Neutral citation no: [2018] EWHC 2347 (Ch)

IN THE HIGH COURT OF JUSTICE **Claims: BL-2018-000840 and CR-2018-00305**
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES LIST (ChD)

Mr M H Rosen QC sitting as a Judge of the Chancery Division
14 September 2018

IN THE MATTER OF LAST LION HOLDINGS LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

BETWEEN:

OTELLO CORPORATION ASA

Petitioner/Claimant

-and-

(1) MOORE FRÈRES & COMPANY LLC
(2) LAST LION HOLDINGS LIMITED

Respondents/Defendants

JUDGMENT

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(1) Introduction

1. These conjoined proceedings arise from the wish of the Claimant/Petitioner ("Otello") to sell its minority shareholding of some 30% in an English company Last Lion Holdings Limited ("Last Lion", the Second Respondent), currently to Mercury Software Partners LLC ("Mercury"). Mercury is a Delaware company, part of a group controlled by a New York-based investor called Rainer Busch ("Busch"). The First Defendant/Respondent ("MFC"), also Delaware incorporated and New York based, is the majority shareholder of Last Lion and opposes such a sale.

2. Article 24 of Last Lion's Articles of Association entitles MFC to appoint three directors and Otello to appoint one. Clause 3(e)(ii) of their "Shareholders' Deed" dated 19 December 2016 provides that, regardless of the number of directors in attendance at any meeting, MFC's appointed directors are entitled to exercise the number of votes necessary for them to command a majority.

3. The directors appointed by MFC are its owner and CEO, the chairman of Last Lion, Martez Moore ("Martez"), his brother Martino Moore ("Martino") and his friend Robert Azeke ("Azeke"). The appointed director of Otello, a listed Norwegian company, is its CEO Lars Boilesen ("Boilesen").

4. Pursuant to Article 13.2 of Last Lion's Articles of Association, Otello can only transfer its shares to a person *"approved by a majority of the Board"* of Last Lion, *"such approval not to be unreasonably withheld or delayed"*. Otello sought such approval on 20 February 2018 but, more than two months later, on 27 April 2018, it was refused by the MFC-appointed majority of the board of Last Lion.

5. By the Part 7 claim form and Companies court petition in these two actions, both issued and supported by a single Particulars of Claim on 12 April 2018, Otello sought an injunction compelling approval for its sale to Mercury and if the sale to Mercury should fail, alternative relief by way of an order that MFC buy Otello's shares or an order for the sale of Last Lion's assets or damages. It also sought a declaration that, with the sale of its shares to Mercury, it was entitled to assign its right to appoint a director of Last Lion.

6. Much of the case turns on (a) negotiations between MFC and on the one hand Otello and on the other Mercury, for the sale and purchase of a 30% holding in Last Lion in the period November and December 2017 and (b) the conduct of the parties in relation to Otello's request for approval from Last Lion's board in early 2018.

7. Part of the flavour might be gleaned from Martez's answers in cross-examination regarding alleged lies in his emails (to which I refer further below) which included the following, startling exchange:

> Q. *Why start with a lie?*
> *A.* *Well, in terms of this, right, I think there are some rules of engagement that are worth, you know, quickly sharing around how sophisticated parties interact with one another. Right? So there's often exaggeration, extrapolation, you know, there's artful dodging. There's also being intentionally vague. And there's also, you know, sort of lulling people into assumptions.*
> *Q.* *But Mr Moore, this isn't –*
> *A.* *Which I understand is somewhat analogous to what it's like between a cross-examination and being in the witness box here over the past week...*

8. Otello has been represented by James Collins QC, David Peters and Jackie McArthur of counsel, instructed by Dorsey & Whitney (Europe) LLP ("Dorseys"); and the Defendants by Craig Orr QC, Michelle Menashy and Ben Zelenka Martin of counsel, instructed by Willkie Farr & Gallagher ("WFG"). I am grateful to them all for their preparation, presentation and assistance, in what was in some respects a not uncomplicated matter. This included their lengthy opening and (more concise) closing written submissions.

(2) Background

9. The following summary is largely derived from the contemporaneous documents, which does not mean that it is explicitly agreed by all parties in every respect. As will be mentioned later, there were some controversies as to the authenticity, meaning and completeness of written communications, but before coming to the issues, it will assist to have some of the context.

10. MFC is an investment holding company. The business of Last Lion (through operating subsidiaries) is principally in "Vewd Software", which was entirely owned by Otello (under its previous name Opera Software ASA) until late 2016, when MFC acquired some 70% of the 9,468 £0.001 shares, based on a total enterprise value of about US$100 million. MFC obtained financing from its bankers Morgan Stanley, for whom Martino is a trading director; and the 468 non-voting B Preference shares in Last Lion not owned by MFC or Otello were earnt by Aneesh Rajaran, Vewd's CEO.

11. After acquiring its majority control, MFC, by its own account *"... oversaw and facilitated a period of very significant growth for the Vewd business."* A senior employee of MFC is Thomas Reynolds and its lawyer throughout the material time has been Mark Getachew of WFG

12. It might also be mentioned at this stage that by a letter to MFC dated 12 October 2015 signed by Azeke as managing partner, Farol Asset Management LP ("Farol") had purported to give it a "*preliminary indication of our strong interest in providing up to $25 million in equity capital in support of a proposed investment*" by way of acquiring "*a controlling interest in Opera TV, a business unit of Opera Software ASA ... we have known you and your partners for nearly 20 years*".

(a) MFC's proposed share sale to Mercury in late 2017

13. During October 2017, MFC approached potential purchasers in order, initially, to sell 3% of its own shares and (if the purchaser wanted more) some of Otello's shares. For that purpose it held itself as having authority to market Otello's shares. Thus -

    (a) in an email to Martez on 17 October 2017, Reynolds reported a conversation with MFC's broker Jean-Marc O'Brien of Ardour Capital in which O'Brien had asked if MFC had an *"agreement in writing with [Otello] that allows us to market/sell their shares*" and asked Martez *"is that in the purchase agreement?"*

    (b) as regards the fact that Otello held B Preference shares but MFC wanted the purchaser to buy A Ordinary shares, Martez claimed that *"... regarding the secondary sell of the [Otello] equity in Vewd Software, after my discussion with our counsel ... [Otello] is required to convert its B Preference shares into Ordinary Shares prior to effecting a sale. In other words, [Otello] can only sell Ordinary Shares to a third party..."*.

14. One of the potential purchasers was Busch/Mercury, and Mercury Software Partners GmbH signed a Confidentiality and Non-Disclosure Agreement with MFC on or about 26 October 2017 ("the NDA").

15. On 2 November 2017, MFC told Busch that it was *"authorised to negotiate a sale of Otello's shares"* and that *"Otello could not sell its shares at all without MFC's approval"*. By mid-November, O'Brien told Busch that MFC was *"very comfortable"* with Mercury and MFC appears to have stopped approaching or talking to anyone else and to be negotiating exclusively with Mercury.

16. Subsequently in December 2017, when Mercury asked to see the *"agreement with [Otello] authorising [MFC] to sell 17% of the company shares owned by [Otello]"*, Martez responded that *"documents will be provided once conviction level is satisfactorily determined"*.

17. In the negotiations, Martez stated that the price that Mercury had to pay was being negotiated (through MFC) with Otello and that MFC's consent was required for any sale. Accordingly when Mercury sent its first offer letter to MFC on 8 December 2017, the covering email referred to the acquisition of shares from Otello and the Offer Letter was addressed to both MFC and Otello, identified Otello as the seller and included (as a condition precedent) a requirement that MFC approve the transaction. The revised offer the next day was (save for the addition of a requirement that Mercury acquire a "Board Observer seat") materially identical.

18. Martez informed Busch that MFC would *"be in contact after we review and discuss internally"*. On 12 December 2017 he said that he had now had a chance to *"review in detail"* and set up a call in which they discussed various details. There was no suggestion that the Offer Letter (which had been sent on by Martez to WFG) did not accurately reflect the structure of the proposed deal and a further version with an extended expiry date was again addressed to both MFC and Otello, and identified Otello as the seller.

19. Martez asked Busch to review a list of items that MFC was shortly going to share; to determine if this was everything Mercury needed for its due diligence; and to amend the Offer Letter *"to reflect these are the outstanding items ... instead of the unspecified financial/tax/legal categories currently inserted"*. He did not ask Busch to remove Otello as an intended recipient of the Offer Letter, or as the seller of the shares.

20. MFC did not send the Offer Letters on to Otello. Instead, on 15 December 2017, Martez told Busch that because Otello did not want to give representations or warranties, the deal would be re-structured as a sale by Otello to MFC and a separate sale by MFC to Mercury. This was confirmed in an email sent the following day in which Martez stated that *"after a lot of negotiation"* MFC had secured Otello's agreement to a price of $40 million for 25% and that MFC would *"be coming in along side Mercury to purchase the last 5% of [Otello's] equity"*. He attached a letter from Otello confirming that it was willing to sell its shares.

21. In the meantime, when Martez first approached Otello, it was as an intermediary, claiming in an email of 6 November 2017 that third parties had expressed an interest in Otello's shares, and stating that MFC expected a fee for securing the sale. Then, from 9 December 2017, Martez stated that MFC was buying the shares for itself, with the benefit of finance.

22. The price being negotiated was, however, very different from that being reported to Mercury. By 16 December 2017, Otello and MFC had reached agreement in principle on a price of $31 million for the whole of Otello's 30% shareholding. Thus MFC was looking at a gross profit of some $17 million (equivalent to nearly 55%) on the sale to Mercury.

23. In an email that day to Busch and others including WFG, Martez said that Otello wanted to close the transaction by 21 December 2017 and that this was *"certainly achievable"*. Later the same day, Getachew of WFG on behalf of MFC told Otello that the goal was to close *"no later than December 21"* and they were negotiating the mechanics of the closing that was to take place by that date. This was followed by another email from Martez saying that *"containment of the attorneys is essential in order to hit the tight target window"*.

24. Complete sets of draft documents were sent by WFG -

(a) on 16 December 2017, to Dorsey for Otello to sign and return (consisting of a Share Purchase Agreement, a Share Transfer Form and a Power of Attorney irrevocably authorising MFC to exercise Otello's voting rights); and

(b) on 17 December, to Mercury (consisting of a Share Purchase Agreement, a Power of Attorney appointing Mercury as substitute attorney to exercise Otello's rights over some of its shares, a Share Transfer Form, draft revised Articles of Association and an Amended Shareholder Deed identifying Mercury as a party and a shareholder).

