Neutral Citation Number: [2025] EWCA Civ 57

Case No: CA-2024-001627
CA-2024-001621

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS ANDS PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
Dame Clare Moulder DBE
[2024] EWHC 1437 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/01/2025

Before :

SIR JULIAN FLAUX, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE LEWISON
and
LORD JUSTICE SNOWDEN

- -

Between :

J.P. MORGAN INTERNATIONAL FINANCE LIMITED	**Appellant**
- and -	
WEREALIZE.COM LIMITED	**Respondent**

Case No: CA-2024-001614
CA-2024-001626

WEREALIZE.COM LIMITED	**Appellant**
- and –	
J.P. MORGAN INTERNATIONAL FINANCE LIMITED	**Respondent**

- -
- -

Richard Handyside KC, Rosalind Phelps KC, Rupert Allen and Christopher Langley (instructed by Freshfields LLP) for **J.P. Morgan International Finance Limited**
Richard Lissack KC, Robert Weekes KC, Timothy Lau and Charles Redmond (instructed by Quinn Emanuel Urquhart & Sullivan UK LLP) for **Werealize.Com Limited**

Hearing dates: 16 to 18 December 2024

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Approved Judgment

This judgment was handed down remotely at 10.00am on Thursday 30 January 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 Lewison:

Introduction

1. Viva Wallet Holdings Software Development S.A. ("Viva") is a Greek fintech company jointly owned by J.P. Morgan International Finance Limited ("JPM") and WEREALIZE.COM Limited ("WRL"). It carries on business directly and through its subsidiaries (together the "Group") providing a range of financial and payment system solutions to business. The relationship between the shareholders is governed by a shareholders' agreement (the "SHA"). Under the terms of the SHA each party was granted call options to purchase the other's shares. The parties raised a number of preliminary issues, which were determined by Dame Clare Moulder DBE, after an expedited trial, in a judgment at [2024] EWHC 1437 (Comm), [2024] BCC 1250.

2. Unsurprisingly, the judge answered the formulated issues in the order in which they were raised. But I think that the order in which they were raised (and argued before us) needs a little modification in order to deal with them in a logical fashion.

3. The current appeals arise out of the terms of those options. Broadly, there are three main issues:

   i) Is the option granted to JPM exercisable once only or once in each option period? This turns on what is meant by the word "exercised" and its cognates.

   ii) To what extent should any appraisal of the open market value of the shares take into account restrictions on the business Viva is entitled to carry on in the US as a consequence of restrictions applicable to JPM by virtue of US legislation known as Regulation K?

   iii) Was the judge entitled to make, and was it appropriate for her to make, a declaration reflecting some of her findings on US law?

4. The judge answered those questions as follows:

   i) The option granted to JPM was only "exercised" if it resulted in the making of a binding contract for the sale of WRL's shares. Unless such a binding contract had come into existence during one of the option periods, the option remained exercisable in subsequent option periods.

   ii) The open market value of the shares should be assessed without regard to any obligations, restrictions, and/or limitations under Regulation K, or similar, that were in fact applicable to WRL, JPM or Viva by reason of JPM having a shareholding in Viva.

   iii) It was appropriate for the court, having heard expert evidence, to address the dispute under Regulation K, and to embody its findings in the form of a declaration even though enforcement of Regulation K was a matter for a foreign regulator, namely the US Federal Reserve.

5. The SHA is a lengthy document, running to 138 pages, and I have set out the relevant provisions of Schedule 1 to the SHA in an Appendix to this judgment. The Schedule contains a number of defined terms, which I will use in this judgment.

Background

6. WRL is the majority shareholder (currently, as to 51.49%) in Viva. JPM owns the remaining 48.51% of the shares in Viva, having purchased them pursuant to a share purchase agreement between (i) JPM (ii) WRL and (iii) other entities dated 24 January 2022 for a consideration of approximately €809 million (the "SPA"). The sale of shares pursuant to the SPA completed on 16 December 2022.

7. The terms governing the relationship between WRL and JPM as shareholders in Viva are set out in the SHA. The SHA describes JPM as an "Edge Act Corporation organized under Section 25A of the Federal Reserve Act of the United States of America". Viva became a party to the SHA on 16 December 2022.

8. Clause 38.5 of the SHA provides that (with immaterial exceptions) a person who is not a party to the SHA has no right under the Contracts (Rights of Third Parties) Act 1999 or any other statutory provision to enforce any of its terms.

9. The SHA is expressly governed by English law and contains an exclusive jurisdiction clause in favour of the English Court.

10. The call option process in Schedule 1 of the SHA gives JPM the right to buy WRL's 51.49% shareholding in Viva at a price to be determined by an expert valuation process (the "JPM Call Option").

11. The JPM Call Option is potentially exercisable in four periods at six-monthly intervals, beginning a year from the closing of the sale under the SPA. For the first three of these periods WRL is not required to accept the call option if the option price is less than a floor valuation of €5 billion for Viva as a whole (the "Reference Valuation"). If the JPM Call Option is exercised at a price equal to or above the Reference Valuation, WRL is automatically deemed to accept it. However, in the fourth period, which ends on 30 July 2025, the floor price and WRL's ability to reject the option are removed and WRL is automatically deemed to accept the call option if exercised by JPM and must sell its shares to JPM for the relevant percentage of the option price (irrespective of whether the valuation of Viva as a whole is below €5 billion).

