



Neutral Citation Number: [2020] EWHC 301 (Comm)

Case No: CL-2019-000290

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

The Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 14/02/2020

Before :

MR JUSTICE FOXTON

Between :

ALBION ENERGY LIMITED

Claimant

- and -

ENERGY INVESTMENTS GLOBAL BRL

Defendant

Lord Grabiner QC, Julian Kenny QC and Michal Hain (instructed by Charles Fussell & Co
LLP) for the Claimant

Guy Morpuss QC of Macfarlanes LLP for the Defendant

Hearing date: 30 January 2020

Approved Judgment

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

.....
MR JUSTICE FOXTON

Mr Justice Foxton :

1. This hearing involves:
 - i) An application by the Claimant (“Albion”) against the Defendant (“EIGL”) for summary judgment for the final instalment of the purchase price of 20% of the shares in Heritage Oil Limited (“Heritage”) under a sale and purchase agreement dated 31 January 2018 between Albion as seller and EIGL as buyer (“the SpA”).
 - ii) An application by EIGL for a stay of these proceedings under s.9 of the Arbitration Act 1996, alternatively for unconditional leave to defend the proceedings, and for a stay pending the resolution of proceedings to be brought by EIGL in Jersey.
2. Albion was represented before me by Lord Grabiner QC, Julian Kenny QC and Michal Hain, instructed by Charles Fussell & Co LLP, and EIGL by Guy Morpuss QC of Macfarlanes LLP. I am grateful to all counsel for their oral and written submissions.

The background

3. Mr Buckingham founded Heritage, an oil production and exploration company incorporated in Jersey. It was listed on the LSE. In 2014, EIGL (a company beneficially owned by Sheikh Hamad, the former prime minister of Qatar) acquired 80% of the share capital of Heritage and took the company private. The other 20% remained owned by Albion, a Guernsey company beneficially owned by Mr Buckingham.
4. On 31 January 2018, Albion agreed to sell its remaining 20% interest in Heritage to EIGL on the terms of the SpA for the sum of \$100m. There were six parties to the SpA, which contained other provisions beyond the sale transaction. In addition to Albion and EIGL, Heritage, Mr Buckingham, a company called Albion Resources and a company called Sundance Investments Ltd (“Sundance”) were also parties.
5. The first two instalments under the SpA were paid by EIGL. However, shortly before the final instalment became due on 20 December 2018, Macfarlanes LLP, on behalf of Heritage, wrote to Albion on 14 December 2018 asserting claims against Mr Buckingham. By a second letter of the same date, Macfarlanes LLP wrote to Albion on behalf of EIGL saying that in view of Heritage’s claims against Mr Buckingham, EIGL intended to withhold payment of the outstanding amount payable under the SpA. However, there was no suggestion at this stage that the matters raised in Macfarlanes LLP’s correspondence gave EIGL its own claim against Albion. On 15 December 2018, solicitors acting for Albion pointed out that any claims which Heritage might claim to have could not provide a legitimate reason for EIGL to withhold the final instalment of the purchase price due to Albion. In response, on 17 December 2018, Macfarlanes LLP suggested for the first time that the matters raised were capable of supporting a petition for unfair prejudice which could give EIGL a claim against Albion.

6. Solicitors' correspondence followed in which EIGL agreed to pay \$20m of the outstanding instalment unconditionally, with the remaining \$13.3m ("the Escrow Amount") to be held by Albion's solicitors on the terms of an escrow agreement dated 22 January 2019 ("the Escrow Agreement").
7. Albion has now brought proceedings and seeks summary judgment for the outstanding amount of \$13.3m. In response EIGL seeks a stay of the proceedings, relying for this purpose on the arbitration clause in the Escrow Agreement. Alternatively, EIGL contends that Albion is not entitled to summary judgment because EIGL has a defence with a realistic prospect of success, namely an equitable set-off arising from EIGL's claim for relief for unfair prejudice against Albion. EIGL also contends that these proceedings should be stayed under the inherent jurisdiction of the Court pending the determination of EIGL's unfair prejudice claim in proceedings to be commenced in Jersey.
8. Logically, the issue which falls to be determined first is EIGL's application for a stay under s.9. If that application succeeds, then the merits of Albion's claim, and whether there is any defence to it, are matters for the arbitrators, and it would not be desirable for the Court to say anything about them.

EIGL's application for a stay under s.9 of the Arbitration Act 1996

The relevant arbitration and jurisdiction agreements

9. The SpA, under which the various instalments of the price for the 20% interest in Heritage were payable, provided by clause 11.2:

“The Parties submit to the exclusive jurisdiction of the courts of England and Wales as regards any claim, dispute or matter (whether contractual or non-contractual) arising out of or in connection with this agreement (including its formation)”.
10. In the circumstances which I have summarised above, in January 2019 Albion, EIGL and Mr Buckingham (but not the other three parties to the SpA) entered into the Escrow Agreement. This referred to the various claims asserted by Heritage and EIGL against Albion and Mr Buckingham, and by Albion against EIGL for the outstanding \$13.3m. There were then a series of promises:
 - i) by EIGL to pay the outstanding \$13.3m into escrow;
 - ii) by Albion, Mr Buckingham and EIGL not to instruct Charles Fussell & Co LLP to act other than in accordance with the undertaking it was giving as to the terms on which the Escrow Amount was held;
 - iii) by Mr Buckingham to provide certain responses to queries which Heritage and EIGL had raised;
 - iv) by EIGL to provide certain information to Mr Buckingham;
 - v) by EIGL, Albion and Mr Buckingham, if there remained outstanding disputes after 1 March 2019, to use reasonable endeavours promptly to agree an appropriate dispute resolution procedure to resolve them, and not to commence proceedings in relation to the disputed matters prior to 1 April 2019.

11. Clauses 2.8 and 2.9 involved agreements by all parties that the transfer of funds into the Escrow Account was “entirely without prejudice to the legal rights and position” of those parties, including, in the case of Albion, “the legal rights and position ... in respect of any and all claims arising as a result of EIGL’s alleged failure to comply with the terms of the [SpA] and/or any other rights which Albion ... may have under the [SpA] or otherwise”.
12. Finally, and most materially for present purposes, clause 6 provided:

“Any dispute or difference (whether contractual or non-contractual) arising out of or in connection with this letter (including any question regarding its existence, validity, interpretation performance or termination) shall be referred to and finally settled by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce by three arbitrators appointed in accordance with the said Rules. The place of arbitration shall be London, England and the language of the arbitral procedure shall be English”.
13. It was Mr Morpuss QC’s submission for EIGL that the arbitration clause in the Escrow Agreement (“the Arbitration Agreement”) had varied and supplanted the High Court jurisdiction clause in the SpA (“the Jurisdiction Agreement”) so far as the claim to the outstanding \$13.3m was concerned.

The proper approach on a s.9 application

14. S.9 of the Arbitration Act 1996 provides for a mandatory stay of legal proceedings in the English court in respect of a matter which the parties have agreed to refer to arbitration:

"Stay of legal proceedings.

 - (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

...

 - (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."
 15. Before ordering a s.9 stay, the Court must be satisfied both that there is an arbitration clause, and that the subject matter of the claim falls within that clause (Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press [2000] CLC 647). There are occasions when the Court is willing to stay proceedings under its case management jurisdiction, in order to allow the arbitration tribunal to consider these matters under its *kompetenz kompetenz* jurisdiction. However, (in my view rightly) neither party suggested that this was the appropriate course in this case, nor did anyone suggest that this was not an issue which could and should be finally determined by me.

The approach to overlapping dispute resolution clauses

16. A number of authorities have considered the position where parties have entered into more than one agreement, and their agreements contain different dispute resolution clauses. Many of those cases are concerned with the position where a suite of documents containing different arbitration or jurisdiction clauses are entered into at or around the same time, to give effect to different aspects of one overall transaction, and the issue arises as to which clause applies to a dispute which, at least on first reading, is fairly capable of falling within more than one of them.