25. On 17 December 2017, Martez was fixing up a call with Busch to discuss the *"closing process, mechanism and timing"*. There is nothing to show that MFC required any further due diligence on Mercury beyond that already effected, or planned to seek the approval of the Board of Last Lion (as was required by Article 13.2). The draft SPA with Mercury made no mention of any need for Last Lion board approval (although in any event, given MFC's control, that might have been considered a formality).

26. Busch sent an email to Martez and others including WFG stating that Otello's agreement (on price) was good news, but pointing out that Otello's Confirmation Letter did not specify the price or the number of shares that Otello was selling to Mercury. Busch also asked that both MFC and Otello sign an attached copy of Mercury's Offer Letter.

27. Martez then changed the proposed structure of the deal(s), emailing O'Brien to say, amongst other things, that Otello would not provide representations associated with pricing, and proposing that Mercury should buy from MFC rather than directly from Otello. Busch sent a revised Offer Letter to Martez and others including WFG to comply with that new structure and sought confirmation that the MFC/Otello sale price was the same as that being offered by MFC to Mercury.

28. On 18 December 2017, Dorsey told WFG that Otello would have to inform the Oslo Stock Exchange immediately upon signing the SPA. This would have led to the Otello/MFC price becoming public. Getachew responded (copied to Martez, amongst others) that it was *"odd"* that an announcement was required, and asking that it *"should contain only what is required, as MFC would like to maintain confidentiality"*.

29. Shortly thereafter MFC cancelled the proposed sale to Mercury. Whilst it continued to negotiate with Otello as if the deal might still close on 21 December 2017, it subsequently also terminated the proposed purchase, blaming Otello for being too slow with the documentation. Martino and Azeke had both been told by Martez about the possible deal with Mercury before then, at least in Martino's case by emails as matters had proceeded, and in Azeke's case at a social occasion earlier in December 2017 (although whether and the extent that they paid attention to or recalled details was in issue).

(b) The Insider Trading Finding against Busch

30. Whilst MFC was negotiating with Mercury, and indeed until April 2018, it was unaware of a lengthy decision by the Quebec Financial Markets Administrative Tribunal ("FMAT") against

Busch as a non-executive director of a company called Nstein Technologies Inc ("Nstein"), arising out of the takeover of Nstein by Open Text Corporation ("Open Text") many years earlier in April 2010 ("the Insider Trading Finding" or "ITF").

31. On 16 August 2016 (following a 9 day hearing in December 2015 and January 2016) FMAT determined proceedings under section 187 and 188 of the Quebec Securities Act ("QSA") brought by the Quebec Financial Markets Authority ("FMA") claiming, first, that the CEO of Nstein Luc Filiatreualt, and his accountant Pierre Legare, had engaged in insider trading contrary to the QSA by Legare's purchase of shares in Nstein shortly before Open Text's offer was announced, after being tipped off by Filiatreault. Whilst Filiatreault contested these charges, Legare admitted them and agreed to pay a fine of C$23,500 (representing 150% of the profit he made from unlawfully trading in Nstein's shares) and FMAT found them also proved against Filiatreault.

32. Further charges alleged that Filiatreault and the rest of the Nstein board including Busch had also contravened the QSA on 4 January 2010 by authorising the grant of 1,200,000 options to purchase Nstein shares to Filiatreault, Bruno Martel (Nstein's CFO), Stephanie Benoit (Nstein's legal director) and various other Nstein executives and employees, at a time when the board knew that Open Text had made a takeover offer at a probable premium of 80-100% over Nstein's current share price and that offer was under active consideration by Nstein.

33. The Nstein board formally had approved the Open Text offer on 21 February 2010 and it was publicly announced and subsequently implemented when the Nstein board circulated a recommendation on 4 March 2010 to Nstein shareholders, who approved it on 1 April 2010.

34. Pursuant to the terms of Open Text's offer, the options issued on 4 January 2010 were effectively repurchased by Nstein at its offer price, resulting in each of the grantees making a profit of nearly 125% (representing the difference between the offer price of C$0.65 and the options' strike price of C$0.29). This profit to the Nstein grantees collectively amounted to C$432,000, of which C$126,000 was attributable to Filiatreault, Martel and Benoit.

35. The FMAT found the charges proved against all members of the Nstein board. It concluded that there was "*overwhelming evidence*" that the board was in possession of privileged information when they signed the board resolution authorising the grant of the options on 4 January 2010, namely information not known to the public concerning Open Text's planned acquisition of Nstein (which was "*far from being still in the embryonic phase*").

36. Filiatreault was fined C$180,000, reflecting the profit he made on the options issued to him as well as his involvement in tipping off Legare; Martel and Benoit were fined C$72,00 and C$36,000 respectively, representing double the profit made on their options. The Nstein chairman was fined C$30,000 and the rest of the board including Busch were each fined C$20,000.

37. FMAT considered and rejected the arguments advanced in the defence, to the effect that: (a) the board had 'traded' in securities notwithstanding that the options were technically issued by Nstein, rather than the board; (b) in any event, the three executive members of the board to whom options were granted, had traded by accepting the options and the other members of the board aided in their contravention; (c) the receipt of a personal benefit is not a necessary ingredient in insider trading;

and (d) the evidence did not establish that the issuance of the options was "*necessary in the course of [Nstein's] business*" and so exempt.

38. The Nstein board were criticised for their lack of remorse and refusal to acknowledge the wrongfulness of their conduct. The FMAT regarded this as "*particularly serious in the case of persons who have been working in the roles of company directors and executives within reporting issuers*"; and "*the absence of ethics*" at that level was "*indeed a poison*" that "*undermines the confidence of investors*".

39. The Nstein board's appeal to the Court of Quebec was heard on 24 November 2017 and was dismissed in a judgment handed down on 26 February 2018. On 13 April 2018, it was granted permission to appeal to the Quebec Court of Appeal; but such further appeal does not suspend the execution of a contested decision and the board members including Busch accordingly remain on the Canadian Securities Administrators' Disciplined List for having committed "*illegal insider trading*".

(c) Otello's proposed share sale to Mercury in 2018

40. Otello might never have learnt about Mercury's aborted interest, except that Busch emailed Otello directly on 18 January 2018, referring to the *"offer last year to acquire the shares [Otello] owns in [Last Lion] through [MFC]"* and asking if Otello was still interested in selling. The negotiations that followed quickly led to an SPA between Otello and Mercury. The commercial terms were essentially the same as Mercury's offer as at 18 December 2017: Mercury agreed to pay US$48 million for Otello's 30% stake.

41. However (unlike the agreements which MFC had negotiated) clause 3 of this SPA recognised that Mercury needed to be approved as transferee of the shares under Article 13.2 and as soon as it was signed, on 20 February 2018, Boilesen called for a Last Lion board meeting on 23 February to consider approval.

42. This immediately ran into difficulties. Boilesen was told that the MFC appointed directors could not attend until 5 March 2018, an immediate delay of two weeks without regard to the availability of attendance by phone and/or less than full attendance for a quorum. In the meantime:

43. First WFG on behalf of MFC sent a "Cease and Desist Letter" on 21 February 2018 accusing Mercury and Mr Busch of (a) breaching the NDA between MFC and Mercury relating to the "*acquisition of a minority equity ownership interest in Vewd Software*" (the business indirectly owned by Last Lion) and (b) seeking to harm or interfere with *"MFC's interests in [Last Lion] and/or its relationship with Otello"*.

44. Secondly, WFG produced a draft "Due Diligence Request Letter" on 26 February 2018 to record what would later be decided at the Last Lion board meeting of 5 March, namely that a committee be established to consider Otello's approval request, the costs to be borne by Otello or Mercury with an advance deposit of US$50,000, and attaching a detailed list of due diligence questions.

45. Thirdly, Martez declined on 2 March 2018 to tell Boilesen what further information was required before the board meeting saying only that *"if you would like to share specific materials prior to the board meeting, I defer that decision to you"*.

46. At the Board Meeting on 5 March 2018 (for which there is a transcript), Boilesen did not tell the MFC-appointed directors that he had become aware of its negotiations with Mercury of late 2017, and none of Martez, Martino, Azeke or WFG disclosed any prior dealing with or knowledge of Mercury. On the contrary, Martez criticised Boilesen for not being able to answer questions about it and proposed the establishment of the committee at the cost of Otello or Mercury, as if spontaneously, and Martino and Azeke similarly agreed to that and to serve as such committee.

47. On the following day, 6 March 2018, Boilesen provided the MFC-appointed board members and WFG with copies of a presentation providing information about Mercury and a deal list, which was in fact the same information that Mercury had provided to MFC on 28 November 2017.

48. MFC had required no further due diligence from Mercury when it was considering its sale to Mercury, but in the context of Otello's sale to Mercury, this was said not to be sufficient and on 8 March, WFG sent an updated draft of the Due Diligence Request Letter to Martino and Azeke, who without any part in the formulation of the questions, signed it before it was sent to Otello on 9 March 2018, including the request for the US$50,000 deposit.

49. Thereafter, the committee process consisted of :

    (a) correspondence between WFG and Dorsey, during which WFG was conducting its own research and on 23 March 2018, WFG discovered the Insider Trading Finding (about which Martino and Azeke found out only by reading WFG's letter of 29 March 2018 after it had been sent); and

    (b) committee meetings on 6, 12 and 17 April 2018 for which no contemporaneous notes were made or disclosed, but for which WFG then produced minutes.

50. By means of the correspondence, Busch was asked again and again (by due diligence question 9) for details of any proceedings against him or his companies. He referred to two, but not to the FMA proceedings or to the Insider Trading Finding.

51. The minutes for the committee's meeting produced by WFG after the event recorded that among other things:

    (a) the committee discussed Busch's *"conviction"* on 6 April 2018 but did not have any translation of the FMAT decision (which was in French);

    (a) Martez gave an account of his 2017 dealings with Mercury on 12 April 2018 (after Getachew provided the committee with a selected set of documents which he said "... *will be helpful in understanding how MFC was transacting for itself, and not on behalf of Otello ...*") and Martez and Reynolds had *"repeatedly explained to Mercury"* that Otello was not involved and that MFC was not an agent for Otello; and

(b) the decision by the committee on 17 April was to recommend that the Last Lion Board do not approve of Mercury as a transferee of Otello's shares. It never took up Otello's repeated proposal that Busch attend a Q&A session.

52. At the Last Lion board meeting on 27 April 2018, the MFC-appointed directors accepted the recommendation of the committee who claimed to have considered the matter carefully for themselves. Boilesen voted in favour approving Mercury, but was in a minority of one.

(3) The proceedings and evidence

53. These proceedings were issued on 12 April 2018 as an unfair prejudice petition, and a separate claim form seeking (a) an injunction or damages for breach of Last Lion's Articles and (b) a declaration as regards the meaning of the Shareholders' Deed, supported by single Particulars of Claim. On 19 April 2018, I granted Otello's application for directions so that the proceedings could be heard together and expedited.