12. If JPM does not exercise the JPM Call Option, WRL has the right to exercise its own call option (the "WRL Call Option") at the same price. No floor price is applicable to the WRL Call Option.

13. The Edge Act 1919 is a US federal statute enacted to provide US banks with expanded powers to engage in banking and related activities outside the US. A corporation incorporated under that Act is known as an "Edge Act Corporation". But at the same time the Edge Act seeks to ensure that US banks cannot use an Edge Act Corporation to carry out US domestic business and thus avoid the regulatory framework governing the domestic activities of US banks. As an Edge Act Corporation, JPM is subject to the rules of the Board of Governors of the Federal Reserve System (the "Federal Reserve") on international banking operations in Part 211 of Title 12 of the Code of Federal

Regulations ("Regulation K"). Under Section 211.6 of Regulation K, Edge Act Corporations may only engage, directly or indirectly, in activities in the United States that are permitted by Section 25A (6) of the Federal Reserve Act and are incidental to its international or foreign business (the "US Activity Restrictions"). The phrase "directly or indirectly" is defined as including activities carried out through a subsidiary of an Edge Act Corporation. The expression "subsidiary" is itself defined by the statute. Section 211.6 (a) of Regulation K lists a number of activities that will ordinarily be considered as incidental to an Edge Act Corporation's international or foreign business; but the Federal Reserve has wide power to approve additional activities. Section 211.8 of Regulation K contains restrictions on the investments and activities of Edge Act Corporations outside the United States (the "Non-US Activity Restrictions"). The legislation may require an Edge Act Corporation to divest itself of investments or subsidiaries in relation to activities falling within section 211.8.

14. By the end of December 2023 it became clear that the parties disagreed about the basis of valuation for the purposes of both the WRL and the JPM Call Options. WRL, through its solicitors, took the view that Regulation K did not apply to Viva directly and that any valuation should be conducted on the basis that Viva's market activities could be lawfully conducted in the US without any restriction under Regulation K. JPM disagreed. In the meantime, each of the parties had instructed experts to carry out the valuation required for the purposes of the first Option Exercise Period. Because the two valuations were conducted on different bases, they were nearly €2 billion apart.

15. On 5 January 2024 JPM applied to the ICC to appoint a third valuation expert. WRL's position was that the ICC should refrain from making any appointment until disputes between the parties had been resolved.

16. At that point a further disagreement arose. JPM took the view that it was not required to exercise the JPM Call Option until such time as the Call Option Fair Market Value had been ascertained, if necessary by a third valuation expert. Nevertheless, in its letter of 29 January 2024 it stated:

> "5. JPM's primary position is that, in these circumstances, the SHA on its true construction does not require JPM to exercise the JPM Call Option until a reasonable period after the Third Valuation Expert has issued their determination of the Call Option Fair Market Value in accordance with the SHA.
>
> 6. However, if it is ultimately determined by the Court that JPM's primary position is wrong, JPM hereby irrevocably exercises the JPM Call Option and this letter shall accordingly constitute the JPM Exercise Notice given on today's date, in each case for the purposes of paragraph 2.12 of Part A of Schedule 1 to the SHA."

17. On 8 February 2024 WRL rejected JPM's exercise of the JPM Call Option.

18. On 15 February 2024 the ICC notified the parties that it would proceed with the appointment of a third valuation expert. The ICC repeated its position on 19 February 2024 and 11 April 2024. We do not know, however, whether the appointment has actually been made.

19. Having heard evidence from two expert witnesses, the judge made a number of findings about US law. First, she held that Viva was a subsidiary of JPM for the purposes of Regulation K. Second, she considered that it was common ground that by reason of the terms of the SHA, Viva owed a contractual obligation to JPM not to engage in activities that JPM had notified Viva were not permissible for JPM pursuant to the US Activity Restrictions or the Non-US Activity Restrictions. She did not find it necessary to decide whether Regulation K could be directly enforced against Viva. Third, she made findings on the circumstances in which Regulation K required an Edge Act Corporation to divest itself of a subsidiary or an investment; but she recognised that the Federal Reserve had power to authorise retention. That power was a discretionary power conferred on the Federal Reserve to be exercised on a case by case basis.

Interpretation of contracts

20. We were referred to a number of familiar authorities about the general approach of the court in interpreting commercial contracts. They included *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900, *Arnold v Britton* [2015] UKSC 26, [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173. The principles are well established and there is no need to set them out in yet another paraphrase.

21. I will, however, highlight a few relevant points.

    i) Where the parties have used unambiguous language the court must apply it: *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 at [23].

    ii) Commercial common sense should not be invoked to undervalue the importance of the language of the provision which is to be interpreted. Save in a very unusual case, the meaning of a provision is to be found in its language: *Arnold v Britton* [2015] UKSC 36, [2015 AC] 1619 at [17].

    iii) Business common sense is useful to ascertain the purpose of a provision and how it might operate in practice. But in the tug o' war of commercial negotiation, business common sense can rarely assist the court in ascertaining on whose side the centre line marking on the tug o' war rope lay, when the negotiations ended: *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at [28]. Moreover, business common sense must be considered from the perspective of both parties to the contract; not just one of them: *BMA Special Opportunity Hub Fund Ltd v African Minerals Finance Ltd* [2013] EWCA Civ 416 at [24.]

