Neutral Citation Number: [2025] EWCA Civ 708

Case No: CA-2024-001194
CA-2024-001195

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES COURT
Mr Simon Gleeson (sitting as a Deputy High Court Judge)
[2024] EWHC 387 (Ch) and [2024] EWHC 1056 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: Monday 9 June 2025

Before:

LORD JUSTICE EDIS
LORD JUSTICE SNOWDEN
and
LORD JUSTICE ZACAROLI

- -

IN THE MATTER OF SPRING MEDIA INVESTMENTS LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Between:

SAXON WOODS INVESTMENTS LIMITED	**Petitioner/ Appellant**
- and -	
FRANCESCO COSTA	**Respondent /Appellant**

- -

Edward Davies KC and Jack Rivett (instructed by **Stephenson Harwood LLP**) for **Saxon Woods Investments Limited**
Lord (David) Wolfson KC and Patricia Burns (instructed by **DLA Piper UK LLP**) for **Francesco Costa**

Hearing dates: 25 - 27 February 2025

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Approved Judgment

This judgment was handed down remotely at 10.30 a.m. on 9 June 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Edis, Lord Justice Snowden and Lord Justice Zacaroli:

Introduction

1. These are appeals from the decision of Mr Simon Gleeson (sitting as a Deputy High Court Judge) dated 17 April 2024, determining issues of liability on a petition brought pursuant to section 994 of the Companies Act 2006, relating to the affairs of Spring Media Investments Limited ("the Company").

2. The petitioner is Saxon Woods Investments Limited ("SW"), which was at the material times the holder of 22.33% of the shares in the Company. The first (and only active) respondent is Francesco Costa ("Mr Costa"), who was at the material times the chairman of the Company. Mr Costa is not himself a shareholder but is the holder of a substantial indirect interest in the Company. The judge found that, on the basis that Mr Costa could be said to control the shares owned by Greencage S.A., an investment vehicle through which he held his interest in the Company, then he controlled around 56% of the shares in the Company. He also accepted Mr Costa's position that his actual economic interest in the Company was around 30%. In reality, however, Mr Costa's interests were fully aligned with those of other investors who he had introduced to the Company. They were broadly content to leave decisions relating to the Company to him. Together they owned around 78% of the Company.

3. In a judgment handed down on 22 February 2024 the judge concluded that the Company's affairs had been conducted in a manner that was unfairly prejudicial to SW, and that SW was – conditionally at least – entitled to an order that its shares be purchased by Mr Costa. The condition to the purchase order was that a final offer for the shares in the Company would have been received from a third party by the end of 2019 in an amount that was greater than US$75 million, net of debt. The judge directed a second trial, at which it would be determined whether such an offer would have been received. In the event that SW succeeded at the second trial, its shares were to be purchased by Mr Costa at a price of 22.33% of the amount of such offer. The judge reserved the question of costs until after the second trial.

4. Both SW and Mr Costa appealed against different aspects of the judge's decision.

Background

5. The Company is the holding company for a group of companies which provides creative services to existing brands in the fashion, beauty and luxury brand sectors. The business operated by the group was founded in 1996 by Mark Loy ("Mr Loy") and two other individuals who left soon afterwards. Mr Loy was CEO until 2017. The business of the group grew rapidly and by 2012 it had a turnover of £23 million.

6. At that point, Mr Loy decided to expand the business into New York. This required raising external investment, and Mr Loy was introduced to Mr Costa. Mr Costa, along with others, invested through an investment vehicle (the third respondent). He was appointed to the board.

7. A shareholders agreement was entered into on 27 February 2013. At the heart of these appeals is a novated, amended and restated version of that agreement, dated 20 May 2016 (the "SHA") between the Company and all of its shareholders, who were defined

in the agreement as "the Investors". Of particular significance are the provisions for an "Exit" in that agreement, set out below. It was Mr Loy's evidence that these provisions were critical to his entry into the SHA, and that the expansion into New York had been in order to facilitate his own exit.

8. Further rounds of financing followed in 2014 and 2016. In conjunction with the 2014 financing, Mr Loy's shares were transferred, indirectly, to SW.

9. The provisions for exit are found in Article VI of the SHA, headed "Distributions and Exit", specifically Articles 6.2 and 6.3. These provide as follows:

> "6.2. Investment Period. The Company and each of the Investors agree to work together in good faith towards an Exit no later than 31 December 2019 (the "Investment Period"). In addition, the Company and each of the Investors agree to give good faith consideration to any opportunities for an Exit during the course of the Investment Period. In the event that an Exit has not occurred upon the expiry of the Investment Period, in addition to any rights provided by Clause 3.5(d) and Article V, the Board of Directors shall engage an investment bank to cause an Exit during the Investment Period at a valuation devised by such investment bank and on such terms as shall be consented to by the Board of Directors, which consent shall not be unreasonably withheld.
>
> 6.3. Exit Progress. If an Exit is proposed in accordance with the terms of this Agreement, each of the Investors shall: (i) give such co-operation and assistance as is reasonably required in connection with the proposed Exit, which shall include co-operation and assistance in the preparation of any information memorandum/"teaser" and the giving of presentations to potential purchasers, investors, financiers and their advisers, as well as assisting on any due diligence exercise conducted in relation to an Exit; and (ii) procure (insofar as it lawfully can) that such Exit is achieved in accordance with such proposal."

10. It is common ground that there is an error in the last sentence of Article 6.2, and that it should read "…the Board of Directors shall engage an investment bank to cause an Exit after the Investment Period…"

11. "Exit" is defined by Article 1.1 as:

> "the sale of all or substantially all of: (i) the issued equity share capital of the Company; or (ii) the business or assets of the Company (whether through the shares of a Subsidiary or otherwise), in each case, on arm's length terms as part of a single transaction or a series of related transactions."

12. Similar provisions appeared in the 2013 shareholders agreement, the only material difference being that the intended Exit was to take place by 30 June 2018.

13. Mr Loy ceased to be CEO in late 2016 or early 2017. In July 2017, he wished to move on from the group and sought to negotiate the sale of his shares to Mr Costa. By early 2018, however, that had come to nothing.

14. The parties (and the judge) have focussed exclusively on events from November 2018. No complaint is made, or least pursued before us, as to any failure to progress matters for the five years prior to that.

15. A board meeting was held on 20 November 2018, at which it was resolved that the Company would hire Jefferies LLC ("Jefferies") as the Company's investment bank, to commence the exit process. The board resolved that Mr Costa would lead the relationship with Jefferies, supported by a sub-committee consisting of Mr Loy, Alok Oberoi, Steve Aspinall and Hank Uberoi.

16. The core of SW's case is that thereafter Mr Costa caused the Company to breach its obligations under Article 6.2 of the SHA, by failing to procure that the Company work with the Investors in good faith towards an Exit no later than 31 December 2019, and failing to give good faith consideration to any opportunities for an Exit during the Investment Period.

17. In fact, no Exit was achieved by 31 December 2019, or at all. The Covid pandemic, which commenced in the early part of 2020, had a devastating impact on the Company's business, and thus on the value of SW's shares. In August 2024, following an issue of further shares in which Mr Loy did not participate, his shareholding was reduced to 0.004%.

<u>The judge's conclusions</u>

18. The core finding of fact made by the judge was, as SW had contended, that the Company, as a result of Mr Costa's conduct, failed to work in good faith towards an Exit by 31 December 2019 and failed to give good faith consideration to opportunities for an Exit by that time.

19. The judgment sets out in detail the relevant events from November 2018 onwards. No challenge is made to any of the judge's findings of fact, except in relation to his conclusion that the shareholders would not have approved an offer to purchase the shares in the company for less than US$75 million (net of debt). We set out in the following paragraphs the judge's main findings relevant to the issues on this appeal.

20. Jefferies had presented a transaction overview and update to the board at the November 2018 meeting. The judge found that this was a proposal for either a capital raise or a full sale. Jefferies estimated that a transaction would take 10 weeks from launch to closing. It was common ground that this was in line with market practice.

21. At this meeting, the board also discussed the necessity of appointing a new CEO following the departure of the existing incumbent at the end of December 2018. Recruitment consultants were engaged for that purpose in January 2019.

