paragraphs 73 to 84 above.

205. Applying the principles set out in paragraph 203 above, I am satisfied that both Aapico and FTI complied with the requirements of clause 9.3 of the Share Charge and of Regulation 18(1) in that, taken overall, they acted in connection with the valuation in accordance with the terms of the arrangement and in any event in a commercially reasonable manner.

206. Contrary to ABT Auto's case:

206.1 Aapico provided FTI with the necessary information to enable it carry out its valuation in a commercially reasonable manner and did not deliberately withhold any material items: see paragraphs 121 to 144 above. Aapico's instructions concerning the practical interdependence of SAGUSA and the Chinese Subsidiaries were, on the facts, reasonable. Aapico's decision not to put FTI in touch with the management of the operating divisions was, in all the circumstances, not commercially unreasonable: see paragraphs 145 to 148 above.

206.2 Aapico did not act in a commercially unreasonable manner in communicating to FTI its desire that the valuation produced by FTI should be a low one. Aapico's interest in a low valuation would in any event have been obvious from the circumstances in which FTI were instructed. More importantly, Aapico placed no constraints upon the information which FTI was entitled to request, and did not seek to persuade FTI to act other than in a proper, independent and professional way. On the contrary, Aapico encouraged FTI to produce a valuation which was sufficiently well evidenced and reasoned as to be proof against challenge: see paragraphs 149 to 162 above.

206.3 FTI carried out the valuation exercise in a commercially reasonable manner. It had sufficient information to carry out the valuation. Its decision not to use the DCF valuation method for the divisions other than SAGUSA was not commercially unreasonable. The method in fact adopted by FTI to value the group was a commercially reasonable one in all the circumstances. FTI's approach to the value of Sakthi Portugal and to the value of the Chinese Subsidiaries was reasonable. The fact that the valuation eventually arrived at was lower than earlier assessments was explicable by the distressed circumstances of the group (particularly SAGUSA's receivership, and the loss of support from GM and Aapico) at the valuation date: see paragraphs 163 to 198 above.

207. In this judgment I have dealt primarily with those issues which in my view were necessary to resolve the claim and accordingly have not addressed all the issues raised

by the parties. Where I have referred expressly to the evidence and submissions on a particular issue, I have included only that evidence and those submissions which in my view were necessary to deal with that issue. I have however considered the entirety of the evidence and submissions, both written and oral, and the omission of a reference to a particular piece of evidence or to a particular submission should not be taken to be a failure to consider the relevant evidence or submission.

208. I am very grateful to all counsel and to the teams behind them for their helpful and clear submissions and for their efficient preparation of the case.

## (H) Disposition

209. It follows that ABT Auto's claim fails in its entirety and falls to be dismissed.

210. I invite the parties to attempt to agree the terms of a Minute of Order giving effect to this judgment and dealing with all consequential matters. In the event that agreement cannot be reached by 4pm on Friday 18 November 2022, the parties should so inform the court and should lodge written submissions in relation to the points of disagreement by 4pm on Wednesday 23 November 2022. I will then either give a ruling by email or direct a short further hearing. Pursuant to CPR PD 52A 4.1(a), I adjourn any application for permission to appeal together with all other consequential applications to be determined in that way and extend time under CPR Pt 52.12(2)(a) until 21 days after that determination.

211. This judgment will be handed down remotely by circulation to the parties' representatives by email and release to the National Archives. No attendance by the parties is necessary.