54. A Request for Further Information from the Defendants dated 20 April 2018 was answered by Otello on 11 May 2018 and the Particulars of Claim were amended by Otello on 13 June 2018. The Defence served on 2 May 2018 was amended on 22 June 2018; and a Reply served on 9 May 2018 was amended on 26 June 2018. Further directions were ordered by Penelope Reed sitting as a deputy High Court judge on 16 May 2018 and then by Mrs Justice Rose on 14 June 2018.

55. The trial took place from 9 to 12 July 2018 inclusive. By consent, the parties devised and the Court approved a confidentiality regime to avoid unnecessary reference in open court to MFC counterparties other than Mercury, and a number of documents were redacted to prevent disclosure outside of the parties' legal representatives.

56. 49 bundles of copy contemporaneous bundles were reduced at trial on a rolling basis to 11 core bundles. These were expedited proceedings and in the end the parties are to be complimented on the efficiency of the reduction process for the conduct of the trial: in the end, the core bundles provided compelling evidence for the main elements of the factual narrative.

57. Modern courts have often emphasised the critical importance of contemporaneous documents as well as the objective context, probabilities and motive in resolving complicated factual disputes and issues of honesty. More than 30 years ago, in *The Ocean Frost* [1985] 1 Lloyds Rep 1 at 57, Robert Goff LJ spoke of his own experience:

> *"... I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence ... reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth'...".*

58. Much more recently, in *JSC BM Bank v Kekhman & Others* [2018] EWHC 791 (Comm) at 67-68, Bryan J said this:

"... it is now widely accepted that memories are fallible, people can convince themselves of the veracity of false recollections of events and retain confidence in their false recollection, and a judge's ability to evaluate honesty and reliability merely from a witness's demeanour is also fallible, and therefore where possible a court should rely on documentary evidence and any other objectively provable facts... ".

59. In this case, the contemporaneous documentation is supportive of Otello's case, and contradicts many of the contrary contentions by MFC. Otello called as witnesses for cross-examination Boilesen, Mogstad and Busch. I found Boilesen an honest and relatively clear witness. Some curiosities in his approach to MFC in early 2018 arose from their previous dealings, and his desire to achieve a successful disposal despite that. As explained below I reject the ill-conceived claims by MFC that he set out, in effect, either to bribe it to approve an unsuitable sale to Mercury or to blackmail it into paying an inflated pre-emption price to avoid it.

60. Mogstad was a straightforward witness and I accept that he may have understood from Martez that Martino was his co-owner in MFC (especially given MFC's name, with its reference to "Moore Frères" or Brothers).

61. Busch was an awkward witness, defensive and not always forthcoming, but this was perhaps not surprising given his position, the course of negotiations, and the hostile action against him and Mercury. Whilst he did not deal well with the Insider Trading Finding, the facts do not justify the opprobrium sought to be visited on him in extreme terms, somewhat hypocritically, by MFC. Among other things, the fact that, despite his situation, he acceded to requests during the trial to produce copy letters of support for Mercury's purchase (although they were redacted and did not prove anything like full financing) weighs on balance slightly in his favour.

62. As for MFC's witnesses, whilst Martez was called last, he was clearly the central force. His attempts to dismiss the email evidence (so strong against MFC), to minimise and explain the dishonesty they showed, and to pass responsibility to others whom he controlled, did him no credit. His claim in cross-examination that his emails to Martino in late 2017 were sent "inadvertently" was an obvious, last-ditch fabrication. I would not trust anything he told me which was controversial unless supported by independent evidence.

63. Martino was argumentative and acted out of loyalty to Martez as his older brother. It would again be unsafe to rely on his evidence without strong objective support. I cannot accept that, however busy he was (particularly in his day job at Morgan Stanley), he never read or even noticed any emails from Martez regarding the negotiations with Mercury in late 2017, which were of such significance to his role and to this dispute. I was also very unimpressed by his evidence in cross-examination as to the importance of identifying the source of Mercury's funding, which led him to seek falsely to construe the committee's due diligence questions in order to persuade the court that this had been a crucial matter which they put to Busch.

64. Azeke gave evidence first for MFC and was less manifestly unreliable than the Moore brothers as a witness, but parts of his account (in particular regarding what he told Boilesen at the board meeting on 27 April 2018) were unsatisfactory and the documents and evidence as a whole show that he has allowed himself to go along with Martez's wishes, although probably more because of friendship and maybe carelessness than bad faith.

65. Given the way that these parties deal, I do not attach undue significance to the fact that Azeke earlier lent support to MFC by providing through Farol the "comfort letter" of 12 October 2015 referred to above, with which it might seek to raise finance. But he sought to overstate the committee's role apart from Martez and WFG. Overall, he did not detract from my impression that MFC's evidence was orchestrated, against the contemporaneous documents, in order to add a veneer of purported independence to the committee from MFC and its lawyers and their previous negotiations with Mercury.

66. MFC did not not adduce witness evidence from Reynolds, who was closely involved in the proposed sale of Otello's shares to Mercury in late 2017 (for example, emailing O'Brien that *"we [MFC] have the ability to market [Otello's] shares*") and whom it had earlier indicated it was likely to call. The failure to call Reynolds is capable of leading to adverse inferences, if otherwise justified, as recently summarised by reference to authority in *Mark Richmond v Selecta Systems Ltd* [2018] EWHC 1446 (Ch):

> *"... where a party could give or call relevant evidence on an important point without apparent difficulty, a failure to do so may in some circumstances entitle the Court to draw an inference adverse to that party, sufficient to strengthen evidence adduced by the other party or weaken evidence given by the party so failing ...".*

67. In the event, given the issues and factual analysis based on the other evidence, principally the contemporaneous documents (albeit including Reynolds' part in them), this case does not require such an inference: the primary facts speak for themselves.

(4) The issues

68. On one level, this dispute can be portrayed as one concerning whether the Last Lion board's decision to decline approval of Mercury as a transferee of Otello's shareholding was an honest and reasonable decision for a board in its position to make; and on the face of it, the discovery of the Insider Trading Finding, and Busch's failure to disclose it in response to repeated enquiries, provides at least colourable justification for that decision.

69. However, Otello emphasises that its primary case is that, irrespective of whether a board acting honestly and reasonably could have reached the same decision, MFC conducted the affairs of Last Lion in an unfairly prejudicial manner by causing it to withhold approval when MFC itself would have sold to Mercury, in order to frustrate a direct share sale in which MFC did not itself profit to the extent it hoped in late 2017.

(a) Principal claims

70. Thus it is claimed by Otello, but disputed by MFC, that:

(a) the creation and composition of the committee of MFC-appointed directors assisted by MFC's lawyers WFG, was proposed by MFC in bad faith, as a means of delaying Otello's sale to Mercury, when no such process was or would have been implemented in the event of sale by MFC to Mercury (and the requirement for $50,000 in order for the committee to

commence its work was a breach of the Articles, under which the board was obliged to perform that exercise);

(b) as the committee, Martino and Azeke knew or should have been told or found out that MFC had been happy to sell to Mercury in December 2017, not least since they were advised by Getachew and Erin Kinney of WFG – both of whom had been involved in both the MFC/Mercury and MFC/Otello negotiations; and

(c) the Last Lion board committee was dependent in its consideration of relevant evidence on MFC (which was looking to reject Mercury if necessary by pretext), rather than performing a genuine and independent assessment, and the final decision of the committee on 17 April 2018 and the board on 27 April 2018 was unreasonable and made for an improper purpose and not in the interests of Last Lion rather than MFC.

71. The core issues are whether this conduct (i) is proved and (ii) if so, amounts to a breach of the Articles and/or conduct by MFC of the affairs of Last Lion which is unfairly prejudicial to Otello's interest as a shareholder. Under paragraph 2 of my order dated 19 April 2018, liability (and jurisdiction) questions and the claims for injunctive and declaratory relief are to be determined at this expedited trial.

72. The Defendants contend that the process and the decision to disapprove of Mercury were throughout in good faith and reasonable. Among other things, they stressed that if Busch was involved in - or even more so, on the board of - Last Lion, the Insider Trading Finding would be severely damaging, in particular to any institutional finance-raising. His concealment was also culpable, and his defence of it (in particular, to the effect that that it was under appeal and/or that disclosure would have drawn more questions) was further demonstrative of his unacceptable standards.

73. Perhaps thinking that attack is the best form of defence, MFC launched an extreme attack on the honesty of Boilesen as well as Busch, entirely misconstruing Boilesen's comment in cross-examination that if it had emerged that he had sold Otello's shares for only £31 million when MFC had immediately turned them for £48 million, it would have damaged his reputation, when this in fact served to demonstrate his acceptable business sensibilities, in stark comparison to MFC's.

74. MFC also claimed that it would in any event be impossible to work with Busch as minority shareholder (presumably in contrast with Otello) given the hostility between Martez and Busch, but blithely ignored their way of treating Boilesen and Otello, the present (no-holds-barred) litigation, as well as Boilesen's frank acceptance (alongside his acknowledgement of the importance of prohibitions against insider trading) of Busch's later excuses regarding the ITF and his efforts not to disclose it.

75. If Otello wins on liability and relief, and its deal with Mercury is completed, or alternatively it fails on liability, either result will resolve the main dispute in these proceedings. However, if liability is determined in its favour, but Otello is unable to save the deal with Mercury (either because injunctive relief is refused, or because it fails to achieve its intended objective), the Court will then need to give directions for a separate trial of Otello's claims for an order requiring MFC to buy out

its interest in Last Lion on terms equivalent to those offered by Mercury or if MFC cannot comply, an order directing the sale of the underlying business from the net sale proceeds of which Otello will seek an equivalent sum and/or damages against MFC.

(b) Findings on subsidiary aspects

76. Before turning to resolution of the main issues, I would next address, relatively briefly, four further aspects of the matter which featured prominently between the parties, namely: (a) the deletion of Martino's emails; (b) the New York proceedings brought by MFC against Mercury related entities; (c) MFC's allegations of ill-motive against Otello; and (d) the question whether Otello can assign to Mercury with its shares, the right to appoint a director of Last Lion.

77. As to (a) the first of these, MFC's disclosure statements stated that notwithstanding that Martino *"was aware of his disclosure obligations"* he had deleted a number of emails *"as recently as May 2018"* and asserted that this email deletion was *"ad hoc"*, *"unstructured"*, *"inadvertent"* and *"unintentional"*.