22. A further board meeting was held on 28 February 2019. The judge recorded (at §46) that at this point, the view of all concerned within the Company was that the sale process should be capable of being completed within the year, and that the sensible course of

action was to wait for the new CEO to be appointed. This was reflected in the following resolution recorded in the minutes of that meeting: "to circulate Jefferies' Engagement letter pursuant to which Jefferies will commence the exit process as soon as the new CEO is identified." In fact, the new CEO – Mr Tim Ringel – was identified by June, and appointed as from the beginning of September 2019.

23. The judge recorded that Mr Loy was, even by this stage, concerned at Mr Costa's *bona fides*. Specifically he was concerned that Mr Costa was trying to utilise Jefferies, not for a sale, but "to attract an investor to buy-out the shareholders at a low price via a drag and tag."

24. The judge made important findings relating to Jefferies: the communications with them were channelled through Mr Costa, with the help of Mr Uberoi; no board member other than Mr Costa and Mr Uberoi knew what Jefferies had been instructed to do (§202); it was "entirely plausible" (§155) that the actual instructions given to Jefferies were to find investor interest of any kind in the Company, rather than to procure an Exit; crucially, Jefferies were not aware that, in accordance with the SHA, the Company was supposed to be trying to originate offers for an Exit by the end of 2019, and that it was mandated to "cause" a sale immediately thereafter; Jefferies themselves – in ignorance of the Company's obligations under Article 6.2 – "had no intention of conducting a sale by the end of 2019 and did not envisage doing so in early 2020 either" (§74).

25. The judge also referred (at §157 to §159) to the fact that Mr Costa had worked in July 2019 on an alternative transaction involving the sale of the shares of one of the Investors to companies controlled by him and Mr Uberoi and another purchaser. That transaction envisaged that the second tranche of the purchase price for the shares would not be paid, and the interest in the shares not transferred, until the end of May 2020. That would have been impossible if an Exit had in fact been agreed by the end of 2019. The judge found that this was "extremely difficult to square" with a good faith attempt to sell the entire Company by the end of 2019.

26. At §163, the judge found that Mr Costa regarded himself as "the Company", and that his "primary focus at all times appears to have been to ensure that no director or shareholder (other than Mr Uberoi) had any knowledge of or involvement in the Exit process." He gave assurances to the other directors, however, (§163) that he was doing everything in accordance with Jefferies' advice.

27. The judge also found, (§164 to §166) that "Mr Costa had formed the view that he did not want to sell the Company until he was confident that he could get a good price for it, and that he did not expect this to happen until 2020 at the earliest." Indeed that was confirmed by Mr Costa's own evidence: the only way in which he could avoid being compelled to sell at what he regarded as an undervalue would have been either to find a lender to finance him to purchase the shares or to find a potential investor prepared to purchase these shares and come in with him as a long term holder: "From Mr Costa's perspective, almost the worst possible outcome would have been a firm offer in late 2019 to purchase the Company for $100m capable of being accepted by the shareholders."

28. These matters led the judge to make the following key findings in §202, which we set out in full:

> "Aside from the updates on the process presented to the board, it does not seem that any board members other than Mr Costa and Mr Uberoi, and possibly Ms Kurtzman, had any interaction with Jefferies. Consequently, the only information that the board had as to what Jefferies were in fact recommending was what they were told by Mr Costa. Critically, however, no board member (other than Mr Uberoi) seems to have had any idea what it was that Jefferies had actually been instructed to do. Mr Costa's determination to maintain his control of the sale process was so strong that he responded with threats to suggestions from other directors that they might even speak to Jefferies. The result of this is that the information which the board had as to what advice the Company was receiving was filtered through Mr Costa. As regards the terms of the specific obligation, the directors, had they asked themselves whether the Company was performing its obligations under clause 6.2, would presumably have said that the Company was obliged to act in good faith towards securing an Exit, that Mr Costa had assured them that he had appointed Jefferies to do exactly that, and the Company was therefore clearly performing its obligations. This argument would have worked for most directors apart from the two – Mr Uberoi and Mr Costa – who were in actual contact with Jefferies. I am in no doubt that Jefferies were clearly aware of Mr Costa's desire to maximise the profit on his shareholding, and I am equally clear that it would have been entirely reasonable for them to advise that this might best be achieved by waiting until late 2020 to begin marketing. Mr Costa and Mr Uberoi were therefore the only people in a position to know both about the scope of Jefferies' mandate, and about the Company's obligations under 6.2, and therefore to realise that what Jefferies were engaged in was absolutely not "working in good faith towards an Exit no later than 31 December 2019". In giving their fellow directors a different impression, they misled the board. Mr Costa therefore cannot rely on the argument that it was the board who had caused the Company to breach its obligations, since the Board's decisions in the matter were the result of the fact that he had misled it."

29. The judge set out his conclusions on the issues raised by the petition from §177 onwards, which we summarise in the following paragraphs.

30. He dealt first with the construction of Article 6.2 of the SHA:

(1) He concluded that it did not impose an obligation to procure an Exit by the end of 2019, but did impose an obligation to work together in good faith towards an Exit by that time;

(2) He concluded that if no Exit had in fact been achieved by 31 December 2019, then, by implication, it required that the Exit must take place as soon as reasonably practicable and/or within a reasonable time after 31 December 2019 (see §193 to §194);

(3) He rejected Mr Costa's argument that the directors would have been in breach of their fiduciary duties by procuring an Exit by the end of 2019 if they formed the view that a better price could be achieved via a sale in, say, 2021 (see §181);

(4) He rejected, at §184, the argument that there was a "commercial reasonableness override", i.e. that a director's determination that it would be commercially reasonable to defer the sale beyond the end of 2019 was permitted by Article 6.2;

(5) He rejected Mr Costa's argument that the obligation to work in good faith towards an Exit by the end of 2019 was satisfied by making preparations before that date, with a view to achieving an Exit afterwards (see §183);

(6) He concluded that, during the Investment Period, the board was not empowered to bind the shareholders to a sale, but merely to present such offers as it had solicited or received; it was open to the shareholders – provided they acted in good faith – to reject any such offer (see §196).

31. The judge found that the Company breached Article 6.2, first by not working in good faith towards an Exit by the end of 2019. It was no answer to this that Mr Costa believed that the Company was not ready for a sale and that it would have realised a low price if sold before the end of 2019. He also found that the Company breached Article 6.2 by failing to give good faith consideration to offers received from an entity called Metric Capital Partners ("Metric"). Mr Costa had argued that the Metric proposal was not an Exit, because SW would have an equity stake in the acquisition vehicle. The judge rejected the argument that the Metric proposal was not an Exit, but in any event found that, since the precise form of any deal acceptable to Metric was never identified, the possibility that it might not have constituted an Exit was no answer to the failure to give good faith consideration to it.

32. The judge concluded (at §200) that the Company's breach of Article 6.2 was the result of Mr Costa's conduct. The process had been entrusted to him. He pursued a strategy – of delaying a sale because he believed a better price could be achieved in the future – which he knew or should have known was contrary to the Company's obligations. The judge rejected Mr Costa's defence that it was the board, and not him alone, who made decisions in relation to the sale: see §202, set out in full above.

33. The judge rejected, however, SW's contention that Mr Costa had acted in breach of his duties as a director. He regarded these allegations as "purely ancillary" to the section 994 petition, but acknowledged that they seemed aimed at supporting the case on unfairness. He held, at §207, that the fiduciary duties set out in section 172 of the 2006 Act were subjective in nature, the question being whether "the director honestly believed that his act or omission was in the interests of the company": referring to *Regentcrest plc v Cohen* [2001] 2 BCLC 80, at §120.