17. I was referred by both parties to the following summary of the law by Hamblen LJ in BNP Paribas v Trattamento Rifiuti Metropolitani SpA [2019] EWCA Civ 768 at [68] as to the proper approach in these circumstances:

“In the light of the guidance provided by these authorities, so far as relevant to the present case I would summarise the approach to be as follows:

- (1) Where the parties' overall contractual arrangements contain two competing jurisdiction clauses, the starting point is that a jurisdiction clause in one contract was probably not intended to capture disputes more naturally seen as arising under a related contract: Trust Risk Group at [48]; *Dicey, Morris & Collins* at § 12-110.
- (2) A broad, purposive and commercially-minded approach is to be followed - Trust Risk Group at [48]; Sebastian Holdings at [39] and [50].
- (3) Where the jurisdiction clauses are part of a series of agreements they should be interpreted in the light of the transaction as a whole, taking into account the overall scheme of the agreements and reading sentences and phrases in the context of that overall scheme: see UBS v Nordbank [2009] at [83]; Trust Risk Group at [47]; Sebastian Holdings at [40].
- (4) It is recognised that sensible business people are unlikely to intend that similar claims should be the subject of inconsistent jurisdiction clauses: UBS v Nordbank at [84], [95]; Sebastian Holdings at [40]; Savona at [1].
- (5) The starting presumption will therefore be that competing jurisdiction clauses are to be interpreted on the basis that each deals exclusively with its own subject matter and they are not overlapping, provided the language and surrounding circumstances so allow: Monde Petroleum at [35]-[36]; Savona at [1].
- (6) The language and surrounding circumstances may, however, make it clear that a dispute falls within the ambit of both clauses. In that event the result may be that either clause can apply rather than one clause to the exclusion of the other – Savona at [4] and [31].”

18. The present case concerns the interrelationship between the dispute resolution clause in an agreement documenting a transaction, and the effect on that clause of the parties deciding at some later point in time to conclude a further agreement with a different dispute resolution clause. In this context, it might be suggested that the approach identified by Hamblen LJ applies with less force. The passage from *Dicey, Morris &*

Collins on the Conflict of Laws (15th) at ¶12-110 which Hamblen LJ cited (and the fact pattern he was considering) concerned the position “where a complex financial or other commercial transaction is put in place by means of a number of inter-linked contracts”. Nonetheless where, as here, it is not suggested that the agreement which was later in time superseded the earlier agreement for all purposes, such that the parties must have contemplated the agreements subsisting together, the approach identified in the Trattamento case remains a helpful guide as to the parties’ likely intentions. I note in this regard that the Court of Appeal decision in Satyam Computer Services Ltd v Upaid [2008] EWCA Civ 487, which was concerned with successive agreements rather than a single transaction embodied in multiple agreements, was cited by the Court of Appeal when considering essentially simultaneous inconsistent dispute resolution clauses in UBS AG v HSH Nordbank AG [2009] EWCA Civ 585 at [83] and Deutsche Bank AG v Sebastian Holdings Inc [2010] EWCA Civ 998 at [42].

19. Finally, it may be apparent from the nature of the agreement in which a particular dispute resolution provision is located that it is intended to have a narrower scope and is principally concerned with disputes of a particular kind. I note that the Court of Appeal in UBS AG rejected the contention that the English jurisdiction clause in the Kiel notes extended to the parties’ overarching dispute because it was a “boilerplate’ bond issue jurisdiction clause ... primarily intended to deal with technical banking disputes” ([89]). The scope of a dispute resolution provision in an escrow agreement which is in different terms to that contained within the associated principal contract has been considered in at least two cases. In PT Thiess Contractors Indonesia v PT Kaltim Prima Coal [2011] EWHC 1842 (Comm), Blair J considered a case in which the parties had entered into a “Cash Distribution Agreement” (which he found was essentially an escrow agreement: [42]) containing an English jurisdiction clause, alongside an Operating Agreement for Mining Services which provided for arbitration. He noted at [41] that “there is nothing unusual about submitting a contractual dispute to arbitration whilst referring matters relating to security to the jurisdiction of one or more courts”, noting “this is frequently a feature of international transactions, and the choice of jurisdiction in the security agreement may have to do with factors independent of the principal agreement”. At [43] he concluded:

“In my view, the claim in the English action is a claim under the CDA concerned with a procedure whereby the sums in dispute are to be set aside until the dispute is determined. It raises a discrete claim, related to, but distinct from, the underlying dispute arising under the OAMS which is the subject of the arbitration. There is no reason why the parties cannot be taken to have intended that these claims are to be the subject of different jurisdiction clauses.”.

20. In his judgment, Blair J referred to the decision of Andrew Ang J in the Singapore High Court in Transocean Offshore International Ventures Ltd v Burgundy Global Exploration Corp [2012] 2 SLR 821. That case involved a principal agreement (an offshore drilling contract) which provided for arbitration, and an escrow agreement which provided for the jurisdiction of the Singapore High Court. Andrew Ang J rejected the contention that proceedings brought under the escrow agreement fell within the arbitration clause, so as to require the court to stay the proceedings under s.6 of the Singapore International Arbitration Act. He also referred to the different types of dispute which might arise under the principal contract and the escrow

agreement, noting that the latter were likely to be “relatively straightforward and non-technical in nature” and for that reason the parties were likely to have deliberately chosen a dispute resolution provision for the escrow agreement which could ensure more speedy relief (at [21]).

21. While those were both cases in which the court jurisdiction clause appeared in the security document, and the arbitration clause in the principal agreement setting out the parties’ primary obligations (as opposed to this case where the location of the two types of dispute resolution clause is reversed), they reflect the fact that the parties may frequently choose a different dispute resolution provision for an agreement which sets out the primary obligations of their relationships, and an agreement intended to operate by way of a security, without intending that the dispute resolution provision in the security agreement extend to disputes arising under the principal agreement.

Analysis and conclusion

22. On the facts of this case, I am quite satisfied that the claim which Albion now brings – which is essentially concerned with establishing its entitlement to be paid the outstanding instalment of the purchase price, and not with the operation of the Escrow Agreement so as to realise the benefits of the security provided for that liability if established – does not fall within the Arbitration Agreement. I refer to the claim which Albion “now brings” because as originally formulated, Albion’s Particulars of Claim sought relief in the form of “a declaration that Albion is entitled to payment of the Escrow Monies”. However, to avoid any debate as to whether that relief fell within the ICC arbitration clause, Albion has confirmed that it does not pursue that claim at this stage. It is accordingly not necessary for me to determine whether that claim for declaratory relief would have been stayed.
23. I have reached the conclusion that EIGL is not entitled to a stay under s.9 of the Arbitration Act 1996 for the following reasons.
24. First, I agree with Blair J and Andrew Ang J that there is nothing particularly surprising in parties stipulating for different dispute resolution provisions in principal and security agreements, given the different purposes of those agreements, and the more limited scope of the latter. I consider it inherently more likely that the Arbitration Agreement in the Escrow Agreement was intended to address the security and other ancillary obligations created by that agreement, rather than to displace (at least so far as the outstanding instalment is concerned) the parties’ agreed choice of jurisdiction under the SpA for the purposes of determining whether EIGL is in fact under any liability to Albion.
25. Mr Morpuss QC submitted that it would be “absurd” if Albion was required to establish its entitlement to the amount due in one forum but might be forced to resort to another forum for the purpose of realising the security provided for that obligation. However, that is the position whenever the principal and security agreements in a transaction contain different dispute resolution provisions which, as Blair J noted, they frequently do and for good reasons. Further, while the amount paid into the Escrow Account is clearly the most obvious means of enforcing any judgment which Albion might obtain, it is far from Albion’s only option. In particular, Albion has security for the outstanding instalment in the form of a charge over 20% of the shares in Heritage. Further, in the event of a dispute, it was inherently likely that Albion

might become entitled to recover a sum in excess of the Escrow Amount once interest and costs were taken into account. For these reasons, it would be wrong to approach the identification of the agreed forum for the determination of Albion's debt claim under the SpA solely from the perspective of enforcement against the Escrow Amount.