    iv) A court should be wary of assuming that it knows what is or is not commercially sensible where the language points to a clear answer. Parties who have chosen clear language in which to express their bargain can be assumed to have intended the result and therefore not to have regarded it as one that has no commercial or economic rationale: *Palladian Partners LLP v The Republic of Argentina* [2024] EWCA Civ 641 at [59].

    v) A court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be an imprudent one for one of the parties to have agreed: *Arnold v Britton* at [20].

vi) In the case of a sophisticated and complex agreement, prepared with the assistance of skilled professionals, textual analysis is likely to be the principal tool of interpretation: *Wood v Capita Insurance Services Ltd* at [13].

vii) But even in such a case, negotiators may not achieve a logical and coherent text, because of conflicting aims, different drafting styles or deadlines which require compromise: *Wood v Capita* at [23]. In complex documents of the kind in issue there are bound to be ambiguities, infelicities and inconsistencies. An over-literal interpretation of one provision without regard to the whole may distort or frustrate the commercial purpose: *Re Sigma Finance Corp* [2009] UKHL 2, [2010] BCC 40 at [35].

viii) It is trite both that a provision in a formal document should be considered in the context of the document as a whole and that one would in principle expect words and phrases to be used consistently in a carefully drafted document, absent a reason for giving them different meanings: *Barnardo's v Buckinghamshire* [2018] UKSC 55, [2019] ICR 495 at [23].

The basic architecture of the options

22. In order to evaluate the various points raised in these appeals, I begin with the basic architecture of the options. The overall timetable is of some importance for many of the issues. I can do so by reference to the JPM Call Option during the first Option Exercise Period.

23. 16 December 2023 was the First Measurement Date. The valuation experts appointed by each of the parties were to determine the Call Option Fair Market Value within 15 days of the Measurement Date.

24. 31 December 2023 was the JRM First Option Exercise Date. That had the effect of opening the window during which the option could be exercised during the first JPM Option Exercise Period. The valuation experts were to produce their valuations by that date. The valuations were to take the form of a certificate which was to be supplied to the parties. If the valuations were within 15 per cent of each other, then the option price was to be the average of the two valuations. If they were more than 15 per cent apart, then a third valuation expert was to be appointed and requested to determine the Call Option Fair Market Value within 15 days of the appointment. Once the third valuation expert had determined the Call Option Fair Market Value, the purchase price was to be the average of that valuation and the valuation of the parties' expert valuer whose valuation was closer to that of the third valuation expert.

25. 29 January 2024 was the end of the First JPM Option Exercise Period which closed the window.

26. If notice was served exercising the JPM Call Option during the First JPM Option Exercise Period, then WRL had 10 Business Days from receipt of the notice to reject it. If WRL did not reject the notice within 10 Business Days, then it was deemed to accept it. If WRL accepted the notice then the parties were required to enter into a transfer agreement no later than 10 Business Days thereafter. The price payable for the shares was to be the Call Option Fair Market Value of the shares.

27. If, on the other hand, the JPM Call Option was not exercised during the JPM First Option Exercise Period, then the WRL Call Option arose. The WRL Option Exercise Date was 31 days after the JPM Option Exercise Date (i.e. 31 January 2024). That opened the window for the exercise of the WRL Call Option. The window remained open for 30 days. But if JPM served notice, and WRL rejected the JPM Call Option by notice given within 10 Business Days, then the parties were to proceed to the next Option Exercise Date. If WRL exercised the option by notice, then the parties were required to enter into a transfer agreement no later than 10 Business Days thereafter. The price payable for the shares was to be the Call Option Fair Market Value of the shares.

The "One-Shot" issue

28. Paragraph 2.3 of the SHA provides for the exercise by JPM of the JPM Call Option. It specifies five periods of potential exercise. But apart from the first period, each period is qualified by a proviso in the following terms:

> "provided neither the JPM Call Option nor the WRL Call Option has been previously exercised in accordance with this Schedule 1"

29. The question is: what is meant by "previously exercised"? WRL argue that the JPM Call Option is "exercised" by the service of notice; and a notice can only be served once. This was referred to as the "One-Shot" interpretation. JPM, on the other hand, argues that the option is not exercised merely by the service of a notice, if that notice does not result in a binding contract for the sale of WRL's shares. This was referred to as the "Multi-Shot" interpretation.

30. The judge held at [326] and [327] that the JPM Call Option was a substantive right to acquire the WRL Company Shares. Unless and until the service of a notice resulted in a binding contract for the acquisition of these shares, it could not be said that the option had been "exercised". The mere giving of a notice (which WRL was free to and did reject) did not amount to the exercise of the option. She summarised her conclusion at [402]:

> " In my view the natural interpretation of the language in the provisos to paragraph 2.3 is that "*exercised*" means the exercise of the substantive right and not merely the giving of a notice to exercise the right. Although on occasions within Schedule 1 the term "*exercise*" is not used consistently, when the Schedule is considered as a whole and in the context of the SHA as a whole, and having regard to commercial common sense, it is clear in my view that the objective meaning of the language is that JPM can send a JPM Exercise Notice in any and all of the four Option Exercise Periods and for the reasons set out above, I find that the Multi Shot Construction is correct."