34. Applying that test, the judge concluded, at §208, that Mr Costa was not in breach of his duties under section 172(1). That is an important paragraph which we set out in full,

> "208. Mr Costa's position is that he reasonably believed that it was in the best interests of the Company's shareholders for it not to comply with the requirements of clause 6.2 on the timetable that it specified, on the basis that a considerably higher

> value might be obtained for them by delaying the process. He knew perfectly well that at least some of the shareholders disagreed with this, and felt that their interests would be best served by complying with the clause 6.2 timetable. He also perceived that his personal interests as a shareholder were best served by delay. More importantly, he ensured that it was him and him alone who controlled the Company's actions in this regard, such that he was not merely in a position to recommend a course of action, but to ensure that that course of action was in fact pursued. However, I do not believe that it was his intention by doing this actively to injure either the Company or any investor. I think his state of mind might be summarised as 'they wouldn't like it now if they knew, but they will thank me in the long run'. Put another way, I think Mr Costa did sincerely believe that he was acting in the best interest of the Company and its investors."

35. The judge also rejected SW's claim that Mr Costa was in breach of the duty under section 174 (failing to exercise reasonable skill, care and diligence). At §215 he concluded that, because Mr Costa sincerely believed that he was engaging in a course of action which would ultimately be for the benefit of the Company and its shareholders, his conduct could not be described as negligence so as to breach the section 174 duty.

36. At §226 to §235, the judge considered whether, if the Company did breach its obligations under the SHA, that resulted in unfair prejudice to SW. Relying on *Re Saul D Harrison & Sons plc* [1994] BCLC 475, at p.499G, he held that the conduct must be both prejudicial and unfair. He also concluded that there must be a causal link between the conduct and the prejudice suffered by the shareholder (citing *Re Southern Counties Fresh Food Limited* [2008] EWHC 2810 (Ch), at §47).

37. The judge also held, at §228, that it is "fatal for a petition if the petitioner is no worse off as a result of the allegedly prejudicial conduct" (citing *Rock Nominees Ltd v RCO (Holdings) Plc* [2004] BCC 466). However, he accepted, at §230, that a disregard of members' rights – without any financial consequences – may amount to prejudice falling within the section (citing *Re Coroin (No2)* [2013] 2 BCLC 583, per David Richards J at §630). The judge continued,

> "Indeed, disregard of a member's rights will be prejudicial where it is serious and likely to continue in the absence of relief under s. 996 and has a significant impact on the value of the member's shares (*Re Last Lion Holdings Limited* [2018] EWHC 2347 (Ch) at [109], per Murray Rosen QC). This will be the case where a minority shareholder is unable to realise the value of its shares in breach of its rights unless relief is granted (ibid at [180]). That is an accurate characterisation of the position here."

38. At §231, the judge noted the rival arguments of the parties as to whether there was prejudice. Mr Costa's case was that, if the Company had been offered for sale in 2019, it would have been impossible to raise an offer "at any reasonable level", and if that turned out to be correct, then SW would have suffered no prejudice. SW's case was that

if a sincere attempt had been made to market the Company in 2019 it is likely that bids at a level of at least US$100 million would have been realised, and if that turned out to be correct, then SW had suffered serious prejudice, in that SW was locked into a company from which it sought to Exit for good reasons. The judge concluded, however:

> "I do not have sufficient material before me to reach a final decision as to what the position would have been, and this will have to be the subject of a further hearing."

39. The judge elaborated on this (at §233) by defining the question to be determined at the further hearing as:

> "whether another offer, had it been sought, would have been made. If it would have been made at a level that Mr Loy would have accepted, then that is the measure of the detriment which he has suffered."

40. He also found that the prejudice was unfair. Citing *O'Neill v Phillips* [1999] 1 WLR 1092, HL, he said "'Unfairness' for this purpose includes a breach of the terms on which it had been agreed that a company's affairs would be conducted, e.g. a breach of the articles of association or shareholders' agreement or expectation that the directors would act in accordance with their duties to the Company." He noted Mr Loy's evidence that from the moment he first agreed to accept external investment he was looking to exit the Company within a specified time frame, and that the commitment to use good faith to sell the Company by the specified time was the basis of his involvement with the Company thereafter. He concluded, at §235:

> "I think it is clear that the Company undertook to Mr Loy to conduct such a process, and that it did not perform that undertaking, despite his insistent efforts to induce it to do so. I think that that constitutes unfairness."

41. Under the heading "Consequences", at §253, the judge noted that Mr Costa's "gamble" – that the Company would significantly increase its value if its sale was deferred – spectacularly failed because of the onset of Covid. The judge concluded that the fact that Covid was unforeseeable, however, did not help Mr Costa because:

> "254. If the Company had performed its contractual obligation to consider all offers, it would have had at least one or two conditional offers on the table by the end of the Investment Period. If it had properly instructed Jefferies, it might well have had more. The extent of the loss suffered by [SW] as a result of the unfair prejudice which it has suffered is, therefore, to my mind, simply a function of the value of the best offer which the Company would have received".

42. The judge thus concluded, at §255, that there would have to be a second trial to determine the value of such a hypothetical offer.

43. At §257, however, the judge stated that this was only half of the story, because,

> "In order for [SW] to be able to Exit the Company, the offer would have had to have been at a level which would not have been rejected by the other shareholders. On the basis of the evidence before me, I am satisfied that that means an offer in excess of $75m net of debt."

The judge explained, at §258, that he had set this level of $75 million on the basis of an email dated 19 November 2019 from Mr Uberoi which assumed that an offer at this level would have been unacceptable to the board of the Company. The judge thought that this finding was supported by evidence from Mr Loy that none of the shareholders would have been interested in a price of $72 million for the Company at that time.

44. At §259, the judge set out the parameters of the hypothetical scenario upon which the question of whether there would have been an offer in excess of $75 million would be determined at the second trial. These were: (1) the attempt to hire a new CEO should be assumed to have taken place; (2) the Company should not have paused the marketing process whilst the search for a new CEO was ongoing, since that was incompatible with the idea of a good faith attempt to obtain offers by the end of 2019; (3) the Company should have instructed Jefferies that it was required to seek offers by the end of the period; and (4) the Company should have given due consideration to the offer from Metric, and should have progressed a contact which had been made with another prospective purchaser, the Hut Group, in a timely manner.

45. At §261 the judge brought together his thinking on unfair prejudice and loss, stating,

> "261. In the event that it is concluded that any offer received would have been below $75m net of debt, then I find that [SW] has suffered no loss caused by the unfair prejudice, and that, following *Rock (Nominees) Ltd v RCO (Holdings) plc (In Members Voluntary Liquidation)* [2004] BCC 466, [it] is not entitled to relief. In the interests of clarity, I should emphasise that this does not imply that there was no prejudice, nor that it was not unfair – as I say, I accept that [SW] has suffered unfair prejudice. However, where it is clear that the unfair prejudice suffered by a petitioner has not in fact caused him any loss, then I do not think that the broad equitable principles which I am required to apply in considering a petition for relief permit the grant of any such relief."

46. Finally, the judge concluded (at §265) that the buy-out order he had proposed was appropriate and proportionate:

> "The injustice suffered by [SW] is precisely that [Mr Costa], apparently having it in his power to arrange for [SW] (inter alia) to sell his shares, in breach of the Company's obligations to [SW], intentionally decided not to comply with those obligations. As a result, [SW] was unable to sell [its] shares at the price which [it] would have received had not Covid

> intervened. I find it hard to think of a clearer set of circumstances justifying a buy-out order."

47. After hearing further argument at a consequentials hearing, the judge's order made on 17 April 2024 attached a schedule setting out in greater detail the counterfactuals that were to be assumed for the purposes of the second trial:

> "1. There would have been at least one binding offer for the Company by the end of 31st December 2019 (an "Offer") (Judgment/254-6).
>
> 2. The Offer would have been for an Exit within the meaning of clause 1.1 of the [SHA] (Judgment/254-6).
>
> 3. The Company would have had at least one or two conditional offers (possibly more) on the table by the end of 31st December 2019 (Judgment/254).
>
> 4. The Company should have instructed Jefferies that it was required to seek offers for an Exit by the end of 31st December 2019 (Judgment/259(iii)).
>
> 5. The Company was not obliged to change its strategy or alter its behaviour in any way in order to facilitate an Exit but was simply required to solicit or consider offers for an Exit. Consequently, the decisions to reject the Loy/Flammini strategy and to proceed with the attempt to hire a new CEO should be assumed to have taken place (Judgment/259(i)).
>
> 6. The Company should not have paused the marketing process while it searched for a new Chief Executive Officer (Judgment/259(ii)).
>
> 7. The Company should have given due consideration to the offers made by [Metric] (Judgment/259(iv)).
>
> 8. Each of the expressions of interest made by Metric (by letters dated 13th September 2019, 19th November 2019 and 23rd January 2020) constituted an opportunity for an Exit within the meaning of clause 6.2 of the Shareholders' Agreement (Judgment/198).
>
> 9. An offeror would not necessarily have approached the making of any Offer purely by reference to the actually achieved EBITDA figure for calendar year 2019 but may have looked at a number of different variables (Judgment/80).
>
> 10. Any Offer would have followed proper due diligence and may well have been lower than the initial offers (Judgment/256).