26. Second, the language of the Arbitration Agreement – in particular its reference to “any dispute or difference arising out of or in connection with *this letter* (including any question regarding its existence, validity, interpretation, performance or termination)”, suggests that the focus of the clause is obligations created by the Escrow Agreement (“this letter”) rather than disputes as to the interpretation, performance or termination of the SpA. When the parties were contracting against a background in which the outstanding balance was due under the SpA and subject to the Jurisdiction Agreement, it is unlikely that they would have used a clause which took “this letter” as the fulcrum of the Arbitration Agreement if that agreement had been intended to extend to claims under the SpA.
27. Third, I agree with Lord Gribner QC that clause 2.9, which provides that the payment into escrow is “without prejudice to... any other rights which Albion ... may have under the SpA” tells against the suggestion that clause 6 of the Escrow Agreement is intended to remove Albion's right under the SpA to take proceedings in the High Court. While I accept Mr Morpuss QC's submission that it would be possible to construe this provision as applying only to non-ancillary obligations (and therefore as not extending to the choice of forum), it can nonetheless be said that clause 2.9 points away from any suggestion that the parties intended provisions in the Escrow Agreement to supplant potentially inconsistent provisions in the SpA. This is particularly the case given the width of the language used to preserve Albion's prior entitlements – not simply “in respect of any and all claims arising as a result of EIGL's alleged failure to comply with the terms of the [SpA]” but also “any other rights which Albion ... may have under the [SpA] or otherwise”.
28. Fourth, the Escrow Agreement concerns only three of the six parties to the SpA. This factor itself suggests that the parties can only have intended the Arbitration Agreement to have a localised effect, in order to avoid the commercially unattractive position where claims between some of the parties to the SpA were subject to High Court jurisdiction, and other related claims under the SpA were subject to ICC arbitration. Adopting Hamblen LJ's language in Trattamento, this is an outcome which sensible businesspeople are unlikely to have intended.
29. Finally, although this is a point which merits very limited weight, I also accept Lord Gribner QC's submission that if clause 6 of the Escrow Agreement was intended to provide a new agreed and exclusive mechanism for resolving all of the disputes, it is perhaps surprising that clause 2.7 provides that the parties are to “use reasonable endeavours promptly to agree an appropriate dispute resolution process to resolve the dispute”.
30. EIGL's application for a stay having been rejected, it is necessary to turn to Albion's application for summary judgment.

The test for summary judgment

31. There was no dispute before me as to the appropriate test on a summary judgment application. A frequently quoted summary of the applicable principles is that of Lewison J in Easyair Limited v Opal Telecom Limited [2015] EWHC 399 (Ch) at [15]:
- i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 1 All ER 91.
 - ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8].
 - iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman.
 - iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10].
 - v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550.
 - vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63.
 - vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better.
 - viii) If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not

currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.

EIGL's factual complaints in more detail

32. EIGL's claim arises from a series of payments made by Heritage which were the subject of an audit of Heritage's business undertaken by Alvarez & Marsal ("Alvarez").
33. First, there are payments to three Nigerian suppliers, Lamic Nigeria, Professor Damachi and Zomay Marine, which total \$17.5m, for consultancy services. In addition to these payments, all made after EIGL had acquired 80% of Heritage, payments totalling \$13.25m had been made prior to EIGL's investment. Alvarez stated that there was weak documentation supporting these payments and lack of transparency as to their use and their size, giving rise to "heightened corruption related risk".
34. Second, payments of \$7m made to MENA Danismanlik Ltd, a Turkish company, in connection with Heritage's efforts to enter into the Libyan market, which Alvarez concluded posed "a potential high risk" with "no direct oversight as to how the monies were actually spent".
35. Third, expenses of \$866,258 incurred by Mr Buckingham between July 2014 and June 2017 which were charged to Heritage, and which were said to involve or include payments on personal luxury items or services. Alvarez concluded that the required support, justification and explanation for these expenses had not been provided and that the payments were not "consistent with a best practice approach".
36. Finally, between July 2014 and July 2016, costs of £10m were incurred by Heritage in relation to a Gulfstream jet used principally by Mr Buckingham, of which some £2,766,977 had not been allocated to any specific project nor charged back to Mr Buckingham.
37. EIGL's position in relation to these expenses, as set out in Mr Morpuss QC's skeleton, is that "it does not know for certain that the claims are well-founded" and "that is why it wishes to have them investigated by way of its unfair prejudice position in Jersey". Mr Morpuss QC confirmed at the hearing that he was satisfied that he is in a position to plead that these payments were improper payments which implicated Mr Buckingham and Mr Atherton, an individual who acted in an executive role in the management of Heritage until his resignation in December 2017. In these circumstances, I will proceed on the basis that there is a serious issue to be tried to this effect, while noting that Mr Morpuss QC's characterisation of the payments is hotly disputed. I will refer to these payments as "the Disputed Payments".
38. If the various complaints prove to be well-founded, the party who had made the payments, suffered the immediate loss, and who would ordinarily be entitled to bring

a claim, would be Heritage. In this regard, it is noticeable that when these matters were first articulated by Macfarlanes LLP, they were presented as claims by Heritage. The suggestion that these matters gave EIGL a claim (on the basis of unfair prejudice) only surfaced after Albion had taken the point that any claims which Heritage might have did not relieve EIGL of its payment obligations under the SpA. In these circumstances, it will be necessary to consider with some care the route by which EIGL now says that the payments made provide it with a claim against Albion, and provide the basis for an equitable set-off against Albion's otherwise undisputed debt claim.

39. Before doing so, however, I should first address two threshold objections taken by Lord Grabiner QC:
- i) that any claim which EIGL might have has been settled and waived under the terms of the SpA;
 - ii) that the SpA precludes a right of set-off.

Has EIGL waived or settled any claim it might have against Albion?

Introduction

40. This issue arises as a result of the terms of clauses 7 and 8 of the SpA. Before introducing those clauses, it is first necessary to set out a little more background. As noted above, in 2014 EIGL acquire an 80% interest in Heritage. In anticipation of that acquisition, two agreements were entered into which were designed to address Mr Buckingham's involvement in Heritage going forward:
- i) A Shareholders Agreement dated 29 April 2014 between Albion and EIGL, which dealt with the relationship between the two shareholders, including on such matters as the appointment of directors and the conduct of business.
 - ii) An Advisory Agreement between Heritage, Mr Buckingham and Mr Buckingham's company Sundance, which was agreed in principle in April 2014 but not signed until July 2014, under which Sundance agreed to provide the services of Mr Buckingham to Heritage. Under clause 5.7, Heritage agreed to make the company jet available to Mr Buckingham "for the purposes of providing the services" and under clause 8.1, there was an entitlement on Sundance's part to be reimbursed "any reasonable travelling and accommodation expenses and reasonable entertaining expenses which are reasonably and properly incurred by or on behalf of [Sundance] or [Mr Buckingham]".
41. When EIGL agreed to buy Albion's remaining 20% stake in Heritage, clauses 7.1 and 7.2 of the SpA addressed the position of the Shareholders Agreement and the Advisory Agreement respectively, in materially identical terms. Under the heading "Terminations", clause 7.1 provided:
- "In consideration of their mutual terminations, the Seller and the Buyer irrevocably and unconditionally agree for all purposes that with effect from and conditional on Completion:

- 7.1.1 the Shareholders' Agreement shall be hereby terminated and have no further effect.
- 7.1.2 each party to the Shareholders' Agreement shall be irrevocably and unconditionally discharged and released from all and any obligations (past present and future) arising under or resulting from the Shareholders' Agreement; and
- 7.1.3 any rights that each party to the Shareholders' Agreement may have or has against any other such party thereunder (including any rights in respect of antecedent breaches) shall hereby be waived for all purposes and no such party shall be entitled to make any claim against any other such party or parties under or in relation to the Shareholders Agreement or its termination".
42. Clause 8 of the SpA provided:
- "Settlement of claims
- 8.1 In consideration of their mutual settlements, each of the Seller, Albion Resources, the Advisor and the Consultant hereby releases and forever discharges each of the Buyer and the Company in respect of the Seller Released Claims.
- 8.2 In consideration of their mutual settlements, each of the Buyer and the Company hereby releases and forever discharges the Seller, Albion Resources, the Advisor and the Consultant in respect of the Buyer Released Claims".
43. So far, so good. However, difficulties arise from the definition of Buyer Released Claims. Both the definitions of Buyer Released Claims and Seller Released Claims apply to "any Claim for breach of the Shareholders' Agreement, the Advisory Agreement, the Main Counterindemnity Agreement, the Supplemental Agreement or otherwise arising between the Parties in connection with the Company and its business", and do so "whether or not notified and/or in existence at the date of this Agreement". However, immediately after the words "in connection with the Company and its business", the definition of Buyer Released Claims provides:
- "other than any Claim which relates to any matter reported by Alvarez and Marsal Disputes and Investigations LLP in relation to their audit of the business and affairs of the Company currently in progress on behalf of the Seller (pursuant to clause 8.3 of the Shareholders' Agreement)".
44. By way of yet further background:
- i) Clause 8.3 of the Shareholders Agreement allowed any party "from time to time" to require an audit or review of the company.
- ii) In 2017, Alvarez was commissioned to undertake such a review. That review had not reached its endpoint in January 2018, with the result that the carve-out from the definition of Buyer Released Claims was included in the SpA.
- iii) It is common ground that the factual basis of EIGL's alleged equitable set-off "relates to any matter reported by Alvarez and Marsal Disputes and

Investigations LLP in relation to their audit of the business and affairs of the Company”.

- iv) However, an issue arises as to whether the carve-out qualifies the terms of clauses 7.1 and 7.2 of the SpA.

The parties' arguments in summary

45. Lord Grabiner QC's argument for Albion is as follows:

- i) The release of liability for past breaches in clauses 7.1 and 7.2 is unqualified.
- ii) The qualification made to clause 8.2 of the definition of Buyer Released Claims must therefore be interpreted as limited to such claims as may have existed before the Shareholders Agreement and Advisory Agreement were entered into.
- iii) In support of this latter argument, Lord Grabiner QC submitted that clauses 7 and 8 of the SpA had distinct subject-matters, such that there is nothing surprising in the settlement of claims in clause 8 being qualified, without this impacting on the scope of the release offered by clause 7.

46. Mr Morpuss QC submitted that:

- i) The releases in clause 7 had to be read subject to the qualification to the definition of Buyer Released Claims.
- ii) Clauses 7 and 8 were addressing different aspects of the same subject-matter, with clause 7 principally aimed at the release of obligations going forward, and clause 8 with the settlement of past claims.
- iii) (With rather less enthusiasm) if he was wrong on this point, then a claim for relief under statutory unfair prejudice provisions did not fall within clause 7 in any event.

Analysis and conclusion

47. While the SpA is not particularly happily drafted in this respect, I am satisfied that Mr Morpuss QC's submissions are to be preferred on this issue.

48. First, it is clear that clauses 7 and 8 substantially overlap. In particular the definitions of Buyer Released Claims and Seller Released Claims specifically refer to both the Shareholders Agreement and the Advisory Agreement, and the release of claims effected by clause 8 achieves exactly the same outcome as the release of “rights in respect of antecedent breaches” in clauses 7.1.3 and 7.2.3. Unless, therefore, the carve-out from the definition of Buyer Released Claims does not apply to the Shareholders Agreement and the Advisory Agreement, there is a clear conflict between the two provisions.

49. Lord Grabiner QC put forward an ingenious argument that the carve-out only applied to the words “or otherwise arising between the Parties in connection with the Company and its business” in the definition of Buyer Released Claims, and not to

“any claim for breach of the Shareholders’ Agreement, the Advisory Agreement, the Main Counter Indemnity Agreement, the Supplemental Counter-Indemnity Agreement”. However, that argument is not persuasive:

- i) The word “Claim” in the carve-out (“any Claim which relates to any matter reported by Alvarez ...”) refers back to the word “Claim” which appears at the beginning of the definition and naturally embraces all the words which follow.
 - ii) While Lord Grabiner QC can point to clause 7 as a possible reason for the carve-out not applying to the Shareholders and Advisory Agreements, no explanation has been offered as to why the carve-out did not apply to the other agreements which appear in the definition, which is the effect of Lord Grabiner QC’s construction.
 - iii) In circumstances in which the carve-out specifically identified clause 8.3 of the Shareholders Agreement as the basis on which the Alvarez audit was being conducted, it is improbable that the parties did not intend the carve-out to apply to the release of claims under the Shareholders Agreement.
50. Second, I do not believe that the conflict can be resolved by treating the carve-out as an attempt to preserve pre-Shareholders Agreement and Advisory Agreement claims:
- i) This is not the natural reading of the definition of Buyer Released Claims, for the reasons set out above.
 - ii) It was known to all parties that the Alvarez audit was being conducted under the Shareholders Agreement and had yet to be completed. It ought also to have been appreciated by all parties that EIGL’s principal interest was likely to concern the period after it invested in Heritage in June 2014, rather than the preceding period. In these circumstances, the suggestion that the parties were only seeking to preserve any claims which might be revealed by that audit to the extent they had arisen before and independently of the Shareholders Agreement or the Advisory Agreement is highly improbable.
 - iii) It is clear from the appendices to the draft Alvarez report of 22 November 2017 and the body of the final report of 26 February 2018 that prior to the conclusion of the SpA, Alvarez had held two meetings with Heritage on 20 October 2017 and 15 November 2017 in connection with its review, made enquiries about Mr Buckingham’s expenses in respect of a period from 2014 to 2017 and had exchanges with Heritage on the subject of Mr Buckingham’s credit card expenditure and his use of the company jet. The fact that Mr Buckingham appears to have been aware (at least to some degree) of the chronological scope of the Alvarez investigation further tells against the suggestion that the carve-out was intended only to preserve pre-April or July 2014 claims.
51. In these circumstances, there is an obvious inconsistency between the scope of the release for breaches of the Shareholders Agreement and Advisory Agreement apparently offered by clauses 7.1.3 and 7.2.3, and the express carve-out of the settlement provisions for breaches of the same agreements so far as concerns the Alvarez investigation in clause 8. I am satisfied that the more specific consideration

given to the issue in the carve-out should prevail over the more general provisions in clause 7. I agree with Mr Morpuss QC that clause 7 appears to have had its principal focus on terminating the primary obligations of the Shareholders and Advisory Agreements going forward, albeit (in the manner characteristic of the “saturation bombing” approach to the drafting of general provisions which Hoffmann LJ identified in Arbuthnott v Fagan [1995] CLC 1396, 1404) the language used, if considered alone, would have a wider collateral impact.

52. If I had not accepted Mr Morpuss QC’s submissions as to the effect of the carve-out from the definition of Buyer Released Claims, I would not have accepted his alternative submission that the particular legal route which EIGL proposes to use to seek relief – a petition for unfair prejudice – would fall outside the releases in clause 7 even if claims in respect of the same matters brought under the Shareholders Agreement and Advisory Agreement would not. The language of the waivers in clause 7.1 is relatively broad (“all and any obligations ... arising under or resulting from” the relevant Agreement and a statement that no party is entitled to make a claim “under or in relation to the Shareholders’ Agreement”). Where the facts relied upon as a basis for the unfair prejudice petition could also have been relied upon to allege a breach of one or both agreements, the requisite nexus with the Shareholders or Advisory Agreement is satisfied. I reject as uncommercial, and contrary to the obvious intention of the parties in effecting what is, after all, a mutual release of this kind, the suggestion that whether claims were released or not would depend on the specific cause of action or legal provision relied upon, and the ingenuity of the pleader in being able to formulate a claim without mentioning either Agreement.

Is the right of set-off excluded by the SpA?