31. WRL appeal against that conclusion. Mr Weekes KC, who argued this part of the case, in effect submits that the "One-Shot" interpretation is compelled by the language of the contract; and no amount of appeal to commercial sense can displace the clear language of the contract. Where the language of a contract is clear, the court must give effect to

it. This question logically comes first, because if Mr Weekes is right, JPM may have already exercised the JPM Call Option (as alleged in paragraph 78 of WRL's Defence) and the remaining issues either do not arise or are of minor importance.

32. Before coming to the detailed drafting of the contractual provisions, it is necessary to say something about the consequences of the rival interpretations. Both produce strange commercial results. The One-Shot interpretation has the effect that if JPM gives notice and WRL rejects it, JPM's option is lost even though it does not result in JPM acquiring WRL's shares. Thus:

    i) JPM could give notice and thereby "exercise" its call option in one (but only one) of the first three Option Exercise Periods; but

    ii) WRL could reject JPM's notice and call option if the valuation of Viva was below the Reference Valuation of €5 billion; and

    iii) WRL would then be free to "exercise" its own call option in the next or any subsequent Option Exercise Period, with the result that JPM must then sell its shares, without the protection of any minimum price.

33. The effect would be to render the JPM Call Option a limited blocking right to prevent WRL from exercising the WRL Call Option to acquire JPM's shares in one (and only one) of the four Option Exercise Periods.

34. JPM might hold back from "exercising" its call option in the first three Option Exercise Periods, in the hope of saving it up for the fourth and final Option Exercise Period when it could compel WRL to sell its shares whatever the valuation of Viva. But JPM would then be exposed to the risk of WRL exercising its own WRL Call Option to buy JPM's shares in any of the first three Option Exercise Periods, without the protection of any minimum price. This too would in practice deprive the JPM Call Option of any value or utility and would mean it did not function as an option.

35. On the other hand, if JPM's interpretation is correct, odd results also follow. In order to prevent WRL from exercising its own call option, JPM would have to serve a notice in each of the first three Option Exercise Periods even if it knew that WRL would reject the notice, and even if JPM did not then want to buy WRL's shares. The service of a notice in such circumstances would simply serve to block WRL's ability to serve its own notice, and would advance no immediate commercial advantage for JPM. If the intention had been to give JPM the right to buy WRL's shares without the risk of being bought out by WRL before the Fourth Option Exercise Period, why give WRL the apparent right to exercise an option before then? The WRL Call Option, in so far as it was capable of exercise during the first, second and third Option Exercise Periods, would be entirely illusory.

36. This is, therefore, in my judgment, one of those cases in which analysis of the text must be the primary tool.

37. Paragraph 2.3 begins by saying that "JPM may elect to exercise the JPM Call Option at the following times by sending the JPM Exercise Notice in accordance with paragraph 2.12 below." The times specified are the Option Exercise Periods, which are presented as alternatives separated (for the most part) by the word "or".

38. Both Mr Weekes and Ms Phelps KC, who argued this part of the case for JPM, built arguments on the opening words of paragraph 2.3 namely that JPM "may elect" to exercise the option; and Mr Weekes suggested that the separation of the Option Exercise Periods by the word "or" also had some significance. I do not consider that these arguments advance the point in issue. The word "elect" means simply that JPM may choose to exercise the option or not. It is inherent in the nature of an option that the option-holder has the choice whether or not to exercise it. The word "or" is of no significance either: it is neutral as to whether the JPM Exercise Notice can be sent during only one of the periods or in more than one. The question remains: what amounts to "exercise" of the JPM Call Option?

39. The introductory words to paragraph 2.3 are clear about what amounts to the exercise of the option. The option is exercised *by sending* a notice in accordance with paragraph 2.12. That is emphasised by paragraph 2.5 which states that the date of "exercise" of the JPM Call Option is the date when the notice under paragraph 2.12 "is sent." That is consistent with paragraph 2.12 that sets out what the exercise notice must contain:

> "2.12 The JPM Call Option shall be exercised by JPM sending WRL an irrevocable written exercise notice in accordance with Clause 29, which shall include:
>
> (a) the date on which the notice is given;
>
> (b) a statement to the effect that JPM is exercising the JPM Call Option;
>
> (c) JPM's reasonable and good faith estimate of the Exit Proceeds due to WRL (including any amounts to be set-off against the Exit Proceeds in accordance with Clause 22); and
>
> (d) a signature by or on behalf of JPM
>
> (the JPM Exercise Notice)"

40. Once again the language of the contract emphasises that the option is "exercised" by sending a notice in the required form. The notice itself must state that JPM "is exercising" the option. It is also of some consequence that a notice compliant with paragraph 2.12 is labelled the JPM *Exercise* Notice, both at the end of that paragraph and also in the definition section of the Schedule. As has been said many times, the words used to label a defined term are usually chosen as a distillation of the meaning or purpose of the term defined.

41. The notice is irrevocable, so JPM cannot change its mind. The notice must also include JPM's estimate of the Exit Proceeds due to WRL. That is, in essence, a mathematical calculation based on the Call Option Fair Market Value. Paragraph 2.6 (a) provides that if the JPM Call Option Price is less than €5 billion then WRL need not accept the JPM Call Option. If that value exceeds €5 billion, then WRL is deemed to accept it in accordance with paragraph 2.6 (b). By the time (or at the time) that the window for exercising the option has opened JPM will already have had the two valuation certificates provided by each party's valuer. If the two valuations are within 15 per cent of each other, then the option price will be known at the date of the service of the option

notice. JPM will therefore know whether WRL is free to reject the notice. But even if the two valuations are more than 15 per cent apart, JPM will at least know the parameters of the dispute.