78. Otello submits that this is implausible since on the Defendants' case, hostile litigation was in contemplation from 19 March 2018 and Martino as a director of Last Lion must have appreciated that his emails might be relevant and was advised to retain potentially relevant documents on both 12 April and 2 May 2018. It is said to be clear that he deleted relevant emails after being so advised, and did not just delete them from his Gmail inbox but then double-deleted them from the "Deleted items" or "Trash" folder in order to delete them from that folder, whereas WFG's letter of 6 June 2018 stated only that *"The aim of his mail management was to remove the items from his inbox"*.

79. Moreover, analysis of sample emails using the other information provided by WFG is said to demonstrate that WFG extracted emails from Martino's Gmail account on 4 May, including emails from his Trash folder which WFG stated would automatically delete items in it for 30 days, so that any email created or deleted from Martino's inbox on or after 4 April 2018 ought therefore to have been retrieved from his Trash folder on 4 May 2018 by WFG; but WFG has identified 19 of the deleted emails in its letter of 6 June 2018, of which five were sent *after* 4 April 2018.

80. It is clear that Martino did delete emails of direct relevance to the pleaded issues as to what, if anything, Martino knew of MFC's negotiations with Mercury in late 2017. MFC denied that Martino had *any* knowledge of Mercury, whereas they admitted that Martez had mentioned Mercury to Azeke *"in passing"*. The disclosed documents include a number of emails in which Martino was kept informed of the 2017 negotiations between MFC and both Otello and Mercury, including one in which he was blind copied to Martez's instructions and information to O'Brien and another in which Martez sent Martino an email chain between Martez/MFC and Busch/Mercury.

81. There was another pleaded issue, as to whether or not Martino has any interest in MFC and it is said that he deleted emails relevant to this issue also - for example, an email from Martez to Martino and a recipient redacted on privilege grounds. The fact that Martino was sent this email (but not Azeke) and was privy to privileged communications of MFC is said further to support the allegation that Martino had an ownership interest in MFC (as Martez had suggested to Mogstad), generally concealed because he works for Morgan Stanley.

82. However, in the face of the denials by Martez and Martino, and the absence of other evidence (even bearing in mind Martino's email deletions) it is unnecessary for me to hold that Martino did have an ownership interest. The obvious issue to which that goes is his knowledge, motivation and alleged lack of independence from MFC in relation to the Last Lion decision not to approve Mercury as transferee of Otello's shares but there is ample material to demonstrate the facts sufficiently in that regard.

83. In the end, I am not sufficiently satisfied that Martino deliberately targeted and deleted emails to avoid disclosure of relevant material in these proceedings. This would be a serious finding of evidence-destruction which is again not needed in this case for the Court's primary task.

84. Martino's attempted explanation of his personal mail-management by double-deletion (outside of his work at Morgan Stanley) is not wholly impossible and MFC is entitled to argue that deliberate concealment would have been irrational *"because those deleted emails were always recoverable, and in fact have been recovered, from other custodians"*, even though that does not entirely negate Martino's intentions and provide any assurance that all his emails with Martez (including those on his Morgan Stanley account, through which he received relevant emails) have been recovered elsewhere.

85. The second matter (b) above, concerning MFC's New York proceedings, relates to Busch's evidence. MFC sent him the Cease and Desist Letter and there were obvious reasons why he would not want to get involved as witness in these proceedings. On its application for expedition, Otello expressed the opinion that it was then *"... unlikely that he is going to cooperate or give evidence ..."*; whereas MFC (i) in opposing expedition, stated that it needed time to compel him to do so and (ii) at the hearing, stated that

> *"... Mr Busch is going to be a very important participant in this – in this trial and it is going to be very important for the court to have fair disclosure, full and fair disclosure, of Mr – of Mercury's documents in order to resolve the bad faith allegations that arise out of the dealings in late 2017"*.

86. Busch indicated however, by a letter dated 6 June 2018 from his American attorneys Fried Frank, that if these proceedings were not resolved by consent, he would provide Otello with a witness statement and attend for oral evidence. Within a week, on 12 June 2018 (shortly before the deadline for exchange of witness statements), MFC served New York proceedings on Busch, seeking relief in respect of alleged breaches of the NDA, including (i) an urgent injunction prohibiting the completion of the proposed transaction with Otello and (ii) an indemnity in respect of MFC's costs of the English proceedings, and any losses which MFC might suffer as a result.

87. On 18 June 2018, WFG attended before the New York court in order to seek directions in respect of MFC's application for urgent interim relief, leading to a hearing on 11 July 2018, in the middle of the trial window for these current proceedings.

88. This may suggest a tactical game. MFC appeared to have taken no action on the Cease and Desist Letter (to which it received no substantive response) until Busch indicated that he was prepared to provide evidence in these proceedings; and whilst it had claimed earlier to regard it as important

that evidence be obtained from Busch, once MFC became aware that Busch intended to provide it, it took immediate steps, plausibly to frighten him off.

89. The narrative alleged for MFC's New York proceedings is similar to its current case. Otello invites the court to find that it is fabrication, that its allegations of wrongful disclosure by Busch to Otello must be absurd when the information concerned Otello and MFC's purported agency for it in late 2017, and to find that MFC is seeking to mislead the New York court in order to obtain illegitimate tactical advantage in these proceedings.

90. However, despite the force of these arguments, it is neither necessary nor appropriate for this court to go beyond the issues which it must resolve, as it does below. If this involves finding that MFC fabricated its defence contrary to the documents and the evidence as a whole, and/or that it was not justified in relying on a breach of the NDA to refuse approval, that is something which must be grappled with.

91. But whether MFC has acted or is acting tactically and/or deliberately to mislead the New York court in order to scare off Busch is not such an issue. He gave his evidence at this trial; he assisted where he felt he could and was truthful on relevant points (despite his failure to disclose or express remorse for the Insider Trading Finding, as addressed below); and he stood his ground in the face of (i) some notably hostile cross-examination (ii) the pressure on his stated desire to keep certain matters confidential and (iii) MFC's claim to recover in New York any losses incurred as a result.

92. Thirdly as regards (c) the allegations of bad faith against Otello, MFC pursued at the trial an unpleaded allegation that it is and has been the victim of a conspiracy between Otello and Mercury to agree an artificially inflated price for the shares, so as to fund a payment to MFC to secure its approval of Mercury. However this accusation (a) is not supported by any documents; (b) ignores the fact that the price which Busch offered for Otello's shares in 2018 ($48 million for 30%) was equivalent to the price which he offered MFC for Otello's shares in 2017 ($40 million for 25%); and (c) depends on hypotheses which I reject, that Busch would be willing to overpay for Otello's shares, Boilesen having disclosed to him that he had agreed a price of only US$31million with Martez in late 2017.

93. MFC also alleged that Otello determined in advance to push through the deal with Mercury by litigation. It is difficult to understand what this means, beyond MFC's general attack on Otello's good faith. Otello obviously (i) wished to gain approval urgently, not least because its SPA with Mercury contained a long-stop date as usual (although that might be and later was extended by agreement) and (ii) feared that MFC might seek to thwart the transaction, starting with the delay to the board meeting requested on 20 February 2018 and then the committee process. But if MFC was indeed abusing its position as majority shareholder in the service of its own commercial interests, that was not because of or excused by Otello's decision to bring proceedings.

94. Fourthly (d) as to the declaration sought by Otello, in relation to the meaning and effect of clauses 3(d)(iii) and 20 of the Shareholders' Deed, this is a simple issue of construction. The relevant clauses of the Shareholders' Deed provide as follows:

> **Clause 3(d)(iii)** *For so long as [Otello] holds at least 15% of the Shares in the Company (on a Fully Diluted Basis) [Otello] shall be entitled (but not obligated) to appoint one*

Director to the Board (the "Opera Software Director") and to remove any Director so appointed and, upon his or her removal whether by [Otello] or otherwise, to appoint such other Director in any such Director's place.

Clause 20 *Successors and Assigns; Beneficiaries. This Agreement is personal to the Parties and shall not be capable of assignment, except that each Shareholder may assign the whole or any part of its rights in this Agreement to any Person to whom Equity is Transferred in compliance with this Agreement, the Articles and applicable law.*

95. Otello submitted that, on the proper construction of the Shareholders' Deed, the effect of these clauses was that Otello had the right to appoint a director to the Board of Last Lion so long as it holds at least 15% of the shares and this right is fully assignable to any person to whom Otello transfers its shares in accordance with the Shareholders' Deed and the Articles; and so Otello may assign the right to appoint a director to the Board to any person to whom it transfers 15% or more of the shares in Last Lion, in which event the transferee would meet the qualifying requirement in clause 3(d)(iii), and would obtain the right to appoint a director to the Board.

96. The Defendants disputed this, although in closing they relied on Otello's contention and Busch's alleged unsuitability as a Last Lion director because of the Insider Trading Finding, in support of the reasonableness of its disapproval to the share sale from Otello to MFC and in opposition to an injunction compelling approval. They claimed that the effect of the provisions is that, whilst Otello may assign its rights under clause 3(d)(iii), the transferee would only obtain the right to appoint a director to the Board if Otello (rather than the transferee) continued to hold 15% of the Shares.

97. I am satisfied that Otello's construction makes complete sense and is clearly right, whereas MFC's purported interpretation makes no sense. It might in practice prevent Otello being able to assign its rights under clause 3(d)(iii) at all, contrary to the express wording of clause 20; and lead to the commercially absurd result that a transferee (i) could obtain the right to appoint a director to the Board if it acquired anything up to a 15% stake in Last Lion from Otello but (ii) could not do so if it acquired a greater stake.

(5) Relevant law

98. In order to establish the jurisdiction to grant relief under section 994 of the Companies Act 2006, the petitioner must establish unfairness in the conduct of the affairs of the company causing prejudice. There cannot be any dispute now as regards MFC's conduct of the relevant affairs of Last Lion in relation to the transfer of shares to Mercury; and it is common ground that in order to show that there has been unfairness and prejudice, there must be a breach of *"the terms on which the parties have agreed the affairs of the company should be conducted"*.

(a) Authorities regarding section 994

99. As Lord Hoffmann put it in *O'Neill v Phillips* [1999] 1 WLR 1092 at 1098:

"Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief ... to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable [but] the concept of

fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles."