53. I can deal with this issue very briefly. Lord Gribner QC faintly contended that clause 3.2 of the SpA, by which Albion “irrevocably undertakes to pay each instalment ... in cash by way of electronic transfer of immediately available funds” was sufficient to exclude the right of equitable set-off. However, it is well-established that this right can only be excluded by clear language. Even a promise to pay an amount “without any deduction” has been held insufficiently clear to effect this exclusion (Connaught Restaurants Ltd v. Indoor Leisure Ltd [1994] 1 WLR 592). The language of clause 3.2 does not come close to achieving this effect.
54. There is a further potential issue as to whether EIGL can establish an equitable set-off in this case, namely whether such a set-off can arise from a claim to relief which the defendant claims it can obtain from the future exercise of a statutory discretion, given that, at the date the set-off is asserted, the claimant cannot be said to be under any liability to the defendant, and any such liability is contingent on a court subsequently choosing to exercise a broad statutory discretion in a particular way. There are cases which suggest that contingent claims cannot generally be relied upon to establish a defence of equitable set-off. For example in Manzanilla Ltd v Corton Property and Investments Ltd [1996] EWCA Civ 942, an appeal against a decision of Mr Anthony Gribner QC sitting as a deputy High Court judge in the Chancery Division, Millett LJ observed that “a debt which is not yet payable or which is still contingent is not available for set-off at law or in equity”.
55. However, an application for future relief pursuant to a statutory discretion on the basis of facts existing at the date the set-off is asserted may be said to raise different

considerations. An issue with some similarities to that question - whether an existing factual basis for obtaining future discretionary relief constituted an “obligation incurred” for the purpose of rule 13.12(1)(b) of the Insolvency Rules 1986 – was considered by the Supreme Court in In re Nortel GmbH [2013] UKSC 52. Lord Neuberger PSC (with whom Lord Mance, Lord Clarke and Lord Toulson JJSC joined) held at [77] that “at least normally, in order for a company to have incurred a relevant “obligation” under rule 13.12(1)(b), it must have taken, or been subjected to, some step or combination of steps which (a) had some legal effect (such as putting it under some legal duty or into some legal relationship), and which (b) resulted in it being vulnerable to the specific liability in question, such that there would be a real prospect of that liability being incurred”. The Supreme Court overruled previous cases, which had held that the prospective liability of a bankrupt to a future discretionary costs order in legal proceedings in which the bankrupt was involved on the date of bankruptcy did not arise from obligations which had arisen before the issue of the bankruptcy proceedings. Lord Neuberger PSC held at [89]:

“In my view, by becoming a party to legal proceedings in this jurisdiction, a person is brought within a system governed by rules of court, which carry with them the potential for being rendered legally liable for costs, subject of course to the discretion of the court. An order for costs made against a company in liquidation, made in proceedings begun before it went into liquidation, is therefore provable as a contingent liability under rule 13.12(1)(b), as the liability for those costs will have arisen by reason of the obligation which the company incurred when it became party to the proceedings”.

56. This is a difficult issue, and one on which I did not receive argument. In these circumstances, I will proceed on the basis that a claim for the future exercise of discretionary relief based on existing facts which, once exercised, would place the claimant under a monetary obligation to the defendant is capable of being relied upon as an equitable set-off. The question, therefore, is whether EIGL has shown that it has a realistic prospect of obtaining such relief.

EIGL’S alleged equitable set-off

EIGL’s case in summary

57. EIGL did not prepare a draft pleading explaining the basis on which it contended it had a claim against Albion. However, EIGL’s claim appeared to involve the following steps:
- i) The Disputed Payments involved mismanagement of Heritage “on behalf of Albion” and Albion’s “failure to disclose what had occurred”.
 - ii) The mismanagement gave rise to unfair prejudice so far as EIGL is concerned, because EIGL has suffered prejudice which cannot be remedied notwithstanding the fact that, since June 2014, it has held 80% of Heritage’s share capital and appointed four of its five directors. That prejudice is said to result from the fact that EIGL would have paid less for the 20% of Heritage it acquired in January 2018 had it been aware of the Disputed Payments.

- iii) The range of relief available in response to a petition for unfair prejudice is very broad and includes a power to order Albion to compensate EIGL for its losses, and there is a realistic prospect of such an order being made.
 - iv) It is seriously arguable that the amount of such compensation in this case equals or exceeds the amount of Albion's claim.
 - v) The unfair prejudice claim is sufficiently closely connected with Albion's claim to meet the test of equitable set-off.
58. Before considering these steps in turn, it is necessary to say something about the unfair prejudice jurisdiction invoked by EIGL.

Relief for unfair prejudice

59. The claim for unfair prejudice relied upon by EIGL is one which is available under the Companies (Jersey) Law 1991. Article 141 of the 1991 Law provides that a member of a company may apply to the court for an order under Article 143:
- “on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interest of its members generally or of some part of its members (including at least the member)”.
60. Article 143 provides that if the court is satisfied that the application is well-founded, “it may make such order as it thinks fit for giving relief in respect of the matters complained of”. Without prejudice to the generality of that power, Article 143(2) gives illustrations of the orders the court may make. These included powers to:
- “(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; and
 - (d) provide for the purchase of the rights of any members of the company by other members or the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accounts accordingly”.
61. As the parties acknowledged, the terms of Articles 141 and 143 are substantially identical to those of ss.994 and 996 Companies Act 2006, and neither party suggested that there was any material difference between Jersey and English law so far as the issue was concerned.

The Disputed Payments involved mismanagement of Heritage “on behalf of Albion” and Albion's “failure to disclose what had occurred”

62. As I have explained above, I am willing to assume for the purposes of this application that the Disputed Payments involved breaches of duty by those involved in authorising or receiving them. I am also willing to assume that Mr Buckingham (in his position as a consultant to Heritage under the Advisory Agreement), and Mr Atherton, were in a position to exercise significant influence over Heritage's management. While these matters are hotly disputed, they are issues of fact which are not susceptible to summary determination.

63. The issue of why the conduct of Mr Buckingham and/or Mr Atherton, if established, would give rise to a claim against Albion as the 20% shareholder in Heritage received little attention at the hearing. Mr Buckingham was the beneficial owner of Albion, and Mr Atherton was the director Albion had nominated to the Heritage board. However, it was not suggested that Mr Atherton's position on the board was used to effect the Disputed Payments.
64. The issue of attribution of wrongdoing in the unfair prejudice context was considered by Sales J in F & C Alternative Investments (Holdings) Ltd v Barthelemy and another (No 2) [2011] EWHC 1731 (Ch). At [1096] he identified the relevant test as follows:
- "What is the relevant test of attribution of responsibility beyond the narrow class of case where an agency relationship exists? In my judgment, the test is whether the defendant in a section 994 claim is so connected to the unfairly prejudicial conduct in question that it would be just, in the context of the statutory regime contained in sections 994 to 996, to grant a remedy against that defendant in relation to that conduct. The standard of justice to be applied reflects the requirements of fair commercial dealing inherent in the statutory regime. This is to state the test at a high level of abstraction. In practice, everything will depend upon the facts of a particular case and the court's assessment whether what was done involved unfairness in which the relevant defendant was sufficiently implicated to warrant relief being granted against him."
65. While there is clearly considerable scope for argument as to whether this test is met in circumstances in which none of the payments were made to Albion, and neither Albion's 20% shareholding nor Mr Atherton's position as a director are alleged to have been used for the purpose of effecting the Disputed Payments, the test propounded by Sales J is highly fact-sensitive. I do not feel able to say on the state of the evidence before me that EIGL has no realistic prospect of establishing that attribution to Albion is appropriate on the facts of this case.
66. It follows that I am satisfied that EIGL has shown a serious issue to be tried in respect of this first stage in its argument.