42. It follows that if and when JPM sends a notice compliant with paragraph 2.12 it will know whether the proposal is one that WRL must accept or one which it is entitled to refuse. Moreover, if the value exceeds €5 billion, so that WRL is deemed to accept, there is nothing more that needs to be done other than to complete the transaction. JPM will have exercised its option merely by sending the Option Exercise Notice. In that situation, service of the notice does have the effect of bringing into existence a binding right to call for the shares. Why should the meaning of "exercise" differ as between the different Option Exercise Periods; or on what the Call Option Price is?

43. The sequential nature of the process is also reflected in paragraph 4.2 which applies "if either the JPM Call Option or WRL Call Option is exercised (and, if applicable, accepted)." The acceptance is something different from the exercise of the option. In addition this paragraph contemplates that the option may have been exercised *without* having been accepted. Paragraph 4.2 goes on to provide in sub-paragraph (a) that once Mandatory Consents to a transfer have been obtained:

> "WRL, where the JPM Call Option has been exercised, and JPM, where the WRL Call Option has been exercised, may (but is not obliged to) elect (within a period of five Business Days of the Unconditional Date) to require the Valuation Experts to prepare updated valuation reports…"

44. If the One Shot interpretation is correct, then "exercised" in sub-paragraph (a) is given the same meaning as in the opening part of that paragraph. If, on the other hand, the Multi-Shot interpretation is correct, the same word in the same paragraph must be given two different meanings.

45. There is a further point that arises under paragraph 4.2. Let it be supposed that in one of the first three JPM Option Exercise Periods, JPM serves a JPM Exercise Notice which WRL accepts. Mandatory Consents (which are essentially regulatory consents) are sought but refused. In those circumstances has JPM "exercised" the option? In my view Ms Phelps struggled to find an answer.

46. It is also instructive to consider the exercise of the WRL Call Option. Paragraph 2.4 provides that if JPM does not exercise its own option then WRL may exercise its own option "in accordance with paragraph 2.9". Paragraph 2.9 provides:

> "WRL may elect to exercise the WRL Call Option during the Option Exercise Period commencing on the relevant WRL Option Exercise Date by sending the WRL Exercise Notice in accordance with paragraph 2.13 below. WRL may only exercise the WRL Call Option if JPM has not already exercised the JPM Call Option in the relevant Option Exercise Period."

47. It is clear (and common ground) that WRL may exercise its own option "by sending the WRL Exercise Notice in accordance with paragraph 2.13 below." The mere act of sending the notice suffices to exercise the option. But WRL may only exercise its own

option "if JPM has not already exercised the JPM Call Option in the relevant Option Exercise Period". It is common ground for the purpose of this paragraph that JPM will have "exercised" its own option merely by sending an Exercise Notice. Any other interpretation would have the consequence that JPM could not block the WRL Call Option merely by sending the Option Exercise Notice. Yet that, on the Multi-Shot interpretation, is the primary purpose of serving the JPM Exercise Notice. I should also note the definition of "WRL Option Exercise Date". That date (in relation to the First Option Exercise Period) is 31 days after the:

> "JPM First Option Exercise Date, if JPM does not elect to exercise the JPM Call Option in accordance with paragraph 2.3 (a) of this Schedule 1."

48. It is the exercise of the JPM Call Option in accordance with paragraph 2.3 (a) which has the effect of deferring the WRL Option Exercise Date in accordance with this definition. JPM's case is that the mere service of a notice under that paragraph has that effect. That is entirely consistent with WRL's case that the sending of the notice amounts to the exercise of the JPM Call Option. What may differ is not the *manner* of exercise or the time of exercise, but the *consequences* of the exercise of the options. On JPM's case, however, "exercise" both in paragraph 2.9 and in the definition of "WRL Option Exercise Date" means something quite different from the meaning of the same word in paragraph 2.3, even though that definition expressly refers to JPM exercising its option "in accordance with paragraph 2.3 (a)". In other words, the interpretation that JPM gives to the word "exercise" in paragraph 2.3 is directly contradicted by the definition of "WRL Option Exercise Date."

49. Paragraph 2.13 provides that the WRL Call Option "shall be exercised by WRL sending an irrevocable notice" in the form required by that paragraph. Nothing further needs to be done in order to bring a contract for the sale of the shares into existence. That is recognised by paragraph 4.2 which applies "if either the JPM Call Option or the WRL Call Option is exercised (and, if applicable, accepted)". Since the contract does not provide for acceptance by JPM, paragraph 4.2 applies where the WRL Call Option has been "exercised". And the contract has told us many times that the WRL Call Option is "exercised" by "sending" a notice in the right form.

50. This interpretation gains additional traction from a consideration of how the JPM Call Option works during the Fourth Option Exercise Period. Once again the contract provides that the option is to be exercised by "sending" a notice in the requisite form. But under paragraph 2.7 the effect of the notice during the Fourth Option Exercise Period is that WRL is "required to sell the WRL Company Shares to JPM." In other words, the exercise of the option by sending the notice brings about a binding contract for the sale of the shares.