100. As stated in *Re Coroin Ltd* [2012] EWHC 2343 (Ch), per David Richards J at [630]:

> "*Prejudice will certainly encompass damage to the financial position of a member. The prejudice may be damage to the value of his shares but may also extend to other financial damage which in the circumstances of the case is bound up with his position as a member. ... Moreover, prejudice need not be financial in character. A disregard of the rights of a member as such, without any financial consequences, may amount to prejudice falling within the section.*"

101. There a number of different ways in which a shareholder can establish unfairly prejudicial conduct. Some of these were listed in *Cobden Investments Ltd v RWM Langport Ltd* [2008] EWHC 2810 (Ch) per Warren J at [41]:

> "A *shareholder generally needs to establish one of the following: (a) A breach of the terms on which he agreed that the affairs of the company should be conducted; (b) That equitable considerations (those referred to by Lord Wilberforce in Ebrahimi v Westbourne Galleries Ltd [1973] AC 360 at 379) arising at the time of the commencement of the relationship or subsequently, make it unfair for those conducting the affairs of the company to rely on their strict legal rights; (c) That the board of directors has exceeded the powers vested in them or have exercised their powers for an illegitimate or ulterior purpose..."*

102. The terms on which shareholders may agree are not limited to the express terms of the articles or their contractual documents but include, by implication, an agreement that any party who is a director will perform his duties as a director. Consequently, where a director breaches his fiduciary duty to a company, and this results in the affairs of the company being conducted in a way that prejudices a shareholder, this can found an unfair prejudice claim.

103. This is particularly so where a director exercises his powers in bad faith for some ulterior and improper purpose. In *Saul D Harrison* [1995] 1 BCLC 14, Hoffmann LJ adopted with approval the Jenkins Committee's summary of unfair prejudice as entailing

> "*a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely*"

and stated (at 18):

> "*If the board act for some ulterior purpose, they step outside the terms of the bargain between the shareholders and the company ... [T]he fact that the board are protected by the principle of majority rule does not necessarily prevent their conduct from being unfair within the meaning of [section 994].*"

104. This applies to other breaches as well, as stated in *Re Tobian Properties* [2012] EWCA Civ 998, [2013] 2 BCLC 567 per Arden LJ at [22]:

> *"the terms on which the parties agreed to do business together include by implication an agreement that any party who is a director will perform his duties as a director. Primary among these duties are the seven duties now codified in sections 171 to 177 of the Companies Act 2006 . ... Six out of seven of these duties are fiduciary duties, that is, duties imposed by law on persons who exercise powers for the benefit of others. Non-compliance*

by the respondent shareholders with their duties will generally indicate that unfair prejudice has occurred".

105. In deciding whether directors have used powers for one purpose or another, the court must look at the state of mind of each director individually but is entitled to look at the situation objectively, as this may cast doubt on the evidence of particular individuals that they acted for a particular purpose: *Howard Smith v Ampol Petroleum* [1974] AC 821 at 832-3.

106. Where a director has acted in a way that promotes his own interests, *"any court in which the decision is challenged should examine the directors' conduct with particular care"*: *Colin Gwyer & Associates Ltd v London Wharf (Limehouse) Ltd* [2003] BCC 885, at [76].

107. As for equitable considerations, Lord Hoffmann put it this way in *O'Neill v Phillips*, at 1098-99:

> *"One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law. ... [This] leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith..."*

108. Lord Hoffman then referred to *In re Westbourne Galleries Ltd* [1973] AC 360 in which the circumstances identified by the House of Lords in which equitable considerations might arise (at 379) included *"restrictions upon the transfer of the members' interest in the company"* so where there is a power to restrict a transfer of shares that power must itself by exercised fairly. Thus a breach of the rules as to directors' powers in relation to restricting share transfers might amount to unfair conduct under section 994.

109. Finally, whilst according to *Coroin*, a disregard of the rights of a member as such without any financial consequences, *may* amount to prejudice, in my judgment, disregard of a member's rights *will be* prejudicial for the purpose of section 994 where it is serious and likely to continue in the absence of relief under section 996 and has a significant impact on the value of the member's shares.

(b) The power to restrict share transfers

110. According to *Re Discoverers Finance Corp Ltd* [1910] 1 Ch 312 per Buckley LJ: "*In the absence of restrictions in the articles the shareholder has by virtue of the statute the right to transfer his shares without the consent of anybody...*". In the absence of an effective restraint, the transferor has an unfettered right to transfer and the transferee then has an absolute right to have that transfer registered.

111. Section 544 of the 2006 Act (in common with earlier legislation) allows that right to be restricted by the Articles. However, *"as the right to deal freely with a share is an important attribute of ownership and the prima facie right of a shareholder, the existence and extent of any restriction on transfer, such as pre-emption provisions, must be clearly stated"*: *Re Coroin Ltd* [2011] EWHC 3466 (Ch) at [73].

112. In this case, the right to transfer shares in Last Lion is restricted by Article 13.1 to transfers which fall within certain specified categories. One of those categories is transfers to a *"Permitted Transferee"* – which is defined to include *"any transferee approved by the Board"*. Article 13.4 provides that *"Subject to article 13.2, a shareholder may Transfer his, her or its Securities to any Permitted Transferee ..."*. Article 13.2 provides that

> *"... no Shareholder may Transfer any of its Securities or any beneficial or indirect interest in such Securities to any prospective transferee unless such prospective transferee has been approved by a majority of the Board (such approval not to be unreasonably withheld or delayed). It shall be reasonable for the Board to not accept, among others, any Transfer to a prospective transferee, or Affiliates of any prospective transferee, that the Board reasonably considers to be a competitor of the Group"*.

113. Where – as here – the decision-making power is qualified by the words *"not to be unreasonably withheld or delayed"*, this also imposes an objective element, subject to the context of the particular decision. The double negative "*not ... unreasonably*" may give rise to a complication as regards evidential and persuasive burdens but in my view (although not crucial for my findings), it should be on the Defendants in the first instance to demonstrate the Last Lion board's reasons for withholding or delaying approval. Any restriction on the right to transfer shares diminishes their value and must be explained in the first instance: this is consistent with section 771 of the 2006 Act, which provides that where a share transfer is lodged with the company, and it refuses to register the transfer, the company must give *"its reasons for the refusal"*.

114. That does not mean, however, that it is never for the challenger to the decision then to establish objective unreasonableness. In the (different) landlord and tenant context, which may provide some (albeit incomplete) guidance by analogy:-

(a) In *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] 1 Ch 513 the Court of Appeal held that the principles applicable to the application of a clause that prohibited any demise "*without the licence in writing of the lessor being previously obtained such licence not to be unreasonably withheld*" included the following:

> *"... (3) The onus of proving that consent has been unreasonably withheld is on the tenant ... (4) It is not necessary for the landlord to prove that the conclusions which led him to refuse consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances ..."*.

(b) On the other hand, in *Mount Eden Land Ltd v Straudley Investments Ltd* (1997) 74 P & CR 306, it was held that the burden was on the landlord "*to demonstrate that the condition that they sought to impose in this case was reasonable*".

(c) Perhaps most helpful is *Hautford Ltd v Rotrust Nominees* Ltd [2018] EWCA Civ 765, [2018] 3 WLR 1, in which Sir Terence Etherton MR stated at [41] that "*the test of reasonableness is an objective one*"; and that the decision would not have been unreasonable if it was "*one which a reasonable landlord might have reached in the circumstances, even though other landlords might have decided otherwise*".

115. The question whether the decision was one which a board, acting reasonably, might have reached (a) requires that the outcome must have been within the range of reasonable outcomes, not that all

boards would have reached the same decision - see *Hautford* at [41]; and (b) what is or is not reasonable *"will depend upon the precise circumstances at a particular moment in time, and so the matter of reasonableness must be judged at the time ..."* - see *Hautford* at [44].

(c) Sections 171-173 of the 2006 Act

116. Section 171 of the 2006 Act provides that "*A director of a company must ... (b) only exercise powers for the purposes for which they are conferred.*" In order to assess whether a director has acted in breach of section 171, according to *Extrasure Travel Insurances Ltd v Scattergood* [2003] 1 BCLC 598 at [92-93]:

> *"... The court must: (i) identify the power whose exercise is in question; (ii) identify the proper purposes for which that power was delegated to the directors; (iii) identify the substantial purpose for which the power was in fact exercised; and (iv) decide whether that purpose was proper... ".*

117. Having identified the power in question, the court must also ascertain the purpose(s) for which the power was conferred on the director. According to the Supreme Court in *Eclairs Group Ltd v Glengary Overseas Ltd* [2016] 2 All ER (Comm) 413, in order to ascertain the purpose for which a power has been conferred (in circumstances where the instrument is silent) the court is required to make:

> *"... an inference from the mischief of the provision conferring it, which is itself deduced from its express terms, from an analysis of their effect, and from the court's understanding of the business context."*

118. The court must then proceed to establish the purpose for which the power was in fact exercised by the director. This is a notoriously difficult task for, as was pointed out in *Ex parte Hill* (1883) 23 Ch D 695, per Bowen LJ at 704:

> *"... If we are to consider whether amongst all the shadows which pass across a man's mind, some view as well as the dominant view influenced him to do the act, we shall be embarking on a dark and unknown voyage across an exceedingly misty sea."*

And as the Defendants put it, more prosaically, individuals will act for a number of different purposes, which may be hard to disentangle.

119. Section 172(1) of the Act provides:

> "*A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to: - (a) the likely consequences of any decision in the long term, (b) the interests of the company's employees, (c) the need to foster the company's business relationships with suppliers, customers and others, (d) the impact of the company's operations on the community and the environment, (e) the desirability of the company maintaining a reputation for high standards of business conduct, and (f) the need to act fairly as between members of the company.*"

120. Section 173(1) of the Act provides that "*A director of a company must exercise independent judgment.*" This duty applies equally to appointed directors, who cannot blindly follow the

judgment of those who appointed them, although they may rely on their advice provided they make a judgment of their own. An appointed director may take the interests of his nominator into account, provided that his decisions as a director are in what he genuinely considers to be the best interests of the company: *Hawkes v Cuddy (No 2)* [2009] 2 BCLC 427 (CA) at [32-33].

(d) The primacy of the company

121. The Defendants submit that action may well be justified by the overriding interests of the company as a separate entity even though in conflict with the interests of some section of its members: see *Re BSB Holdings Ltd (No 2)* [1996] 1 BCLC 155 per Arden J at 251 said that "*[the] law does not require the interests of the company to be sacrificed in the particular interests of a group of shareholders*".

122. I accept that the factors set out in section 172(1), go wider than the wishes of a company's current shareholders and it is for the directors to determine in good faith what they consider is in the best interests of the company, and not just the shareholders' views. If the shareholders object to the course of action determined by the directors, they may (subject to the terms of the company's constitution) exercise their rights to remove and replace directors, but unless they do so, they cannot dictate to the directors how they should exercise their powers as directors.

123. If the company's interests diverge from the interests of its members as a whole, and not just a section of them, the directors still "*have but one master, the company*": *Dawson International Plc v Coats Patons Plc* (1988) 4 BCC 305 per Lord Cullen at 314. Moreover it is not the case that

> "... *a company can have no interest in the change of identity of its shareholders upon a takeover ... there will be cases in which its agents, the directors, will see the takeover of its shares by a particular bidder as beneficial to the company. For example, it may provide the opportunity for integrating operations or obtaining additional resources. In other cases the directors will see a particular bid as not in the best interests of the company ...* ".