The mismanagement gave rise to unfair prejudice so far as EIGL is concerned, because EIGL has suffered prejudice which cannot be remedied notwithstanding EIGL's majority control of Heritage

67. There are two striking features of the present case. The first (as I have mentioned) is that the Disputed Payments took place during a period when EIGL owned 80% of the shares in Heritage and had the right to appoint four of the five directors to Heritage's board. The second is that the putative petition for unfair prejudice is to be brought at a time when (a) EIGL has owned 100% of Heritage for two years (albeit 20% of that interest is subject to a security interest which will continue for so long as EIGL refuses to pay the outstanding amount); (b) (necessarily) Albion has not been a shareholder of Heritage for two years; (c) reflecting that new reality, the Shareholders' Agreement was terminated by consent some two years ago; (d) Mr Buckingham ceased to have any role in the management of Heritage and the Advisory Agreement was terminated by consent two years ago and (e) Mr Atherton resigned from Heritage in December 2017 and, as I am told, Heritage is currently involved in litigation with him in Jersey.

68. These circumstances are very far removed from the normal habitat of unfair prejudice petitions. In Re Legal Costs Negotiators Ltd [1999] BCC 547, it fell to Peter Gibson LJ to consider an application to strike out an unfair prejudice petition (advanced under s.459 of the Companies Act 1985) brought by the holders of 75% of the shares in a company seeking to force a buy-out of the 25% shareholder. The petitioners complained that the minority shareholder – Mr Hateley – had failed to perform his duties, leading to his dismissal, and that the majority shareholders’ legitimate expectation that he would contribute to the business was not being fulfilled. Peter Gibson LJ noted at p.551:

“As Oliver LJ said in Re Bird Precision Bellows Ltd (1985) 1 BCC 99,467 at p.99,471 ... the very wide discretion conferred on the court to do what is considered fair and equitable is ‘in order to put right and cure for the future the unfair prejudice which the petitioner has suffered at the hands of other shareholders of the company’. If the matters complained of have been put right and cured and cannot recur, it is hard to see how the court could properly give relief”.

He continued:

“The court on an application to strike out a s.459 petition can look at the realities of the case. It is entitled to take the pragmatic view that the petition should not be allowed to proceed where the likelihood of the trial judge exercising his discretion to grant the claimed relief is so remote that the case can be described as perfectly hopeless”.

69. Peter Gibson LJ further noted at p.552:

- i) That prejudice will not be unfair to the petitioner’s interests “where the petitioner has available to him a method of bringing that prejudicial state of affairs to an end”.
- ii) The prejudice caused by Mr Hateley’s conduct could not be said to be continuing simply because he remained a shareholder because “the retention of those shares is not conduct of the company’s affairs or an act or omission of the company”.
- iii) That “if the remedying of the unfairness was carried out in such a way that the objectionable conduct could not reoccur, then there is no scope for giving relief under s.461 in respect of the matters complained of”.

70. In my view, the points made by Peter Gibson LJ are fatal to Mr Morpuss QC’s argument, and show that this is indeed one of those cases where “the likelihood of the trial judge exercising his discretion to grant the claimed relief is so remote that the case can be described as perfectly hopeless”. Throughout the period to which the Disputed Payments relate, EIGL was in control of Heritage and in a position to ensure that Heritage pursued whatever claims were open to it. That remains the position now, at a point in time when the unfair prejudice petition has yet to be commenced. Neither Mr Buckingham or Mr Atherton has any ongoing role in the management company as a result of the agreements which EIGL chose to enter into in January 2018, or, in the case of Mr Atherton, his resignation some three years ago.

71. Mr Morpuss QC advanced two responses to this argument.
72. The first was to contend (as I accept) that there are cases in which a majority shareholder can bring an unfair prejudice petition, pointing to the decision of Rose J in Cool Seas (Seafoods) Limited v. Interfish Limited [2018] 2038 (Ch). However, that was a case in which the minority shareholder's stake was sufficient, under the company's Articles of Association, to prevent the company from bringing claims against its former directors for breach of fiduciary duty: [151]-[153]. By contrast, Heritage has always been able to and can still pursue such claims, if so advised. EIGL has throughout its period as a shareholder in Heritage been in a position to cause Heritage to pursue those claims, and there is no legal impediment to Heritage or EIGL taking this course. In so far as Mr Morpuss QC relied in his skeleton on the possibility that Heritage's claims had been waived by clause 7 of the SpA, (a) I have resolved this issue in his favour; and (b) in any event, it could not be an appropriate use of s.994 to allow a shareholder to recover in respect of breaches of fiduciary duty owed to the company simply because the company (and in this case the petitioning shareholder as well) had chosen to settle those claims: Sikorski v Sikorski and another [2012] EWHC 1613 (Ch).
73. Mr Morpuss QC's second argument was that the loss alleged here – the fact that EIGL had paid more when purchasing the 20% shares than if it had been able to deploy the potential claims against Albion as, in effect “negotiating leverage” – was a different loss from that which Heritage could recover by reason of the Disputed Payments. However, there are a number of reasons why I have concluded that this argument does not have a realistic prospect of success.
74. First, it is necessary to test the “leverage” which EIGL claims it would have had when the price for its 20% share was being negotiated. There could be no question, prior to the sale of the 20% being concluded, of EIGL having a putative unfair prejudice petition in respect of the price it had paid for its interest. At best it (or more properly, Heritage) had claims to recover the Disputed Payments and any loss it had suffered resulting from them. Heritage (and EIGL through its control of Heritage) retains those rights. The suggestion that EIGL might somehow have negotiated a greater reduction in the purchase price than the value of the putative claims to be used as leverage is inherently improbable, and wholly speculative. Indeed in circumstances in which EIGL now has a 100% interest in Heritage, rather than the 80% interest it had at the time it claims it could have used the Disputed Payments as leverage, it is particularly hard to see a credible basis for EIGL contending it has suffered some prejudice over and above the claims open to Heritage at the time the SpA was under negotiation.
75. Second, it is necessary for EIGL to establish a realistic case that it has been prejudiced in its interests *as shareholder*. I accept that this requirement is not to be too narrowly or technically construed (Lord Hoffmann in O'Neill v Phillips [1999] 1 WLR 1092, 1105). However, the prejudice in question must be “bound up with [EIGL's] position as a member” (Cool Seas at [113(7)]) or be prejudice to EIGL in its capacity as a shareholder (Re Blackwood Hodge plc [1997] 2 BCLC 650, 673 per Jonathan Parker J). It is not enough that there is conduct which prejudices the interests of persons who happen to be members of a company: Re a Company [1983] Ch 178 at p. 189E and Re a Company No. 00477 of 1986 (1986) 2 B.C.C. 99,171 at p. 99,174. EIGL's complaint that it paid more than it might have done for the 20% is not damage which is bound up with its position as a member, but, at best, prejudice to its interests when

it happens to be a member of a company by reason of its purchase of different shares some three and a half years previously.

76. In response to this point, Mr Morpuss QC referred to the fact that EIGL held an 80% interest in Heritage when the additional 20% was purchased. However, he accepted that there was no link between the damage for which he was contending EIGL could secure compensation for unfair prejudice, and the size of its existing shareholding. EIGL's complaint that it would have paid less for the 20% had it known "the true position" (as the matter is put in its witness evidence and in correspondence) is a complaint which would ordinarily sound in misrepresentation or actionable non-disclosure in relation to the sale, or not at all. Those are risks which well-advised buyers and sellers are careful to allocate through the terms in their sale contract, as they did so here through very limited warranties in clause 5 and an extensive "entire agreement" clause in clause 9. The risk of "paying too much" in a share acquisition in circumstances in which there has been no breach of contract or tortious conduct by the vendor is not prejudice of a kind which the unfair prejudice jurisdiction exists to remedy. Mr Morpuss QC accepted that if there had been no carve out for claims arising from the Alvarez investigation, then it would not have been possible to bring a complaint premised on EIGL having paid more for the 20% than it would have done with knowledge of the Disputed Payments, by way of an unfair prejudice petition. However, it is difficult to see why the fact that Heritage has retained its ability to bring claims in respect of the Disputed Payments can leave EIGL in a better position so far as petitioning for unfair prejudice is concerned than if it had not.
77. Third, in circumstances in which (as I explain below), it is clear that EIGL had substantial knowledge about the Disputed Payments before the SpA was signed, and it chose notwithstanding that knowledge to purchase the shares at the agreed price but preserve such claims as already existed from matters arising from the Alvarez investigation, there can be nothing unfair in EIGL being limited to such benefit as it can now derive from those preserved causes of action. As Peter Gibson LJ noted in Re Legal Costs Negotiators Ltd at p.552, quoting Knox J in Re Baltic Estate Ltd (No 2) [1992] BCC 629, 636, "conduct may be prejudicial without being unfair" (to similar effect see Peter Gibson J in Re Ringtower Holdings (1989) 5 BCC 82, 90). To my mind, the clear unfairness here would lie in EIGL agreeing to pay a price for the 20% interest on the basis that any existing claims from the Alvarez investigation were to be carved-out of the general release and settlement, and then using the fact of that carve-out as a means of retrospectively adjusting the price it had agreed to pay through an unfair prejudice petition.