51. The Multi-Shot interpretation requires a quite different meaning to be given to the word "exercise" as applied to JPM on the one hand and WRL on the other. It also requires a quite different meaning to be attached to the word "exercise" depending on whether it is used in relation to the First, Second or Third Option Exercise Period on the one hand, or the Fourth Option Exercise Period on the other. It requires a different meaning to be given to the word "exercise" in different paragraphs of the Schedule. In a complex agreement like this one (clearly drafted by professionals) one would expect the same word to be used consistently. To return to paragraph 2.3, I have noted that the proviso

states that in periods other than the First Option Period the JPM Call Option may be exercised:

> "provided neither the JPM Call Option nor the WRL Call Option has been previously exercised in accordance with this Schedule 1"

52. The same verb "exercised" governs both the JPM Call Option and the WRL Call Option. In the case of the WRL Call Option it is common ground that it means that WRL have not served a notice. But on the Multi-Shot interpretation "exercised" in the very same phrase governing both options means something quite different depending on whether the JPM Call Option or the WRL Call Option is the relevant option.

53. We were referred to a diagram referred to in Schedule 1 as an "illustrative example" of the way the Call Options were intended to work. I did not find it a helpful document. It threw up as many questions as it answered.

54. The judge found support for her preferred interpretation in paragraph 2.6. That relevantly provides:

> "Save with respect to any JPM Exercise Notice served after the JPM Fourth Option Exercise Date…, if the JPM Call Option Price during the applicable Option Exercise Period during which a JPM Exercise Notice is sent is:
>
> (a) less than the Reference Valuation [i.e. €5 billion], then WRL shall not be required to (but may at its discretion) accept the JPM Call Option and sell the WRL Company Shares to JPM (provided that, unless WRL rejects the JPM Call Option by written notice to JPM within 10 Business Days of receipt of the JPM Exercise Notice, WRL shall be deemed to have accepted the JPM Call Option and shall be required to sell the WRL Company Shares to JPM for the Exit Proceeds on the terms set out in this Schedule 1, and, for the avoidance of doubt, if WRL issues such notice to JPM, the Parties shall proceed to the next Option Exercise Date)"

55. The point that arises under this paragraph is that it provides for "the Parties" (not just WRL) to proceed to the next "Option Exercise Date" (not just the next WRL Option Exercise Date). Because "Option Exercise Date" as defined includes both the JPM Option Exercise Dates and the WRL Option Exercise Dates, it is implicit that JPM has not lost its option by sending an Option Exercise Notice which WRL rejects. I do not regard that as a weighty point. The next Option Exercise Date is simply the next date on which one of the parties is entitled to exercise an option. That is borne out by the definition of Option Exercise Date which refers to the JPM Option Exercise Dates, and/or any WRL Exercise Date "or any one of them as applicable". If JPM has already exercised its option, that party will be WRL, and the applicable Option Exercise Dates will be the WRL Option Exercise Dates. But to the extent that it does have any weight, it is, in my view, outweighed by the other textual provisions that I have considered.

56. The judge also relied heavily on her perception that the grant of the option was the grant of a substantive right to acquire the shares. There is, in my judgment, some force in this point, but not as much as the judge thought. First, on the basis that it is an option in the sense in which the judge understood, there are nevertheless conditions attached to it. Paragraphs 2.3 and 2.12 set out those conditions and how they are to be fulfilled. In the conventional case of an option it is in fact exercised by the giving of notice. Any further conditions precedent must be clearly expressed.

57. Second, it may well be that the right, although described as an option, is not really an option at all. The parties have created contractual rights, but in the case of the JPM Call Option have wrongly labelled those rights as an option. This takes a little explanation which is best done by reference to *Spiro v Glencrown Properties Ltd* [1991] Ch 537 on which JPM relied. The issue in that case was whether an option granted in writing satisfied the formality requirements in section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 which required a contract for the sale or other disposition of an interest in land to be in writing. Hoffmann J held that it did. He discussed the nature of an option at a number of places in his judgment. At 541 he said:

> "But only the grant of the option depends upon consent. The exercise of the option is a unilateral act. It would destroy the very purpose of the option if the purchaser had to obtain the vendor's countersignature to the notice by which it was exercised."

58. Yet that is exactly what paragraph 2 requires, in practical terms, if the price is based on a value of less than €5 billion. If, on the other hand, the price is based on a greater value, then sending a notice fulfils this purpose. Hoffmann J went on to say:

> "An option to buy land can properly be described as a contract for the sale of that land conditional on the exercise of the option."

59. That cannot be said in the present case. Whether it can be so described depends on the price. Hoffmann J went on to quote Sir George Jessel MR in *London and South Western Railway Co v Gomm* (1882) 20 Ch D 562, 581:

> "The right to call for a conveyance of the land is an equitable interest or an equitable estate. In the ordinary case of a contract for purchase there is no doubt about this, and an option for repurchase is not different in its nature. A person exercising the option has to do two things, he has to give notice of his intention to purchase, and to pay the purchase money; but as far as the man who is liable to convey is concerned, his estate or interest is taken away from him without his consent, and the right to take it away being vested in another, the covenant giving the option must give that other an interest in the land."