> 11. The Company should have progressed the contact with The Hut Group (and any other prospective purchaser) in a timely manner (Judgment/259(iv)).
>
> 12. The sales process would not necessarily have been limited to a competitive auction but would have been flexible in strategy, with a view to maximising value (Judgment/147)."

The grounds of appeal

48. SW appeals on the following seven grounds:

(1) The judge should have found that Mr Costa breached his fiduciary duty under section 172(1) of the 2006 Act;

(2) The judge should have found that Mr Costa breached his duty under section 174 of the 2006 Act;

(3) The judge misdirected himself as to the correct approach to granting relief under section 996 of the 2006 Act: (a) by equating prejudice with financial loss; and (b) by adopting the misguided basis that the purpose of section 996 was to compensate SW for any loss it suffered.

(4) The judge misunderstood the nature of the prejudice suffered by SW. That prejudice was being denied the opportunity to Exit the Company by the end of 31 December 2019, and it was irrelevant whether a binding offer made before that date would have been one acceptable to the shareholders. The judge was therefore wrong to make the buy-out order conditional on a finding (at the second trial) that a binding offer in an amount more than US $75 million (net of debt) would have been received.

(5) There was in any event no proper evidential basis for the judge's conclusion that the shareholders would have rejected an offer of US $75 million or less.

(6) The judge failed to take into account, in exercising his discretion under section 996 of the Act, that SW remained locked into the Company as a minority shareholder, with the person responsible for the prejudice, Mr Costa, remaining in *de facto* control of the Company, and there was no regime the Court could impose to safeguard SW's rights going forward.

(7) The judge erred by reserving costs until the conclusion of the second trial.

49. Mr Costa appeals on four grounds:

(1) The judge should have found that the first sentence of Article 6.2, on its true construction, imposed only an obligation on the Company and the Investors to work together, during the Investment Period, in good faith towards an Exit and that, so construed, there was no breach.

(2) The judge should have found that the offer from Metric was not an "Exit", in circumstances where it involved the rollover of a substantial portion of the shares of the existing Investors, and accordingly that there was no breach of the obligation,

contained in the second sentence of Article 6.2, to give good faith consideration to opportunities for "an Exit".

(3) The judge failed to carry out a proper causative assessment. Had he done so, he should have found that the conduct said to have been unfairly prejudicial did not actually lead to any prejudice, and SW suffered no unfair prejudice entitling it to relief.

(4) The judge erred in his directions as to the counterfactuals to be assumed at the second trial.

50. We address the issues that arise from these grounds of appeal in the following order:

(1) The true construction of the obligation to work together in good faith towards an Exit in the first sentence of Article 6.2, and whether it was breached.

(2) The true construction of "Exit", and thus whether the obligation in the second sentence of Article 6.2 to give good faith consideration to opportunities for "an Exit" was breached by failing to consider the Metric offer.

(3) Whether Mr Costa's conduct in causing the Company to breach its obligations under Article 6.2 was unfairly prejudicial to SW.

(4) Whether Mr Costa breached his fiduciary duty under section 172(1) of the 2006 Act. (For reasons we develop below, there is no need to consider the alternative case based on breach of the duty in section 174 of the 2006 Act.)

(5) Whether the judge erred in the exercise of his discretion under section 996 in imposing a condition on the buy-out order that a binding offer would have been received in an amount of at least US $75 million (net of debt).

(6) The appropriate relief, following our conclusions on the above issues.

51. First, however, we set out the legislative background and a summary of the principles established by case law.

<u>The legislative background and legal principles</u>

52. Section 994(1) of the 2006 Act provides as follows:

> "A member of a company may apply to the court by petition for an order under this Part on the ground—
>
> (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
>
> (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."

53. The powers of the Court in the event that unfairly prejudicial conduct is established are set out in section 996:

> "(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.
>
> (2) Without prejudice to the generality of subsection (1), the court's order may -
>
> (a) regulate the conduct of the company's affairs in the future;
>
> (b) require the company -
>
> (i) to refrain from doing or continuing an act complained of, or
>
> (ii) to do an act that the petitioner has complained it has omitted to do;
>
> (c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;
>
> (d) require the company not to make any, or any specified, alterations in its articles without the leave of the court;
>
> (e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly."

54. The legal principles applicable to unfair prejudice petitions were not substantially in dispute between the parties, although Lord Wolfson KC, who appeared with Ms Burns for Mr Costa, placed particular emphasis on a number of points beyond those articulated in the skeleton of Mr Davies KC and Mr Rivett, who appeared for SW.

55. First, the jurisdiction to grant any relief under section 996 is only engaged if the grounds established in section 994(1) are established: *Re Coroin* (above), per Arden LJ at §11.

56. Second, the conduct complained of must be both prejudicial (in the sense of causing harm or prejudice to the relevant interest) and unfairly so: *Re Saul D Harrison & Sons plc* [1994] BCC 475, per Neill LJ at p.499G.

57. Third, there must be a causal link between the conduct complained of and the prejudice suffered by the shareholder: *Re Southern Counties Fresh Food Limited* [2008] EWHC 2810 (Ch), per Warren J at §47.

58. Fourth, prejudice can, but 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: *Re Coroin* (in the passage quoted above from the judgment of David Richards J).

59. Fifth, unfairness can include a breach of the terms on which it is agreed that the company's affairs would be conducted, for example a breach of the articles of association, or of a shareholders' agreement, or of the expectation that the directors would act in accordance with their duties to the company: *Re Tobian Properties Ltd* [2012] WCA Civ 998; [2013] 2 BCLC 567, per Arden LJ at §21 to §22.

60. Sixth, if unfair prejudice is established, the Court's power to award relief is discretionary, and is intended to remedy the unfair prejudice, both for the present and for the future. The breadth of this discretion was explained by Oliver LJ in *Re Bird Precision Bellows Ltd* [1986] Ch 658 (CA), at p.669:

> "It seems to me that the whole framework of the section, and of such of the authorities as we have seen, which seem to me to support this, is to confer on the court a very wide discretion to do what is considered fair and equitable in all the circumstances of the case, in order to put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of the other shareholders of the company."

61. Seventh, as Lord Wolfson emphasised, it is incumbent on a petitioner properly to identify in its pleading the prejudice which it says it has suffered. Given the breadth of the Court's jurisdiction it is essential that the respondents know the case they have to meet: see, for example, *In re G&G Properties Ltd* [2019] EWCA Civ 2046; [2020] Bus LR 762, per David Richards LJ at §35.

<u>Issue (1): Obligation to work together in good faith towards an Exit</u>

62. Mr Costa's appeal gives rise to two issues of construction of Article 6.2, one relating to the first sentence, and one relating to the second sentence.

63. As to the first sentence ("The Company and each of the Investors agree to work together in good faith towards an Exit no later than 31 December 2019 (the "<u>Investment Period</u>")), it is common ground that Article 6.2 does not impose an obligation on the Company and the Investors to <u>secure</u> an Exit by the end of 2019. As noted above, the judge found that it did impose an obligation to work together in good faith towards an Exit by that time.

64. Lord Wolfson submitted that in this respect the judge was wrong, and that he should have found that while Article 6.2 imposed an obligation on the parties *during the period up to 31 December 2019* to work together in good faith towards an Exit, they did not need to work towards *an Exit before 31 December 2019*.