The range of relief available in response to a petition for unfair prejudice is very broad, and includes a power to order Albion to compensate EIGL for its losses

78. I would accept that the Court has a very broad discretion as to the relief it can award if unfair prejudice is made out. However, EIGL's contention that the requisite element of mutuality for an equitable set-off is satisfied here is premised on the Jersey court granting relief in respect to its unfair prejudice which requires Albion to make a payment to EIGL, not to Heritage.
79. Mr Morpuss QC pointed to cases in which claims for directors' breaches of fiduciary duty to the company had been litigated as part of unfair prejudice petitions. However, those claims have almost invariably involved the litigation of claims *on behalf of the*

company with orders being sought for payment to the company, brought as an adjunct to unfair prejudice relief sought by the shareholder. In Apex Global Management v Fi Call [2014] BCC 286, Vos J (as he then was) summarised the applicable principles as follows:

“119. In Re Chime Corp Ltd; Kung v Kou [2004] HKCFA 73, the Hong Kong Court of Final Appeal (the “CFA”) considered the distinction between derivative actions intended to compensate the company for wrongful acts by individual directors or shareholders and the equivalent of a s.994 petition, the purpose of which was to remedy the unfairly prejudicial conduct of the affairs of the company. The CFA held that the purpose of a s.994 petition was not to order the payment of damages or compensation by a shareholder. Lord Scott (with whom the other members of the CFA agreed) held (at [47]–[48] and [61]–[62]) that, although the court did not lack jurisdiction, in the strict sense, to make the orders sought against a director for breach of duty, a derivative action was the proper way in which to remedy such a breach. The essence of the decision was that, where the central claim was an action by the company to be compensated for a director’s breach, a minority shareholder should not use s.994 as a way of circumventing the rule in Foss v Harbottle (1843) 2 Hare 461. It seems to me that the decision was simply an application of the principle I have described in a particular situation. The facts were very far removed indeed from this case.

120. In Gamlestad AB v Baltic Partners Ltd [2007] UKPC 26; [2007] BCC 272, the Privy Council, on appeal from Jersey, considered Chime (above). Lord Scott gave no indication that he thought that the law was different in Hong Kong. He said this at [26]–[28]:

“26. As their Lordships have noted, the relief sought under Gamlestad’s representation includes an order that the directors pay damages to Baltic for breach of duty. ...

27. The first question to be addressed, therefore, is whether an order for payment of damages to the company whose affairs have allegedly been conducted in an unfairly prejudicial manner can be sought and made in an unfair prejudice application. Another way of putting the question is whether a cause of action allegedly vested in the company can be prosecuted to judgment in an unfair prejudice application. It would, of course, always be essential for the parties allegedly liable on the cause of action to be respondents to the proceedings. But that is not a problem in the present case.

28. There is nothing in the wide language of art.143(1) to suggest a limitation that would exclude the seeking or making of such an order: the court ‘may make such order as it thinks fit for giving relief in respect of the matters complained of.’ The point was raised and considered by the Hong Kong Court of Final Appeal (the CFA) in Re Chime Corp Ltd (2004) 7 HKCFAR 546. An unfair prejudice application had been made in respect of Chime and one of the issues was whether the court had power on such an application to make an order for the payment of damages or compensation to the company. The CFA held that the court did have power to make such an order (see the judgment given by Lord Scott of

Foscote at [39]–[49], concurred in by the other members of the court, and the cases there cited). No reason has been advanced to their Lordships on this appeal why the decision in Chime should not be followed.

Accordingly, no objection to Gamlestaden’s prayer in its art.141 application for an order that the directors pay damages to Baltic for breach of duty can be taken at this strike-out stage.”

80. I accept that breaches of fiduciary duties owed by directors or others to the company often provide the basis of a petition for relief for unfair prejudice. A petitioner who lacks control of the company may in an appropriate case seek an order requiring those liable for the wrongdoing to compensate the company as part of the unfair prejudice petition. And a petitioner who is seeking an order intended to address the consequences of the unfairly prejudicial management of the company (such as an order requiring the respondent to buy out its shares, or permitting it to buy out the respondent’s shares) may secure relief which reflects the consequences of the wrongful conduct of the company’s directors as part of that relief.
81. Here, EIGL has no need for a judicial mechanism (be it a derivative action or relief in the context of an unfair prejudice petition) to find some means of asserting Heritage’s claims on Heritage’s behalf, and it will enjoy the benefit of 100% of any recovery made. Equally, as 100% owner of Heritage, EIGL does not need and does not seek any relief to remedy the prejudicial management of EIGL. Any unfairly prejudicial management of Heritage ceased long ago.
82. The issue of the distinction between prejudicial management of the company’s affairs and wrongful conduct was considered by Millett J in Re Charnley Davies Ltd (No 2) [1990] BCC 605, 625 where he stated:
- "Mr Oliver asked: ‘If misconduct in the management of the company's affairs does not without more constitute unfairly prejudicial management. what extra ingredient is required?’ In my judgment the distinction between misconduct and unfairly prejudicial management does not lie in the particular acts or omissions of which complaint is made, but in the nature of the complaint and the remedy necessary to meet it. It is a matter of perspective. The metaphor is not a supermarket trolley but a hologram. If the whole gist of the complaint lies in the unlawfulness of the acts or omissions complained of, so that it may be adequately redressed by the remedy provided by law for the wrong the complaint is one of misconduct *simpliciter*. There is no need to assume the burden of alleging and proving that the acts or omissions complained of evidence or constitute unfairly prejudicial management of the company's affairs. It is otherwise if the unlawfulness of the acts or omissions complained of is not the whole gist of the complaint, so that it would not be adequately redressed by the remedy provided by law for the wrong. In such a case it is necessary to assume that burden, but it is no longer necessary to establish that the acts or omissions in question were unlawful, and a much wider remedy may be sought."
83. In circumstances in which:
- i) the basis of EIGL’s putative unfair prejudice complaint is alleged breaches of fiduciary duties owed by Mr Buckingham and Mr Atherton to Heritage, which conduct remains actionable by Heritage if EIGL is able to make good its case on the Disputed Payments;

- ii) it has always been open to EIGL to cause Heritage to pursue those claims;
- iii) EIGL as the 100% shareholder will obtain the full benefit of any amount recovered; and
- iv) any connection between Albion, Mr Buckingham and Mr Atherton with Heritage or involvement in the management of Heritage ended some 2 years ago;

I have concluded that the gist of EIGL's complaint is one of misconduct simpliciter. In these circumstances, I can see no realistic prospect of relief taking the form of an order requiring Albion to make a payment to EIGL.

Is there a serious issue to be tried that the amount of such compensation in this case equals or exceeds the amount of Albion's claim?