60. In the present case WRL's shares are not liable to be taken away from it without its consent, unless the price is based on a value exceeding €5 billion or the option is exercised in the Fourth Option Exercise Period. As Hoffmann J said at 544, an option is a sui generis species of contract, and the genus of this particular contract is even more so. It is, in my judgment, a fallacy to work backwards from the label to the rights and obligations rather than examining the contractual rights and obligations in order to

decide whether the label is appropriate. As Sir Christopher Floyd put in *Ortiz-Patino v MGI Golf & Leisure Opportunities Fund Ltd* [2024] EWCA Civ 862 at [37]:

> "It is obviously wrong in principle to start with a preconceived view as to the commercial benefits to be derived by a party from an agreement and then to shoe-horn the language of the agreement to conform with that view."

61. I would allow WRL's appeal on this ground.

Must the valuers disregard Regulation K?

62. As the definition of Call Option Fair Market Value makes clear, the overall object of the valuation exercise is to determine the fair market value of the shares in question. The essence of an open market valuation was distilled by Hoffmann LJ in *IRC v Gray* [1994] STC 360:

> "The property must be assumed to have been capable of sale in the open market, even if in fact it was inherently unassignable or held subject to restrictions on sale. The question is what a purchaser in the open market would have paid to enjoy whatever rights attached to the property at the relevant date: *Inland Revenue Commissioners v Crossman* [1937] AC 26. Furthermore, the hypothesis must be applied to the property as it actually existed and not to some other property, even if in real life a vendor would have been likely to make some changes or improvements before putting it on the market: *Duke of Buccleuch v Inland Revenue Commissioners* [1967] 1 AC 506, 525. To this extent, but only to this extent, the express terms of the statute may introduce an element of artificiality into the hypothesis.
>
> In all other respects, the theme which runs through the authorities is that one assumes that the hypothetical vendor and purchaser did whatever reasonable people buying and selling such property would be likely to have done in real life. The hypothetical vendor is an anonymous but reasonable vendor, who goes about the sale as a prudent man of business, negotiating seriously without giving the impression of being either over-anxious or unduly reluctant. The hypothetical buyer is slightly less anonymous. He too is assumed to have behaved reasonably, making proper inquiries about the property and not appearing too eager to buy. But he also reflects reality in that he embodies whatever was actually the demand for that property at the relevant time. It cannot be too strongly emphasised that although the sale is hypothetical, there is nothing hypothetical about the open market in which it is supposed to have taken place. The concept of the open market involves assuming that the whole world was free to bid, and then forming a view about what in those circumstances would in real life have been the best price reasonably obtainable. The practical nature of this exercise

> will usually mean that although in principle no one is excluded from consideration, most of the world will usually play no part in the calculation. The inquiry will often focus upon what a relatively small number of people would be likely to have paid. It may have to arrive at a figure within a range of prices which the evidence shows that various people would have been likely to pay, reflecting, for example, the fact that one person had a particular reason for paying a higher price than others, but taking into account, if appropriate, the possibility that through accident or whim he might not actually have bought. The valuation is thus a retrospective exercise in probabilities, wholly derived from the real world but rarely committed to the proposition that a sale to a particular purchaser would definitely have happened.
>
> It is often said that the hypothetical vendor and purchaser must be assumed to have been "willing", but I doubt whether this adds anything to the assumption that they must have behaved as one would reasonably expect of prudent parties who had in fact agreed a sale on the relevant date. It certainly does not mean that having calculated the price which the property might reasonably have been expected to fetch in the way I have described, one then asks whether the hypothetical parties would have been pleased or disappointed with the result; for example, by reference to what the property might have been worth at a different time or in different circumstances. Such considerations are irrelevant."

63. The first of the quoted paragraphs encapsulates what used to be known as the principle that property is to be valued *rebus sic stantibus* (i.e. as things stand) but is now more commonly referred to as the "reality principle". Lord Neuberger summarised this principle in *Transport for London v Spirerose Ltd* [2009] UKHL 44, [2009] 1 WLR 1797, 1814:

> "if a statute directs that property is to be valued on an open market basis as at a certain date, one would not expect any counter-factual assumptions to be made other than those which are inherent in the valuation exercise (such as the assumption that the property has been on the market and is the subject of a sale agreement on the valuation date) or those which are directed by the statute."

64. In *Secretary of State for Transport v Curzon Park Ltd* [2023] UKSC 30, [2023] 1 WLR 2762 at [64] the Supreme Court described the reality principle as "a fundamental principle of valuation". At [46] they referred, without any criticism, to my elucidation of the principle in the Court of Appeal in that case ([2021] EWCA Civ 651, [2021] PTSR 1560) on which Mr Weekes relied. What I said was this:

> "[42] I expanded on the reality principle in *Harbinger Capital Partners v Caldwell* [2013] EWCA Civ 492. Although mine was a dissenting judgment, I do not think that my colleagues (Mummery and Beatson LJJ) disagreed with my statement of

principle. They disagreed with the application of the principle to the particular provision under consideration. What I said was:

"22. There are many areas of the law in which an amount is to be ascertained by postulating a hypothetical transaction of one kind or another. Rating is perhaps the oldest example, for which purpose rateable value was measured by postulating the hypothetical grant of a tenancy from year to year. But hypothetical transactions abound in other areas of the law: for example compulsory acquisition, taxation and rent review clauses. Sometimes the hypothesis is statutory and sometimes it is contractual. The courts have developed a well-established set of principles that apply to both kinds of case. The most important of these is that things are to be taken as they are in reality on the valuation date, except to the extent that the instrument postulating the hypothetical transaction requires a departure from reality. In the old cases this is summarised in the Latin phrase rebus sic stantibus. In the more modern cases it has been described as the principle of reality*: Hoare v National Trust* (1998) 77 P & CR 366.