124. As the Defendants submit, the essential principle under section 172(1) is for the directors to make their own decisions, in good faith, as to how to promote the success of the company for the members as a whole. A court will not inquire whether, objectively, the decision was actually the best decision for the company, nor whether the director's honestly held belief was a reasonable one. Of course, the court may be persuaded that the director did not think that the action was in the company's best interests if it forms the view that no reasonable director could have concluded that a particular course of action was in the interests of the company. However, the ultimate test as to compliance with this section is a subjective one.

125. In the present case, therefore there are subjective questions as to the MFC-appointed directors' compliance with their powers in section 171-173. But in my judgment, in assessing whether Last Lion's directors acted for a proper purpose, it is in my judgment inappropriate to treat Last Lion as having an interest superior to any divergence in views between MFC and Otello as to whether Mercury was acceptable as a shareholder. As I now seek to explain, Last Lion had no interest in the identity of its shareholders which enabled its board to disregard the interests of its current shareholders as a whole.

(e) Assessing the (dis)approval process

126. In my view, the power in Article 13.2 was granted for the purpose of protecting the interests of the company, to be equated in this case with the interests of the shareholders as a whole and to be exercised for that purpose; and Last Lion was entitled to the independent judgment of its directors, and those nominated by MFC could not *"blindly follow the judgment of those who appointed them"* (to adopt the phrase in *Palmer's Company Law* at 8.2704).

127. The issue of the identity of a company's shareholders is one which by its very nature arises at the shareholder level, and is therefore principally (if not exclusively) the concern of the shareholders. As Hoffmann J observed in *Re Sherborne Park Residents Co. Ltd* (1986) 2 BCC 528, *"the company is not particularly concerned with who its shareholders are"*.

128. In *Bilta (UK) Ltd (In Liquidation) & Others v Nazir & Others (No.2)* [2015] UKSC 23, [2016] AC 1, Lords Hodge and Toulson cited at [123] the Australian case of *Kinsela v Russell Kinsela Pty Ltd* (1986) 4 NSWLR 722 per Street CJ to the effect that:

> *"In a solvent company the proprietary interests of the shareholders entitle them as the general body to be regarded as the company when questions of the duty of directors arise. If, as a general body, they authorise or ratify a particular action of the directors, there can be no challenge to the validity of what the directors have done"*.

129. In *Re Smith & Fawcett* [1942] Ch 304, the Articles gave the directors an *"absolute and uncontrolled discretion"* to refuse to register any transfer of shares, but Lord Greene MR held that the directors *"... must exercise their discretion bona fide in what they consider - not what a court may consider - is in the interests of the company, and not for any collateral purpose"*.

130. In a different context, in *Socimer International Bank v. Standard Bank London* [2008] 1 Ll Rep 558, Rix LJ said at [66]:

> *"... a decision maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to Wednesbury unreasonableness..."*

131. Article 13.2 of Last Lion's Articles of Association conferred a specific decision-making power on the Last Lion board to approve a prospective transferee of shares in Last Lion but did not prescribe the process for the board to exercise that power, so long as this did not result in the decision being *"unreasonably withheld or delayed"*. That is an objective question and, once the board gives its reasons for withholding or delaying approval, one which in this case it is then for Otello to satisfy if it is to establish that the Articles have been breached.

132. Article 13.2 was engaged as soon as one party asked the board to approve a prospective transferee, in this case 20 February 2018, and every step taken (including delaying the board meeting and/or establishing and pursuing a committee process) is ancillary to the exercise of the power granted by Article 13.2.

133. For its part, Otello submits that since under Article 13.2 it is only the prospective transferee who or which has to be approved (or not) and the board has no decision-making powers in relation to the

terms of the transfer, it is only the attributes relevant to the prospective transferee's position as a proposed member of Last Lion that are relevant and whether or not Busch would be a suitable director is completely irrelevant. I disagree, especially when the proposed member has a right to appoint a director. The hypothetical possibility that whilst Otello is a 15% shareholder, it might seek to appoint Busch as its nominee director under clause 3(d)(iii) of the Shareholders' Deed, seems to me irrelevant.

(e) The *Eclairs Group* test

134. A crucial question concerns the test for deciding on whether a board exercised its powers properly, when one of them acted for an improper purpose but not all. In *Eclairs Group* (cited above) Lord Sumption (with whom Lord Hodge agreed) held that the proper test for determining whether a power had been exercised for an improper purpose is the "but for" test, i.e. whether but for the improper purpose, the power would not have been exercised. Thus:

> *"'[20] ... Directors of companies cannot be expected to maintain an unworldly ignorance of the consequences of their acts or a lofty indifference to their implications. A director may be perfectly conscious of the collateral advantages of the course of action that he proposes, while appreciating that they are not legitimate reasons for adopting it. He may even enthusiastically welcome them. It does not follow without more that the pursuit of those advantages was his purpose in supporting the decision... [21] The fundamental point, however, is one of principle. The statutory duty of the directors is to exercise their powers "only" for the purposes for which they are conferred. That duty is broken if they allow themselves to be influenced by any improper purpose. If equity nevertheless allows the decision to stand in some cases, it is not because it condones a minor improper purpose where it would condemn a major one. It is because the law distinguishes between some consequences of a breach of duty and others. The only rational basis for such a distinction is that some improprieties may not have resulted in an injustice to the interests which equity seeks to protect. Here, we are necessarily in the realm of causation. ... One has to focus on the improper purpose and ask whether the decision would have been made if the directors had not been moved by it. If the answer is that without the improper purpose(s) the decision impugned would never have been made, then it would be irrational to allow it to stand simply because the directors had other, proper considerations in mind as well, to which perhaps they attached greater importance. .... Correspondingly, if there were proper reasons for exercising the power and it would still have been exercised for those reasons even in the absence of improper ones, it is difficult to see why justice should require the decision to be set aside... [22] ... As the majority (Mason, Deane and Dawson JJ) pointed out in the High Court of Australia in Whitehouse v Carlton Hotel Pty Ltd (1987) 162 CLR 285, 294: 'As a matter of logic and principle, the preferable view would seem to be that, regardless of whether the impermissible purpose was the dominant one or but one of a number of significantly contributing causes, the allotment will be invalidated if the impermissible purpose was causative in the sense that, but for its presence, the power would not have been exercised'. I think that this is right. It is consistent with the rationale of the proper purpose rule. It also corresponds to the view which courts of equity have always taken about the exercise of powers of appointment by trustees...".*

135. Although the point is not decisive on the facts of the present case, I accept the Defendants' submission that having regard to the Supreme Court, and the first instance decision of Mann J in *Eclairs Group* [2013] EWHC 2631 (Ch), the "but for" test must involve examination of what caused the majority of the board to vote as they did, but not that it established any subsidiary

"majority rule" test to the effect that unless a majority of the board *shared* the improper purpose, it cannot be treated as causative of their decision.

136. The question, to quote Lord Sumption again, is whether the board's power "*...would still have been exercised for* [proper] *reasons even in the absence of improper ones*". If one director acts for an improper purpose and leads the others to vote with him in breach of their duties, especially their duty to act independently, he will have caused the power to be exercised for an improper purpose under the "but for" test even if not under such a "sharing majority rule" test. As it was put in *Colin Gwyer* (cited above) at 910:

> *"... In relation to a board of directors comprising several persons, the fact that one director acted in breach of fiduciary duty when exercising his vote on a resolution should not invalidate the resolution* ***if the other directors acted in accordance with their duties."*** [emphasis added]

137. It would be bizarre to uphold a decision in which a majority of directors went along with the director acting for an improper purpose, without exercising any independent judgment - or indeed in my judgment, because they had been deceived or were careless. Whether or not they can be said to have "shared" the improper purpose in those circumstances is an unnecessary (and possibly confusing) additional formulation.

138. The main questions in the present case under Lord Sumption's "but for" test are therefore, briefly stated: (a) did Martez have an improper purpose; (b) did Martino and Azeke support or acquiesce in it; and (c) would the Last Lion board still have disapproved of Mercury as transferee of Otello's shares *but for* the same?

(6) Factual analysis

139. The evidence at trial - the documents, the testimony consistent with them, and the parties' motives and conduct overall - goes beyond establishing what was plausible and likely, but confirms to a high standard the crucial parts of the wrongdoing claimed by Otello and denied by MFC.

(a) Main findings

140. My main findings relevant to the principal claims may be summarised as follows:-

(a) From around October 2017, MFC was seeking to decrease its shareholding in Last Lion (and I was not satisfied by its evidence that it was seeking to *increase* its stake, with the benefit of debt finance or at all).

(b) MFC also intended to introduce a buyer to Otello and earn a fee on its sale of shares in Last Lion. MFC misrepresented to its broker Ardour that it was authorised to sell Otello's shares, and at a meeting on 2 November 2017, Martez similarly misrepresented to Busch that MFC had authority to sell Otello's shares. I accept Busch's evidence as to that, consistent with the documents.

(c) In mid-November 2017, Martez decided that MFC should instead seek to buy Otello's shares and sell them on to Mercury at a higher price. He did not tell Ardour or Mercury this and until 15 December 2017, Mercury believed that it would be contracting directly with Otello:

this is what Martez led it to believe, and Martez knew that this was Mercury's belief and took no steps to correct it.

(d) On 15 December 2017, Martez told Busch that the transaction was to be restructured as a back-to-back series of sales and purchases of Otello's shares and claimed falsely that this was at Otello's insistence, because of its unwillingness to provide Mercury with any representations or warranties.

(e) In his email dated 16 December 2017, Martez told a series of lies to Busch. Throughout their negotiations, MFC led Busch into the false belief that Mercury was negotiating the price with Otello and also led Otello falsely to believe that it was seeking to buy Otello's shares on its own account with the benefit of finance.

(f) By 16 December 2017, Martez intended to complete the transaction with Mercury without Last Lion board approval or with formal approval obtained without difficulty from Martino and Azeke (as well as Boilesen). He and MFC were content to complete a sale of Otello's shares to Mercury without any further due diligence.

(g) Martino and Azeke were aware at the time of the negotiations between MFC and Mercury, in the case of Martino because Martez kept him fully informed, including by email, and in the case of Azeke as a result of his discussions with Martez in general terms in December 2017.

(h) Busch's approach to Otello directly in January 2018 cannot for the purpose of these proceedings be characterised as a breach of the NDA, since the proposed transaction the subject of the NDA involved MFC acting purportedly on behalf of Otello, and in any event the price agreed between Mercury and Otello is a genuine arm's length price, even if Otello expected to pay some fee to MFC.