- 84. EIGL made no effort to quantify the amount of compensation which it claimed it could recover through a petition for unfair prejudice. However, its argument involved the assertion that it would have been able to pay less for 20% of Heritage if it had been aware of the Disputed Payments.
- 85. In my judgment, EIGL has not established a serious issue as to this part of its case either.
- 86. First, it is important to note that the prejudice complained of, far from being loss said to flow from the unfair management of the company represented by the Disputed Payments, is a loss said to have resulted from EIGL's inability to utilise the fact that the Disputed Payments had occurred for its own benefit when negotiating the price payable for the remaining 20% of Heritage. In short, far from being prejudice caused by the mismanagement of Heritage which the Disputed Payments represent, it is loss which could only have been avoided if that mismanagement had occurred, but EIGL had then been able to use it for its own advantage. EIGL did not offer any explanation of how it could overcome this threshold obstacle to its causation case.
- 87. Second, I agree with Lord Gubbins QC's submission that, on the evidence, it is clear that EIGL was apprised of the matters now relied upon as constituting the unfairly prejudicial mismanagement before the price for the 20% was agreed, and therefore had the opportunity to use those matters to what it saw as its best advantage in the negotiations, and did so by carving them out of the releases and settlements in clause 8 and (as I have found) clause 7 of the SpA.
- 88. The material filed with the Court establishes the following matters beyond argument:
 - i) In 2016, KPMG, Heritage's auditors, reported to the board of directors raising issues as to the payments made to the Nigerian recipients and the payment to MENA Danismanlik Ltd.
 - ii) EIGL was provided with a draft report by Alvarez on 21 November 2017 which addressed the issues arising in relation to the Nigerian payments and Mr Buckingham's expenses in detail. EIGL did not place a copy of the report in

evidence but did produce the appendices to that report because they were unchanged when Alvarez's final report was produced in February 2018.

- iii) Alvarez produced a further version of its report on 26 February 2018 which, in addition to the Nigerian and Turkish payments and Mr Buckingham's expenses, referred to issues concerning Mr Buckingham's use of the company jet. That report referred to the fact that as Alvarez's work progressed, it "reported [its findings] to EIGL informally and issued interim notes on progress".
 - iv) It is apparent from the appendices to that report that the investigation had involved requests for documents, a detailed discussion at a meeting of 19 December 2017 and what was described as a "wrap up meeting" with Mr Atherton on 9 January 2018. The agenda for discussion at that meeting included the Nigerian and Turkish payments, Mr Buckingham's personal expenses and use of the company jet.
 - v) Mr Mackie in his witness statement for EIGL confirmed that it had a copy of the Alvarez report in draft when negotiating the SpA and stated that this document was prepared for the purpose of contemplated litigation. It is also Mr Mackie's evidence that EIGL's concerns were not resolved by the interview of Mr Atherton.
89. In these circumstances, it is legitimate to ask why EIGL claims it was deprived of the opportunity to leverage claims arising out of the Disputed Payments when the SpA was concluded, yet is able to do so now. Ultimately, all that EIGL has pointed to is the fact that when, on and after 21 November 2018 (a month before the final payment was due), it wrote to Mr Buckingham and others raising questions about the Disputed Payments, it was not satisfied with the responses. That, of course, was equally the position (on its own evidence) with regard to the information provided prior to the conclusion of the SpA. The reality is that EIGL is unable to point to any additional information it has now, when it is threatening to bring an unfair prejudice petition in Jersey, which was not available to it prior to the conclusion of the SpA, when it claims it was prejudiced by its inability to utilise the Disputed Payments to reduce the price payable.
90. Third, to have suffered any compensable loss, EIGL would need to show an arguable case that it would have been able to use the Disputed Payments to reduce the price for the 20% by an amount greater than the value of the claims which it is still open to Heritage to assert in respect of the Disputed Payments now. However, EIGL made no attempt to explain how or why this might be the case. When I asked Mr Morpuss QC what EIGL's case was as to the amount by which it would have been able to use the Disputed Payments to reduce the price, he suggested that the amount of the Disputed Payments was an obvious reference point. However, that would have left EIGL no better off than it is now. Indeed, as an 80% shareholder at the time of the Disputed Payments, the fact that it will now enjoy 100% of the benefit of any recovery appears to leave it better off than if those claims had been pursued before the SpA.
91. EIGL's witness evidence was noticeably thin on the issue of how, and by how much, the purchase price would have been reduced. Mr Mackie of Macfarlanes LLP gave evidence that the price paid for the 20% did not take into account the impact of the

Disputed Payments, and that “it is also my understanding and belief had the Defendant been aware of the true position, it would have paid a lesser sum for the shares held by the Claimant”. However, Mr Mackie did not identify the source for this statement, which amounts to little more than bare assertion.

The unfair prejudice claim is sufficiently closely connected with Albion’s claim to meet the test of equitable set-off

92. It was common ground that the appropriate test in determining whether a sufficient nexus existed between Albion’s claim for the price under the sale contract and EIGL’s putative unfair prejudice petition was that set out by Rix LJ in Geldof Metaalconstructive NV v Simon Carves Ltd [2011] 1 Lloyd’s Rep 517 at [43(vi)], namely to ask whether these are “cross-claims ... so closely connected with [the plaintiff’s] demand that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim”.
93. In this case, the unfairly prejudicial conduct relied upon occurred between 2014 and 2017, and the matters which are said to have made that conduct wrongful are legal duties owed to Heritage. Those matters do not seem to be sufficiently closely connected to Albion’s claim that it would be manifestly unjust to allow the claimant to enforce payment without taking the crossclaim into account. Does the fact that EIGL might be able to rely upon that conduct as a basis for seeking discretionary relief in its favour change the outcome? If EIGL had been able to formulate an arguable unfair prejudice claim premised on the fact that it had paid too much for the 20% shares, I would have found that the requisite connection was established. However, I have rejected EIGL’s contention that it has an arguable entitlement to unfair prejudice relief formulated on that basis. Mr Morpuss QC did not advance an alternative basis for contending that the degree of connection was made out. A mere claim by EIGL to enforce, by way of an unfair prejudice position, the breach of fiduciary duty claims open to Heritage would not have satisfied the Geldof test.
94. Lord Gribner QC also relied upon the fact that the two claims were subject to different forum agreements – the claim under the SpA (as I have held) being subject to the Jurisdiction Agreement, and the unfair prejudice petition subject to ICC arbitration under the Shareholders Agreement. I do not need to decide whether the unfair prejudice claim does fall within the Shareholders Agreement, and I have not heard any argument on this issue. I would note, however, that the fact that two claims cannot, as independent claims, be brought in the same forum does not of itself determine that they lack the requisite connection to give rise to an equitable set-off: Aectra Refining & Marketing Inc v Exmar NV [1994] 1 WLR 1634, 1649 where Hoffmann LJ noted that “in the case of transaction set-off, the authorities are in favour of allowing the set-off to be pleaded, notwithstanding its submission to arbitration or a different jurisdiction”.

Conclusion

95. While I have addressed the various issues raised by EIGL’s proposed set-off separately, in the final analysis they are all different manifestations of the same fundamental point. Heritage (for the benefit of EIGL as its 100% shareholder) had a perfectly conventional legal claim for any loss caused by the Disputed Payments. That was the claim which EIGL’s solicitors, Macfarlanes LLP, originally referred to when

responding to Albion's demand for payment of the outstanding balance. However, to overcome the difficulties that a claim by Heritage is incapable of providing a defence to Albion's claim against EIGL for the balance of the purchase price, EIGL sought to re-package that claim in a form which would allow it, rather than Heritage, to assert it. Ingenious as Mr Morpuss QC's submissions were, I have concluded that that attempt is fundamentally flawed, and does not disclose an arguable defence to Albion's claim.

Stay

96. The proposed unfair prejudice petition in Jersey was the only ground relied upon before me as a reason to stay Albion's claim. In circumstances in which I have concluded that EIGL's claim does not have a realistic prospect of success, it would not be appropriate to grant a stay of these proceedings pending the determination of that claim. I would in any event have been reluctant to order a stay, having concluded that EIGL has no arguable defence to Albion's claim, in circumstances in which it took no steps to raise the Disputed Payments after the SpA was signed until one month before the final instalment was due, and even now has not commenced proceedings in Jersey or elsewhere to pursue those claims.

Conclusion

97. For these reasons:
- i) EIGL's application for a stay under s.9 of the Arbitration Act 1996 is refused.
 - ii) EIGL's application for a stay of these proceedings under the Court's inherent jurisdiction is refused.
 - iii) Albion's application for summary judgment on its claim for the balance of the purchase price and interest is allowed.
98. I will hear the parties on any consequential matters.