65. On Lord Wolfson's interpretation, the first sentence of Article 6.2 means that "during the investment period (i.e. until 31 December 2019) the Company and the Investors have to work together in good faith towards an Exit".

66. That, he submitted, was supported by two things. First, the fact that the drafter set out to achieve two objectives in the first sentence: (1) imposing an obligation and (2) defining "Investment Period". Second, it must be read together with the second sentence: "In addition, the Company and each of the Investors agree to give good faith consideration to any opportunities for an Exit during the course of the Investment

Period". Lord Wolfson submitted that the words "in addition" are a misnomer, because the obligation in the second sentence is already in fact subsumed within the broader obligation in the first sentence. The two sentences must be seen, therefore, as trying to achieve the same purpose and, since the second sentence imposed an obligation "during the Investment Period", the first sentence should be read as imposing an obligation to work "during the Investment Period" in good faith towards an Exit.

67. We reject this argument, which either ignores the words "no later than" in the first sentence altogether, or requires the first sentence to be substantially re-written. The phrase "no later than 31 December 2019" most obviously governs the words "an Exit" which immediately precede it. It makes no sense to read the words "agree to work together in good faith" as governed by the phrase "no later than 31 December 2019", because that would mean the parties could comply simply by *beginning* to work together on 31 December 2019. That would be an absurd interpretation that no-one suggested was the case.

68. It is true that the first sentence does the two things pointed out by Lord Wolfson, but that point does not carry the weight that his argument placed on it.

69. Nor can Lord Wolfson get assistance from the second sentence. Even if working together in good faith would already require good faith consideration to be given to opportunities as they arise, it does not merely restate the first sentence, but addresses the specific circumstance that an opportunity for Exit has arisen. In any event, the obligation is to give good faith consideration to any opportunities "for an Exit during the course of the Investment Period", that is, an Exit before 31 December 2019. Accordingly, the second sentence reinforces, rather than detracts from, the point that the parties have to work together in good faith towards an *Exit before 31 December 2019*.

70. Further, as Mr Davies pointed out, the importance of working towards an Exit by the end of 2019 is supported by the fact that, if no Exit was in fact achieved by 31 December 2019, Article 6.2 required the process to be placed in the hands of an investment bank, to ensure that an Exit was achieved as soon as reasonably practicable thereafter. Although the first sentence did not impose a hard obligation to *achieve* an Exit by the end of 2019, there was a hard-edged requirement to achieve an Exit as soon as reasonably practicable thereafter (as the judge found, and against which there is no appeal).

71. Lord Wolfson candidly accepted that, if the judge's construction of the first sentence of Article 6.2 was correct, then the appeal against the judge's finding that it was breached by the Company was difficult, submitting that "depending on how one interprets the contract here, one is likely to resolve the breach question one way or the other."

72. We agree. The judge found as a fact (at §200) that "Mr Costa pursued on behalf of the Company a strategy which he knew or should have known was contrary to the obligations of the Company, and in particular contrary to its commitments to Mr Loy. It is clear that as a result of this the Company was in breach of its obligations".

73. There is no appeal against that finding of fact, or the many earlier findings of fact on which it was based. We dismiss, therefore, the appeal on this ground.

Issue (2): Obligation to give good faith consideration to any opportunities for an Exit

74. The second issue of construction that arises under Article 6.2 is as to the meaning of "Exit" in the second sentence. This relates to expressions of interest received from Metric. Mr Costa contends that the deal that was proposed by Metric would not have satisfied the definition of an "Exit", so that it was not a breach of the second sentence of Article 6.2 for Mr Costa to cause the Company to refuse to give any consideration to it. That is because, on Mr Costa's case, a transaction which would involve SW and other existing shareholders owning equity in the entity that was to acquire the shares in the Company would not be a sale of "all or substantially all" of the Company's share capital.

75. The fact that Mr Costa did cause the Company to act in that way is not in dispute. The judge found that Mr Costa had determined that he was not prepared to deal with any bidder who was in any way associated with Mr Loy.

76. Nothing of substance turns on this point, given the conclusion that the Company was in breach of the obligation in the first sentence of Article 6.2. In failing to act in good faith towards an Exit no later than 31 December 2019, the Company deprived itself and the Investors of the opportunity of attracting offers from others in the market, which offers may well not have included any requirement for existing shareholders to have an equity stake in the purchasing vehicle.

77. Lord Wolfson submitted that the judge's finding that the Company failed to give good faith consideration to the Metric offer was a critical element of his finding of prejudice so as to justify an order that Mr Costa purchased SW's shares. That is because, he submitted, the Metric offer was the only basis for the judge's finding that there would have been at least one offer on the table before the end of 2019. We do not accept this. At §254, although the judge appears to have based his conclusion that there would have been "at least one or two" conditional offers on the table by the end of 2019 on the existence of the Metric offer, he went on to say that if the Company had properly instructed Jefferies, it might well have had more. That, it seems to us, is the critical point. By failing to comply with the obligation imposed by the first sentence of Article 6.2, the Company deprived itself of the opportunity of soliciting offers from the market generally. The prejudice was the loss of that broader opportunity, not merely the loss of a sale to Metric.

78. We nevertheless briefly state our reasons for upholding the judge on this issue.

79. The first expression of interest from Metric was set out in a letter from it dated 13 September 2019. It expressed interest in acquiring 100% of the shares in the Company for US $110 million. Further detail was provided in a letter dated 19 November 2019, including that the transaction would be funded, through investment vehicles managed by Metric, by a mixture of preferred shares (or notes) and common equity. No mention was made of SW, or any other existing shareholder, participating in the purchasing vehicle. The most that could be said is the fact that the contents of the letter overall, including references to how Metric would commit to provide further funding, and to it being in a position to structure an investment that suited all stakeholders, implied that at least some existing shareholders would be invited to participate in the acquisition vehicle.

80. Lord Wolfson referred to an email from Metric to Mr Loy dated 15 July 2019, which set out high level terms for a possible acquisition. This referred to an equity value of $100 million, an "existing shareholders/management rollover of $56m", and an equity split between Metric and "rollover capital investment" of 41/59.

81. He submitted that a transaction in which a substantial proportion of existing shareholders (whether that was 40%, 50% or 60%) "rolled over" their shares into the purchasing vehicle was not a sale of "substantially all" of the shares in the Company. His starting point was that it was accepted by SW (and the judge) that if *all* the existing shareholders were to be equity stakeholders in the acquisition vehicle, then that would not be a sale of all the shares. It followed, he said, that if a substantial number of Investors were to be stakeholders in the acquisition vehicle, then that would not be a sale of "substantially all" of the shares.

82. We reject this argument. A transfer of the shares in the Company from the Investors to a new entity would, in law, be a sale. Leaving aside the case where all – or perhaps nearly all – the original shareholders are equity holders in the purchasing entity (where there may well be arguments that there was no true sale at all) we do not think the fact that original shareholders are also equity holders in the purchasing entity prevents the transaction being a "sale of all or substantially all" of the Company's shares. The shares are transferred from one legal entity to another.

83. To the extent it is said that this erodes the protection given to other Investors, that is answered by the fact that any Exit must be "on arms' length terms". That is sufficient protection for Investors, whose interest is in ensuring that the sale is at the best price reasonably obtainable at the time it takes place.

84. In any event, the structure which any actual transaction with Metric might have taken is unknown. It is at least possible, had it been pointed out to Metric that an "Exit" could not be achieved if existing Investors acquired an equity stake in the purchaser, that a deal would have been concluded with Metric without Investors acquiring such equity stake. The fact that none of this is known is a direct consequence of the fact that the Company failed to engage at all with Metric's expressions of interest. That in itself establishes a clear breach of the obligation in the second sentence of Article 6.2.

85. Lord Wolfson objected that this approach mistakenly relies on the Company's subjective view of the offer from Metric at the time, whereas the question whether it satisfied the definition of "an Exit" is an objective one, based on all the circumstances whether known to the Company or not. That objection misses the point, however, that since no actual offer was ever received from Metric (as opposed to expressions of interest) and that because the Company never engaged with those expressions of interest it is not known what form any offer from Metric might have taken. The failure to engage with the expressions of interest was a clear breach of the obligation to give good faith consideration to opportunities for Exit.