(i) Martez attempted to disrupt and if possible prevent the sale of shares directly from Otello to Mercury for his and MFC's own financial reasons. The delay in setting up the first Last Lion board meeting and the establishment and process of the committee to consider the request for approval, was devised by Martez and WFG to achieve this objective.

(j) The written component of the committee process, and the investigations into Mr Busch and Mercury, were conducted by WFG, acting on the instructions of Martez, with little if any real input from Martino and Azeke.

(k) As at 6 April 2018, the information provided to Martino and Azeke regarding the Insider Trading Finding was insufficient reasonably to refuse approval of Mercury and subsequently, whilst WFG provided to Martino a single translated paragraph of the decision, neither Martino nor Azeke sought or received any better and/or more detailed understanding of the decision (or appeals process).

(l) At the committee meeting on 12 April 2018, Martez provided an account of his dealings with Mercury in late 2017 and his opinion of it which he knew was false and which Martino and Azeke should at least have suspected, given their previous knowledge.

(m) At the committee meeting on 17 April 2018 Martino and Azeke purported to rely on Martez's false account of MFC's dealings with Mercury and its alleged breaches of the NDA and on the Insider Trading Finding, about which they had insufficient knowledge, in order to meet the collective aim of disapproving Mercury.

(n) At the board meeting on 27 April 2018, Azeke and Martino misled Boilesen about the extent of their involvement in the committee's activities and their knowledge and understanding of the Insider Trading Finding.

(b) Unfair prejudice

141. I find that there was unfair conduct of the affairs of Last Lion in this case and it caused material prejudice to Otello, again in chronological stages as presented for Otello, as follows.

142. First, Martez – supported by Martino and Azeke – delayed the board meeting requested by Boilesen on 20 February until 5 March 2018 so that a strategy to block the sale by Otello could be devised and implemented for the benefit MFC (and MFC's interest in profiting from a sale of Otello's shares is not an interest *qua* member of Last Lion). This was for an improper purpose in breach of section 171. Martino and Azeke deferred to Martez not just because he was chairman but because they did his bidding.

143. After stating that the board meeting could not be convened for 23 February, Martez made no effort to find dates when it could take place until 26 February 2018 and Martino and Azeke refused to give dates to Boilesen. (Although Boilesen was entitled to call a meeting on 3 business days' notice according to clauses 3(e)(i) and (iv) of the Shareholders' Deed, it would not have been quorate unless two of the MFC-appointed directors were present or represented.)

144. In the meantime, the Cease and Desist letter of 21 February showed that MFC wanted to stop Mercury buying from Otello; and notwithstanding Martez's claim not to have instructed WFG to prepare the draft Due Diligence Request letter of 26 February, he accepted that certain parts of it reflected discussions he had had with WFG in his capacity as CEO of MFC, not Chairman of Last Lion, and it set out MFC's strategy for the upcoming meeting, not for Last Lion (whose other directors did not see it).

145. By promoting MFC's interest in profiting from a sale of Otello's shares, rather than acting in the interests of members *qua* members, Martez was also in breach of section 172 and Martino was motivated by the same factional interest and went along with Martez, as did Azeke. Blindly following Martez during this period constituted a failure to exercise independent judgment. In fact Martino at least was not blind – he was aware of his brother's history with Mercury.

146. But for Martez's breaches of duty, the board meeting would have been held earlier or could have decided on Boilesen's request by a written resolution. No committee process would have been imposed and Mercury would have been approved. Even if Martino and/or Azeke did not breach their other duties, they allowed Martez to control this part of the process because they knew it suited him.

147. At the board meeting on 5 March 2018, Martez proposed and voted for the committee process for the same improper purpose. If he had been honest and open, he would have informed the board that he had approved of Mercury in December 2017 and had been days away from signing and closing a sale of shares in Last Lion to Mercury. Martino was motivated by the same improper purpose or wanted simply to agree with Martez, and Azeke was prepared to go along with that because he was Martez's friend and/or did not care on behalf of Last Lion.

148. Again, but for Martez's improper purpose no committee process would have been imposed by the Board and Mercury would in fact have been approved on the basis that 100% of Last Lion's

shareholders had no objection to Mercury as a transferee, notwithstanding that MFC might not like losing its profit on the deal. Martino shared the improper purpose, and both Martino and Azeke failed to exercise any independent judgment, which was additional unfairness, causing further prejudice.

149. The additional delay caused by the imposition of the committee process denied Otello the chance to close the SPA by the original longstop date of 20 May 2018 under clause 8 although it was subsequently able to procure extensions at a cost under clauses 2 and 3. Neither Martino nor Azeke exercised any independent judgment in the committee's work - for the most part, WFG did not even tell them what they were doing until after they had done it, and they were content for WFG to take their instructions from Martez and do what Martez required of them, notwithstanding that they knew that WFG acted for MFC in its disputes with both Mercury as regards the NDA and against Otello.

150. At the 12 April meeting, Martez mis-stated the events of late 2017 in furtherance of his improper purpose as a director, namely to block the sale. If and insofar as Azeke may have believed him, it makes no difference. Martez and probably Martino, given that Martez had kept him fully informed in late 2017, knew that Martez was lying about Mercury. Even if the committee would have been established without Martez's improper purpose, if he had dealt honestly with it, he would have told it that MFC was ready to sell to Mercury in late 2017 and so the committee would have recommended that Mercury be approved by the board.

151. Various factors reckoned against Busch and Mercury depend upon the acceptance of MFC's version of events in late 2017, but no part of that false version of events could have been taken against Busch and the approval of Mercury by a hypothetical, reasonable board.

152. Insofar as it needs to be decided whether Martino and Azeke "shared" in Martez's improper purposes when voting against the approval of Mercury as transferee of Otello's shares, I find that they did. Martino knew and Azeke should have known that Martez wanted to block the sale to Mercury in MFC's interests without regard to the interests of Last Lion and its shareholders as a whole.

153. It was the Defendants' case that Mercury breached the NDA and that was one of the matters which justified the decision to refuse to approve it as transferee. But there was no breach of the NDA to provide such justification because the NDA did not prohibit Mercury from approaching Otello: since MFC was purporting to act as agent for Otello when the NDA was executed, it could not validly complain about Mercury approaching its then purported principal.

(c) Effect of the ITF

154. The most obvious question relates to the effect of the Insider Trading Finding (or "ITF"). If Martez had come clean about his prior dealings with Mercury, the board would have recognised not only that (a) the information which MFC had previously alleged concerning Busch must be ignored, MFC had already approved Mercury without considering it necessary to conduct any investigation into Busch's background but also that (b) the limited material which it had received concerning the ITF did not provide proper grounds for refusing to approve Mercury.

155. In my opinion again, at that late stage in the process, MFC's unfair conduct was continuing to cause prejudice to Otello; and even without the unfair purpose, the board's refusal to approve Mercury

because of the Insider Trading Finding, was still in my opinion unreasonable in the objective sense under Article 13.2.

156. When WFG came across the ITF, and put the FMA's press release before Martez and his confederates, it must have seemed like manna from heaven in feeding the committee and board process and bringing it to Martez's desired conclusion. The Defendants' submissions highlighted passages from the ITF such as paragraphs 120-122, in which the FMAT stated that the Nstein board including Busch had "*shown no evidence of remorse for any matters in regard to the violations of which they stand accused in this case, which are among the most serious in the Transferable Securities Act...*" that it was "*highly concerned by this situation*" and that for "*the financial system, in particular, the absence of ethics is indeed a poison and it undermines the confidence of investors*".

157. However, the particular wrongdoing alleged and proven in the ITF, which set out the detailed chronology of the relevant events at paragraph 75, was one which occurred 8 ½ years ago and in which he played a peripheral role. As relevant against him, it was alleged and held that:

    (a) on 4 December 2009, Nstein's directors including Busch had an informal discussion regarding an expression of interest in purchasing Nstein from Open Text and on 9 December 2009, they received an email informing them *inter alia* that discussions with Open Text were *"continuing"*

    (b) Nstein had hired an investment bank called Pagemill to *"explore other options"* and was trying to buy time in order to allow Pagemill to do so;

    (c) on 4 January 2010 nearly a month later and having heard nothing about Open Text's putative interest in Nstein in the meantime, Busch signed the unanimous written resolution granting stock options to members of Nstein's management, drafted by Nstein's director of legal affairs.

158. There was no finding against Busch's *bona fides* in signing off the relevant stock issuance, based on the belief that it was in the best interests of Nstein and in the ordinary course of its business. This was not expressly rejected by FMAT, as claimed by MFC. Instead, the ITF concluded that the stock issuance did not engage a statutory defence which applied to transactions which were *"necessary in the normal course of business"*, holding that the word *"necessary"* could not be treated as a synonym for *"desirable"* or *"useful"*. So a director could authorise an action which he or she believed to be and was in the best interests of the company, but if that was voluntary, the test for necessity would not be met and the statutory defence would not apply.

159. In one sense, the Nstein board including Busch was found to have contravened the relevant securities legislation because they made an error of judgment by prioritising the interests of the company over the interests of the participants in the public market in its shares. This was "insider trading" within the statute but without the moral opprobrium which might generally be entailed by that nomenclature.

160. The fine imposed on Busch was relatively modest and the FMA did not even seek any order barring or suspending him or imposing conditions on his acting as a company director in Quebec. Whilst Boilesen accepted that he would have "definitely" chosen for a board seat someone without any insider trading findings over someone who did, the ITF was based on facts which, as far as Busch were concerned did not make him unfit to serve as a director of a public company (such as Otello,

on which Boilesen also said it would "definitely" hard for such a person to serve), still less a private company such as Last Lion whose shares do not trade on any public market.

161. That the breaches in 2010 of which Busch stood accused and was "*convicted*" (to use MFC's preferred phrase) are (to use Otello's) "*at the outer edge of the relevant regulatory framework*" is reflected to some extent by the grant of permission to appeal to the Court of Appeal in Quebec, its highest court, on the basis that *"the questions raised are new and deserve to be examined by this court"*. Whether Busch was guilty of the breach found by the FMAT (technical or substantial) therefore turned on an issue of Quebec law, on which the Court of Quebec might be reversed; and Busch's failure to show remorse might be seen in that light.

162. Nor do I accept that Last Lion would or might be seriously damaged if Busch was (through Mercury) a minority shareholder and director. I am not satisfied that third parties would be significantly less willing to provide finance to the Vewd business in that event, so long as it is commercially inviting and controlled by persons of probity.