<u>Issue (3): Unfairly prejudicial conduct by reason of causing the Company to breach its obligations under Article 6.2.</u>

86. On the basis that there was a breach of Article 6.2, there was no real dispute between the parties that, subject only to the question of whether SW would have been in the

same position if Article 6.2 had been complied with, Mr Costa's conduct was unfairly prejudicial to SW.

87. We think that is undoubtedly correct. SW's rights as member of the Company included the benefit of the Company's obligations under Article 6.2, including to work in good faith with the Investors towards an Exit no later than 31 December 2019 or, if no Exit was achieved by that date, to secure an Exit as soon as practicable afterwards. The fact that Mr Costa caused the Company to breach that obligation, and pursued a strategy that was contrary to it, means that SW's rights as member were prejudiced by the loss of that opportunity.

88. The point of dispute between the parties is whether this amounts to unfair prejudice within section 994 if SW would have been in no better position, absent the conduct of Mr Costa of which complaint is made, because no Exit would in any event have been achieved.

89. The judge's findings as to whether there was unfair prejudice are not entirely consistent. At §261, he made a clear finding that SW had suffered unfair prejudice, but that it was not clear that SW had in fact suffered any loss as a consequence. That was because, said the judge, it was unclear whether, even if Mr Costa had caused the Company to act in accordance with Article 6.2, an Exit would have been achieved. That was what led the judge to direct a second trial, to determine whether an offer for the Company in excess of US$75 million would have been received.

90. One of SW's grounds of appeal is that the judge was wrong to determine that no relief could be granted unless SW could demonstrate it had suffered financial loss. If that was what the judge in fact concluded – and there is a suggestion of this at the end of §261 - we agree that he was wrong to do so. As the judge had earlier concluded at §230, it is well established that prejudice, for the purposes of section 994, does not need to be financial in character: *Re Coroin Ltd (No.2)* [2012] EWHC 2343 (Ch); [2013] 2 BCLC 583, per David Richards J at §630 (his decision was upheld on appeal: [2013] EWCA Civ 781). And if unfair prejudice is established, then section 996 plainly gives the court the power to grant such relief as it thinks fit in respect of the matters complained of.

91. Reading the judgment as a whole, however, it appears that what the judge meant in this part of his judgment was that, even though unfair prejudice was established because Mr Costa's conduct deprived SW of any opportunity of achieving an Exit by 31 December 2019, or as soon as practicable thereafter, it would not be appropriate to grant relief by way of an order that Mr Costa buy-out SW's shares if, even without the unfairly prejudicial conduct, SW would have been in no different position.

92. The position is confused, however, by the judge's further findings in the judgment given after the hearing on consequential matters. At §56 of that judgment, he said:

> "I have concluded that the Petitioner has suffered unfair treatment, but I do not know whether he has in fact suffered any material prejudice or not. In these circumstances I think it would be rather odd to make an order that started off by assuming that prejudice had been found and granting a buy-out remedy consistent with that finding."

93. Both sides acknowledged at the hearing that there is little practical difference in this case between finding no unfair prejudice (because SW would have been in the same position even if Article 6.2 had been complied with) and finding that there was unfair prejudice but in the exercise of discretion under section 996 refusing to grant any relief (for the same reason).

94. We prefer, however, the conclusion that Mr Costa's conduct in causing the Company to breach its obligations under Article 6.2 was conduct which was unfairly prejudicial to SW. Whether or not an Exit would otherwise have been achieved, Mr Costa's conduct deprived SW of the opportunity to try to achieve one. That was in itself prejudice.

95. To adopt Lord Wolfson's colourful analogy, that is sufficient to get SW "into the sweetshop", i.e. to open the door to the broad array of forms of relief which, under section 996, the Court may grant where unfair prejudice is established.

96. That still leaves the question whether the judge was correct, on the basis that any prejudice suffered was not sufficiently material if SW would have been in the same position even if Article 6.2 had been complied with, to make a conditional buy-out order. We defer consideration of that issue until after determination of whether Mr Costa's conduct also constituted a breach of fiduciary duty. That is because the discretion under section 996 is to be exercised in light of all the circumstances, which includes whether the unfairly prejudicial conduct involved a breach of fiduciary duty by Mr Costa to the Company.

<u>Issue (4): Breach of fiduciary duty</u>

97. Lord Wolfson urged on us the need for caution in considering the question of whether Mr Costa was in breach of fiduciary duty. We should not do so, he said, unless it was necessary. In support of that contention, he cited *Rock (Nominees) Ltd v RCO Holdings plc* [2004] EWCA Civ 118; [2004] BCC 466. In that case, the judge had found that the directors of the company were in breach of fiduciary duty in conducting a sale of shares by a company but, in circumstances where the sale was not at an undervalue, the petitioner shareholder had not been unfairly prejudiced. The Court of Appeal dismissed an appeal against the judge's finding that there was no unfair prejudice, but allowed a cross-appeal against the finding that the directors had breached their fiduciary duties. At §79, Jonathan Parker LJ, with whom the other members of the Court agreed, said:

> "As to the judge's finding of breach of fiduciary duty on the part of the respondent directors, it is plain that, as the judge found, the respondent directors were 'in a position of hopeless conflict'. Further, they would undoubtedly have been well-advised to obtain an independent valuation. However, no harm was in fact done and no damage or prejudice caused. Nor is there any question of the respondent directors being personally accountable in any way. That being so, it seems to me to be inappropriate to reach a conclusion that they breached their fiduciary duties, as it were, in the abstract."

98. We do not find that case helpful. As already noted, the conduct in this case did amount to unfair prejudice (irrespective of whether there was a breach of fiduciary duty), but

for reasons that we shall explain, it will be relevant to a consideration of the relief to be granted if that conduct also involved a breach of fiduciary duty. This is not a case, therefore, where we would be reaching a conclusion of breach of fiduciary duty "in the abstract".

99. The judge's conclusion that there was no breach of fiduciary duty rests on his finding (at §208) that "Mr Costa did sincerely believe that he was acting in the best interest of the Company and its investors", summarising his state of mind as "they wouldn't like it now if they knew, but they will thank me in the long run."

100. Mr Davies submitted that the judge's conclusion ignored two things.

101. First, section 172 of the 2006 Act requires directors to take decisions which they believe will "promote the success of the company for the benefit of the members as a whole". On the judge's findings of fact, Mr Costa clearly failed in that regard because the interests of the members as a whole were as set out in Article 6.2 of the SHA (to work in good faith towards an Exit before 31 December 2019), whereas Mr Costa was clearly promoting only his own interests (to delay an Exit to a later date with a view to maximising the price). Although the judge found that Mr Costa believed that all shareholders would benefit from his strategy, that benefit is irrelevant given the members' agreement to pursue a strategy of seeking an early sale over a later sale.

102. Secondly, the judge's conclusion that Mr Costa deliberately misled the board in order to achieve his preferred outcome was a clear breach of his fiduciary duty under section 172.

103. The starting point in addressing this ground of appeal is that a director has always owed a duty to act in the best interests of the company. The equivalent duty has, since 2006, been found in section 172 of the 2006 Act. This provides:-

> "**172 Duty to promote the success of the company**
>
> (1) 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."

104. In interpreting this duty, section 170 of the 2006 Act, so far as relevant, provides:-

> "**170 Scope and nature of general duties**
>
> (1) The general duties specified in sections 171 to 177 are owed by a director of a company to the company.
>
> ……….
>
> (3) The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director.
>
> (4) The general duties shall be interpreted and applied in the same way as common law rules or equitable principles, and regard shall be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties."

105. The judge directed himself as to the legal test for the mental element required to be established in order to show a breach of this duty by reference to a single paragraph of a first instance decision from 2000. This was *Regentcrest plc (in liquidation) v. Cohen* [2001] BCC 494; [2001] 2 BCLC 80, a decision of Jonathan Parker J. The judge cited §120 of *Regentcrest* which we shall set out, followed by two further paragraphs which the judge did not cite:-

> *"The nature of a director's fiduciary duty*
>
> 120. The duty imposed on directors to act bona fide in the interests of the company is a subjective one (see Palmer's Company Law (Sweet & Maxwell), para. 8.508). The question is not whether, viewed objectively by the court, the particular act or omission which is challenged was in fact in the interests of the company; still less is the question whether the court, had it been in the position of the director at the relevant time, might have acted differently. Rather, the question is whether the director honestly believed that his act or omission was in the interests of the company. The issue is as to the director's state of mind. No doubt, where it is clear that the act or omission under challenge resulted in substantial detriment to the company, the director will have a harder task persuading the court that he honestly believed it to be in the company's interest; but that does not detract from the subjective nature of the test.
>
> 121. As Lord Greene put it in *Re Smith and Fawcett Ltd* [1942] Ch 304 at p. 306:
>
> > "The principles to be applied in cases where the articles of a company confer a discretion on directors ... are, for the present purposes, free from doubt. They 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." (Emphasis supplied.)

> 122. To similar effect is the following passage from the judgment of Millett LJ in *Bristol & West Building Society v Mothew* [1998] Ch 1 at p. 18E:

> "The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.""

106. As a preliminary observation, we note that §120 of *Regentcrest* was primarily designed to explain that in a commercial company it is the directors and not the court who decide what the best commercial approach for the company is. They have to take business decisions and the court will not find a breach of fiduciary duty (negligence within section 174 may be a different question) simply because the court (or anyone else) might have taken a different commercial view.

107. As Snowden LJ explained in *In The Matter Of Compound Photonics Group Limited* [2022] EWCA Civ 1371 at §147-148, the meaning of a requirement to act "in good faith" must always be considered in its legal and factual context. However, the core meaning of a requirement of good faith is that it requires honesty.

108. That must be especially so in relation to section 172. Section 172 is the codification of a duty of a director of a company which has always been regarded as a paradigm example of a fiduciary duty. That was, for example, why, in *Regentcrest*, Jonathan Parker J cited the judgment of Millett LJ in *Mothew*, explaining that the pre-section 172 duty was but one aspect of a fiduciary's core equitable duties of loyalty and fidelity to his principal. It cannot be disputed that the post-2006 duty under section 172 is also a fiduciary duty.

109. Given that the duty under section 172 is a fiduciary duty, there can be no basis for a conclusion that the requirement of good faith in that context is any less than a requirement of honesty. In the present case, in addition to appearing in section 172 of the 2006 Act, Article 6.2 of the SHA also imposed contractual duties upon the Company and the Investors "to work together in good faith" and to give "good faith consideration to any opportunities for an Exit during the course of the Investment Period". It is always possible for a contract to limit or modify the scope of fiduciary duties. However, we see nothing in Article 6.2 of the SHA that would serve to limit or modify the core meaning of the duty of good faith imposed by section 172 upon Mr Costa as a director of the Company.

110. It would also be incoherent for the law to ascribe a different approach to the determination of whether a director has behaved honestly in section 172, where that determination relates to a fiduciary, than to the determination of honesty in the case of a non-fiduciary. This is important, because since the statements at §120 in *Regentcrest* upon which the judge relied, it has been established that honesty and dishonesty are not

simply subjective concepts. At the time *Regentcrest* was decided, the civil law had not been definitively determined and the criminal law was labouring under an erroneous view mandated by *R v. Ghosh* [1982] QB 1053. But it has since been authoritatively decided that the test as to whether a person has acted honestly or dishonestly requires an *objective* assessment of the conduct of the relevant person, in the light of the facts as they knew or believed them to be when they embarked on their course of conduct.

111. That was clearly stated in *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2017] UKSC 67; [2018] AC 391. At §62, Lord Hughes JSC, with whom all other members of the court agreed, said this:-

> "62. Dishonesty is by no means confined to the criminal law. Civil actions may also frequently raise the question whether an action was honest or dishonest. The liability of an accessory to a breach of trust is, for example, not strict, as the liability of the trustee is, but (absent an exoneration clause) is fault-based. Negligence is not sufficient. Nothing less than dishonest assistance will suffice. Successive cases at the highest level have decided that the test of dishonesty is objective. After some hesitation in *Twinsectra Ltd v Yardley* [2002] 2 AC 164, the law is settled on the objective test set out by Lord Nicholls of Birkenhead in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378: see *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1476, *Abou-Rahmah v Abacha* [2007] Bus LR 220 and *Starglade Properties Ltd v Nash* [2011] Lloyd's Rep FC 102. The test now clearly established was explained thus in the *Barlow Clowes* case [2006] 1 WLR 1476, para 10 by Lord Hoffmann, who had been a party also to the *Twinsectra* case:
>
> > 'Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant's mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree."'

112. Lord Hughes JSC summarised the approach to be applied at §74,

> "When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that

> the defendant must appreciate that what he has done is, by those standards, dishonest."

The judge's approach

113. As we have set out above, the judge's finding in relation to the allegation of breach of the section 172 duty was set out in this way at §208:-

> "208. Mr Costa's position is that he reasonably believed that it was in the best interests of the Company's shareholders for it not to comply with the requirements of clause 6.2 on the timetable that it specified, on the basis that a considerably higher value might be obtained for them by delaying the process. He knew perfectly well that at least some of the shareholders disagreed with this, and felt that their interests would be best served by complying with the clause 6.2 timetable. He also perceived that his personal interests as a shareholder were best served by delay. More importantly, he ensured that it was him and him alone who controlled the Company's actions in this regard, such that he was not merely in a position to recommend a course of action, but to ensure that that course of action was in fact pursued. However, I do not believe that it was his intention by doing this actively to injure either the Company or any investor. I think his state of mind might be summarised as "they wouldn't like it now if they knew, but they will thank me in the long run". Put another way, I think Mr Costa did sincerely believe that he was acting in the best interest of the Company and its investors. Applying the test set out in *Regentcrest*, I therefore do not find that Mr Costa was in breach of his duties under s.172(1)."

114. In his summary at the end of this paragraph, the judge used the word "sincerely", rather than "honestly" or "in good faith" to describe Mr Costa's belief. The use of "sincerely" reflected the judge's view, in reliance on §120 of *Regentcrest*, that all that mattered was Mr Costa's subjective state of mind. But on the judge's approach to section 172 he need not have used any of these words. It was enough if, as a matter of fact, Mr Costa believed that he was acting in the best interest of the company.

115. Moreover, because the judge focussed on the subjective state of Mr Costa's mind alone, he also gave no consideration to the second limb of the approach set out in *Ivey* at §74, and therefore did not address the question of whether Mr Costa's conduct in reliance on his belief was, objectively, honest by the standards of ordinary decent people.

116. The judge's approach, as Lord Wolfson accepted in argument, would mean that a director of a company could do anything provided that he (subjectively) considered that it was the course most likely to promote the success of the company for the benefit of its members as a whole. The director would be the sole arbiter of the best course of conduct to achieve that aim, and also of what constituted "success" for the company at that time.

117. It would also follow that on the judge's approach, a director would not breach his fiduciary duty under section 172 if he were deliberately to mislead his company, in the

form of the other directors or the shareholders in general meeting, provided that the director believed that he was following the course which was most likely to promote the success of his company. On this approach the director could also pretend that he was following the members' definition of success while secretly pursuing his own.

118. In short, as Lord Wolfson candidly submitted, provided that the director believed he was promoting the success of the company, "the ends would justify the means", even to the extent of misleading the other directors and the members both as to the ends and the means.

119. In argument, Lord Wolfson was constrained to accept that a director's fiduciary duty could never require him to act unlawfully or to cause his company to act unlawfully. However, Lord Wolfson did not identify the origin of that limit on the supposed freedom of a director to act in any way he sees fit provided he considered it conducive to the best interests of the company.

Decision

120. The judge's approach to section 172 cannot be right. Section 172 requires a director to act in what he considers, in good faith, would be most likely to promote the success of his company. The judge's approach deprives the phrase "in good faith" of all content and meaning. On his approach, section 172 would work just as well if those words are simply deleted from it. However, they cannot be deleted and must be given meaning.