163. The ITF did not decide whether and to what extent Busch lacked probity and in any event, as a 30% shareholder and director on a board over which MFC's appointees are entitled to exercise majority control, Busch would not have any real power over the Vewd business. If there was such a concern MFC had the opportunity to argue that any injunction should be on conditions as to Mercury's appointment of a Last Lion director (as invited during oral closings).

164. As for Busch's failure to provide the committee with the information it had requested in respect of litigation involving him personally, such answers as he provided were true and manifestly did not answer all of the questions raised. This was, in my judgment, evasive but I would hesitate to agree with MFC that it was dishonest. Indeed this apparent refusal to answer the question, whilst it might be seen as evasive, at least showed that Busch had a standard of commercial probity substantially higher than that which Martez and MFC used in their own dealings. Whilst the test is objective, I cannot see how a reasonable board could object to the character of a potential new shareholder if he was shown to conduct himself with no less propriety than Last Lion's chairman and majority shareholder.

165. I also reject the allegation that Busch lied in an email dated 29 March 2018, stating that the ITF was being appealed to the *"court of Quebec"*. Whilst Busch's first appeal to the Court of Quebec was dismissed on 26 February 2018, he obtained permission to pursue a second appeal to the Quebec Court of Appeal on 13 April 2018 and I infer that his application for permission to pursue a second appeal was launched by 29 March 2018.

166. It can be said of this that Busch failed to disclose the rejection of the first appeal, and perhaps confused the Quebec Court of Appeal with the Court of Quebec, which is not something for which he can fairly be criticised and was not in any event something on which the reasonable board in Last Lion's position could rely as a basis for refusing to approve Mercury.

167. That is not to say that Busch behaved satisfactorily in concealing the ITF in response to WFG's "due diligence" inquiries, but that is to be weighed against Martez's determination to ensure that approval to Mercury was withheld. It is difficult to resist reference to Iago's claim: *"... yet if reason be the guide to truth/I may propose a circumstance so strong/that it will lead you near to certainty*". When it comes to the propriety and validity of the MFC-appointed board majority's conduct, the ITF and Busch's concealment of it is no more proof than Desdemona's handkerchief.

(7) "Clean hands"

168. The Defendants objected to the grant of injunctive relief, first because damages would be an adequate remedy since Otello and Mercury have agreed that Mercury shall be paid a break-up fee of US$75,000 if board approval is not secured by the long-stop date in the SPA (compared with US$1million in the event that the transaction does not close because MFC exercises its right of first refusal). But the fact that Mercury will be paid in the event that it is unable to purchase the shares (paying US$48 million to Otello) has no bearing on the question of whether or not damages will be an adequate remedy for Otello, if wrongly prevented from selling its shares.

169. Secondly, they assert that it would be inappropriate because it would *"shackle"* Last Lion and MFC with a new shareholder who MFC does not want. But if, as I find, Mercury should never have been rejected on behalf of Last Lion, that can be no basis for refusing to grant injunctive relief. This is not a case of "yoking" MFC to a continuing hostile relationship with Mercury instead of Otello, to use Lord Hoffman's phrase when awarding damages rather than specific performance in *Cooperative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1 at 16. The shareholder relationship is a commercial not personal one, and not to be treated as equivalent to a partnership. A similarly invalid position would be to say that Otello should be ousted as a shareholder because of the animosity caused by this dispute, for which (as I find) MFC is to blame.

170. Thirdly, on that last note, the Defendants accuse Boilesen of misconduct, and contend that this ought to disentitle Otello to any relief, on the basis that it does not come to this court with clean hands. I am doubtful that this is even arguable since:

(a) there is no independent or general requirement for relief under section 994 that the petitioner has "clean hands": *Grace v Biagoli* [2005] EWCA Civ 1222, [2006] BCC 85, at [64]; and

(b) a grant of equitable relief can only be avoided by the misconduct of the claimant if there is the necessary relation between that misconduct and the relief sought - see *Royal Bank of Scotland Plc v Highland Financial Partners LP* [2013] EWCA Civ 328 per Aikens LJ at [159]:

> *"It was common ground that the scope of the application of the 'unclean hands' doctrine is limited...the misconduct or impropriety of the claimant must have 'an immediate and necessary relation to the equity sued for'. That limitation has been expressed in different ways over the years in cases and textbooks... there are some authorities in which the court regarded attempts to mislead it as presenting good grounds for refusing equitable relief ... where the misconduct was by way of deception in the course of the very litigation directed to securing the equitable relief.... it must be shown that the claimant is seeking 'to derive advantage from his dishonest conduct in so direct a manner that it is considered to be unjust to grant him relief'. Ultimately in each case it is a matter of assessment by the judge, who has to examine all the relevant factors in the case before him to see if the misconduct of the claimant is sufficient to warrant a refusal of the relief sought".*

171. Thus, the unclean hands defence will only apply in the case of wrongdoing which is of so serious a character, and so closely connected with the existence or exercise of the rights upon which the claimant founds its action, that it would be unjust to grant relief. Even taken at its highest, the

wrongdoing alleged by the Defendants against Boilesen does not seem to me of that character. But in any event, the Defendants' allegations of misconduct listed in paragraph 53(3) of the Defence all fail on the facts.

172. First, they complain that Mr Boilesen acted wrongfully in trying to push through the transaction between Otello and Mercury, regardless of whether that was in Last Lion's interests. But there was nothing opprobrious in Boilesen's pressing the board to deal with approval urgently, given the requirement for Otello's SPA with Mercury to be completed in the relatively near future; and in any event, it was not capable of causing any real prejudice to Last Lion, given that he was only one out of four directors.

173. Secondly, they complain that Boilesen acted wrongfully in suggesting to Martez that the parties' dispute could be resolved if Mercury was approved as a transferee only on Otello making a payment to MFC. This was clearly not an offer of bribery as suggested by the Defendants. MFC is the majority shareholder in Last Lion (a solvent company), and with Otello, held all the voting shares and so was at liberty to negotiate agreements concerning its affairs without any impropriety. Furthermore, Otello and MFC had previously discussed that if there was a buyer for Otello's shares, at least if MFC found a buyer, it would pay MFC a fee.

174. Thirdly, the Defendants complain that, at the board meeting on 5 March 2018:

(a) Boilesen wrongfully concealed the circumstances in which Busch approached Otello: it is correct that Boilesen did not reveal that he knew about the Cease and Desist Letter, but that was not sent until after the Mercury/Otello SPA was signed and the Board had been notified, and what Boilesen said about other assets was true;

(b) Boilesen *"expressly confirmed that Otello's lawyers were not with him"*, which was allegedly untrue: at the beginning of the meeting, Martez asked if *"the Otello lawyers at Dorsey"* were there or dialing in; the answer to that question was *"no"* which was true, but two other lawyers (Messrs Sandli and Hoida) were with Boilesen and he did not volunteer this information; Martez had his lawyers in attendance, the other board members could not have legitimately objected if Boilesen had a lawyer there, and this had no bearing on the parties' rights; and

(c) Boilesen allegedly misled the Board as to what specific materials had been provided to Busch: but as explained in Boilesen's witness statement, that complaint is based on an unfair mischaracterisation of what actually transpired at the meeting.

175. These matters, separately and cumulatively, pale into insignificance compared with MFC's wrongdoing against Otello and provide no answer to the reliefs which Otello claims and for which the Defendants are liable.

(8) Conclusions and relief

176. For the above reasons, I conclude that MFC's appointees on the board of Last Lion were infected by Martez's bad faith and exercised their powers as regards the disapproval of Mercury for MFC's

improper purposes and the achievement of its commercial desire to block the sale of Otello's shares in essence to MFC's earlier candidate because MFC was being excluded from its anticipated, massive margin.

177. The committee of Martino and Azeke was not independent of Martez and MFC's lawyers WFG. On the contrary I am satisfied that they acted to assist MFC in order to lend more credence to the disapproval of Mercury, because that is what Martez wanted and WFG on his behalf assisted them to do so. On an objective basis and in context, their reliance on the ITF to reach that pre-determined result was unreasonable. On a subjective basis, Martez, Martino and (albeit to a lesser extent) Azeke all breached their powers as Last Lion directors.

178. This constituted both unfair conduct by MFC of Last Lion's affairs so as to prejudice Otello and a breach of Article 13.2 of Last Lion's Articles of Association, requiring the Court to intervene under section 996 and if necessary by injunction in order to ensure that Otello can proceed with the sale to Mercury or otherwise exit Last Lion against MFC's opposition.

179. In addition to ensuring that approval of Mercury was withheld, and making it clear that it will abuse its powers to prevent any sale by Otello not on terms with which it agrees, MFC's conduct and that of its appointed directors has jeopardised, and is indeed said to have destroyed Otello's confidence that its rights under the Articles will be protected in future.

180. I sympathise with the perception and consider that if Otello were to try to sell its shares to some different purchaser should one be available, and MFC does not receive the profit that it wanted, there is a real risk that MFC would do the same or something similar again. Although Otello owns valuable shares in Last Lion, it is vulnerable in practical terms to the prospect of being unable to realise the value of those shares from a third party unless relief is granted. I also consider that the declaration as to the assignment with its shares of the right to appoint a director is appropriate to reduce another impediment sought to be erected by MFC.

181. Since the trial, the long-stop date of 20 August 2018 under the extensions to the SPA has passed, Otello having indicated to the Court in correspondence that a further extension to the long-stop date had not then been agreed with Mercury. Accordingly the injunction which it seeks may or may not result in a transaction with Mercury proceeding.

182. However, even in those circumstances, an injunction ought to be granted. The matter in dispute, for which an injunction was sought, is the approval of Mercury as a putative transferee and Last Lion's Articles do not require an SPA in place prior to the request and grant of such approval. Otello has submitted that if Mercury is "pre-approved" pursuant to an injunction, then (given Busch's keen interest in acquiring a stake) there remains a substantial prospect of being able again to agree a sale of Otello's shares.

183. I regard this as representing the least disruptive way of enabling Otello's exit from Last Lion. There is no public market for Otello's shares and I doubt that damages would be an adequate remedy, at least without complex considerations of value and recoverability. If the sale to Mercury does not survive or revive, and is not performed, the Court may have to determine an alternative share purchase or other order, including such damages as a last resort.

184. Accordingly I will grant judgment to Otello against the Defendants and order:

(a) a mandatory injunction as sought in paragraph 41 of the Amended Particulars of Claim, requiring Last Lion by its board immediately to approve Mercury as a potential transferee of Otello's shares;

(b) a declaration that the correct construction of Article 3(d)(iii) of the Shareholders' Deed is as contended by Otello in paragraph 46 of the Amended Particulars of Claim; and

(c) the adjournment of the proceedings generally, with liberty to restore in the event that the injunction fails to achieve its intended objective.