121. We reject the suggestion by Lord Wolfson that the location within the language of section 172 of the phrase "in good faith" means that it attaches only to the "consideration" by the director of which course is most likely to promote the success of the company. Lord Greene MR's classic statement in *Smith and Fawcett* was that directors "must exercise their discretion *bona fide* in what they consider … is in the interests of the company". That placement of the requirement of *bona fide* made it clear that it applied to the exercise of discretion - i.e. what the director actually does - rather than just to his consideration of the best interests of the company. If Lord Wolfson's argument were accepted, it would mean that the 2006 Act made a significant change in the law as it was previously understood to be. That is not an approach to interpretation envisaged by section 170(4), and we do not accept that such a change could occur by such an opaque drafting mechanism.

122. In our judgment, section 172 requires a director, in all he does, to act in good faith towards the company, in the way he considers would be most likely to promote the success of the company for the benefit of its members as a whole; and the requirement that the director acts in good faith includes, as a core fiduciary duty, a requirement that the director acts honestly towards the company.

123. That being so, the judge's finding at §202 that Mr. Costa had misled the Board and by doing so had concealed from them the fact that he was doing nothing to achieve a sale of the shares before 31 December 2019, and in fact was doing as much as he could to prevent it, could only have led to a finding that he was behaving dishonestly in the way explained in *Ivey,* and hence in breach of his fiduciary duty under section 172. The finding that Mr Costa appreciated that his fellow directors and members, "wouldn't like it now if they knew, but they will thank me in the long run", emphasises, rather than negates, that dishonesty and thus the breach of fiduciary duty under section 172.

Deliberately deceiving the board of a company must, either always or almost always, be inconsistent with a director's duty under section 172. We do not rule out the possibility of wholly exceptional circumstances where this may not hold good, but nothing of the kind exists in this case.

124. We are conscious that in reaching that conclusion we are differing from the judge's statement at the start of his judgment at §4, that he did not consider either Mr Costa or Mr Loy to have behaved dishonestly. That was premised, so far as Mr Costa was concerned, on the judge's finding that Mr Costa believed that it was in everyone's interests to delay an Exit. But, as we have explained, that was to apply the wrong test for dishonesty.

125. We also accept Mr Davies' argument that in causing the Company to breach its obligations under Article 6.2 of the SHA, Mr. Costa must have been breaching his fiduciary duties to the Company. The SHA was an agreement by which the Company and all the members had identified their objectives during the time when the members were investors in the Company. By doing so, they had identified what "success of the company for the benefit of its members as a whole" meant, namely the achievement of an Exit on the best available terms during the Investment Period or very soon after its end.

126. The judge found (at §225) that Mr Costa knew that the Company's obligations under Article 6.2 were not being complied with and (at §214) that he knew what Jefferies were engaged to do, that their advice was addressed to that mandate, and that that mandate did not encompass any of the obligations imposed by Article 6.2. The judge also found, at §208, that Mr Costa was well aware that some of the members considered that it was in their interests to adhere to the timetable in Article 6.2, but that he nonetheless acted so as to advance his own interests and to prevent compliance with Article 6.2. In short, because Mr Costa knew that what he was doing was contrary to what the Investors had defined their interests to be in the SHA, that was a breach of his fiduciary duty under section 172.

127. In light of those findings, and his finding that Mr Costa deliberately misled the board, for the reasons set above, the judge's conclusion that Mr Costa was not in breach of his duty under section 172 of the 2006 Act cannot stand. He clearly was. We allow the appeal against that decision.

128. As we have indicated, given that we take the clear view that Mr Costa breached his fiduciary duty to the Company under section 172, it is unnecessary to decide whether he also acted negligently in so doing in breach of his duty under section 174.

Issue (5): The appropriate remedy under section 996

129. As we have indicated above, section 996 gives the court a wide discretion to give relief in respect of the unfair prejudice that has been established. As Oliver LJ said in *Bird Precision Bellows*, the purpose of the grant of relief is to put right and cure for the future the unfair prejudice that the petitioner has suffered at the hands of the respondents.

130. The judge approached his exercise of discretion on the basis that Mr Costa had caused the Company to breach Article 6.2 of the SHA, but that he had acted in accordance with his fiduciary duties when doing so. The consequence of the judge's approach was the

imposition of a condition that meant that SW would not be bought out at all – and hence would obtain no remedy for the unfair prejudice that it had suffered - if the finding at a second trial was that no offer would have been received for the Company in excess of $75 million (net of debt).

131. We have held that the judge was wrong in his assessment of Mr Costa's conduct, because Mr Costa had not only caused the Company to breach Article 6.2 of the SHA, but he had acted in breach of his duties under section 172 in doing so. The basis upon which the judge exercised his discretion was therefore flawed and must be set aside. In the circumstances of this case we consider that it is appropriate for us to exercise the discretion afresh.

132. We entirely see the argument that if all that had occurred was that Mr Costa had, in good faith, caused the Company to breach Article 6.2 of the SHA, then it might have been appropriate for the judge to grant relief designed to replicate the position that SW would have been in had it brought a breach of contract claim.

133. However, we consider that the position is fundamentally different as a result of our conclusion that Mr Costa had not only caused the Company to breach Article 6.2 but had also acted in breach of his fiduciary duties under section 172 of the 2006 Act in doing so. Recognising that a remedy under section 996 can not only seek to put right past unfair prejudice but can seek to cure it for the future, we consider that it would be unjust to SW if it were to be left as a minority shareholder with a continuing investment in a company controlled and managed by a person who has shown himself willing to act in deliberate disregard of its rights as a minority shareholder and to achieve his ends by misleading the Board and the other Investors who did not agree with him, or whose interests he did not think were aligned with his. We have no confidence that the unfairly prejudicial conduct in which he engaged would be a one-off. We also cannot conceive of any regime that we could impose under section 996 that would be an effective safeguard for SW's rights in the future.

134. In short, as the judge found, at §265, this is a clear case for a buy-out order. Where the judge went wrong was to make the buy-out order subject to a condition modelled on a claim for breach of contract.

135. The question remains on what terms should the buy-out be ordered. As we have said, Mr Costa's course of unfairly prejudicial conduct commenced during 2019 and continued after 31 December 2019. The consequence was that SW was deprived of the opportunity to sell its shares pursuant to an Exit, which was something which Mr Costa should have been working in good faith to achieve by 31 December 2019 and which he should have pursued with greater vigour thereafter when an investment bank was to be engaged to devise terms for such Exit to occur within a reasonable period.

136. In these circumstances it seems to us that the most appropriate relief is simply to order Mr Costa to buy SW's shares on a non-discounted basis as a pro rata proportion of the open market value of the Company as at 31 December 2019. The value should be determined by the High Court after hearing appropriate expert evidence.

137. Mr Costa might object that this overvalues SW's shares, because it is a date by which there is no clear evidence that any unconditional offer could have been obtained (still

less could an Exit have been completed), and it is a date before the adverse effects of the Covid pandemic were felt. We would not accept such arguments.

138. As regards the first point, once it is understood that the buy-out order is the exercise of the court's discretionary power under section 996 to provide a remedy for Mr Costa's breaches of fiduciary duty and not simply his conduct in causing the Company to breach the SHA, it is not necessary for the terms of the buy-out order to be constrained by strict considerations of "but for" causation of the type which were recently explored by the justices of the Supreme Court in *Recovery Partners v Rukhadze* [2025] UKSC 10.

139. As regards the valuation date preceding the effects of the Covid pandemic, the gravamen of the judge's findings against Mr Costa – as clearly expressed in §208 – is that he took it upon himself to decide that an Exit should be delayed beyond the Investment Period ending on 31 December 2019. Mr Costa took the view that the value of the Company would rise and that Investors would "thank me in the long run". But he thereby subjected the Investors, without their consent, to the risk that he might be wrong and that the value of their shares in the Company would fall. That was, as the judge held at §253, a gamble. But it was a gamble that Mr Costa was not entitled to take with the property of other Investors, and he cannot be heard to complain when his gamble failed.

Disposition

140. For the reasons set out above, we would allow the appeal, set aside the judge's order, and make an unconditional order that Mr Costa buys SW's shares in the Company on the terms indicated.