"23. The following points amplify the reality principle:

"(i) The hypothesis is only a mechanism for enabling one to arrive at a value of particular property for a particular purpose. It does not entitle the valuer to depart from the real world further than the hypothesis compels: *Hoare v National Trust* at p 380 (Schiemann LJ). The various hypotheses must be taken no further than their terms make strictly necessary: *Cornwall Coast County Club v Cardgrange Ltd* [1987] 1 EGLR 146, 152. It is necessary to adhere to reality subject only to giving full effect to the hypothesis: *Hoare v National Trust* at p 387 (Peter Gibson LJ).

"(ii) Giving effect to the hypothesis may require a legal impediment to the implementation of the hypothesis to be ignored or treated as overridden; but only to the extent necessary to enable the hypothesis to be effective: *Inland Revenue Comrs v Crossman* [1937] AC 26; *Law Land Co Ltd v Consumers' Association Ltd* [1980] 2 EGLR 109; *Walton v Inland Revenue Comrs* [1996] STC 98 .

"(iii) The world of make-believe should be kept as near as possible to reality: *Trocette Property Co Ltd v Greater London Council* (1972) 28 P & CR 408, 420 (Lawton LJ); *Hoare v National Trust* at p 386 (Peter Gibson LJ). Reality must be adhered to so far as possible: *Cornwall Coast County Club v Cardgrange Ltd* at p 150 (Scott J). The valuer should depart from reality only when the hypothesis so requires: *Hoare v National Trust* at p 388 (Peter Gibson LJ).

> "(iv) Where the hypothesis inevitably entails a particular consequence, the valuer must take that consequence into account: *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109, 132.
>
> "(v) But there is a clear distinction between hypotheses expressly directed to be made and assumptions allegedly consequential on the express hypotheses. Where the alleged consequence is not inevitable, but merely possible (or even probable), then the consequence cannot be assumed to have happened: *Cornwall Coast County Club v Cardgrange Ltd* at p 149 (Scott J).
>
> "(vi) The reality principle applies as at the valuation date. Events which postdate the valuation date cannot generally be taken into account. But the purchaser will have regard to future possibilities, and it is his perception of the future possibilities that matters. There is, in this respect, a clear difference between events before and after the valuation date. What has happened before the valuation date is either known (because it really happened) or is required by the hypothesis to be assumed to have happened. But the future is unknowable. Assumptions about the future should not be made. Nor can a tribunal make findings of fact about the future. So all that a purchaser (and by extension a valuer) can do is assess the effect on current value of future possibilities.""

65. The same applies to a contract directing a property to be valued on an open market basis.

66. Mr Handyside KC, for JPM, relied on further parts of my judgment in the *Harbinger* case. At [24] I said that the reality principle had a part to play in the interpretation of a valuation hypothesis; not merely in its application. At [46] I said:

> "But as I have said there is a critical difference in the context of a valuation between events up to and including the valuation date and events thereafter. The basic principle is that the valuer takes reality as it was on the valuation date, subject to any departures required by the hypothesis under which he values, but he makes no *assumptions* about the future. His job is to determine what price would be paid for the asset in question on the valuation date itself. Whatever might happen after the valuation date has not happened either in the real world or in the hypothetical world. The purchaser will no doubt consider all the possibilities, but he would be foolish in the extreme if he were confidently to predict the future."

67. Thus, in the ordinary case, where there are legal constraints which affect the price that could be obtained in the open market those legal constraints must be taken into account in the valuation. Regulation K exists in the real world. It is a US federal statute. It applies to a variety of US institutions, not just to JPM. The reality in the present case is

that, at the time of the hypothetical transaction, Viva was (indirectly) subject to Regulation K. As Hoffmann LJ said, an open market valuation of an asset does not permit a valuation by reference to what the asset might have fetched in different circumstances. Regulation K is not a legal constraint which prevents the shares from being hypothetically placed on the market for sale. It is not, therefore, the kind of legal constraint which must be ignored in order to give effect to the hypothesis. The essential point underlying the reality principle is that it identifies the asset that is to be valued, and the circumstances in which it is to be valued. It does not identify a method of valuation. In other words, there is a distinction between *what* you value, the *measure* of value and *how* you value it. A direction to value an asset at its open market value identifies the measure of value. It does not identify the asset itself. The existence and application of Regulation K may affect the price that could be obtained for the asset; but that is all.

68. There is one other point about the concept of open market value which I should make. It is well settled that if one person in the market is prepared to pay more than other bidders (and on the facts would have bid) then that higher price will be the open market value. That is illustrated by *IRC v Clay* [1914] 3 KB 466. The case concerned the open market value of a house. It was worth £750 as a residence for private occupation, but a nurses' home next door wanted the property in order to extend the home, and paid £1,000 for it. Sir Herbert Cozens-Hardy MR said at 472:

> "I can see no ground for excluding from consideration the fact that the property is so situate that to one or more persons it presents greater attractions than to anybody else. The house or the land may immediately adjoin one or more landowners likely to offer more than the property would be worth to anybody else. This is a fact which cannot be disregarded."

69. If, therefore, within the pool of potential purchasers there are some who would pay a higher price than others then (depending on the valuers' view of whether they would bid) the open market value will be the higher price.

70. The general approach to the valuation in the SHA is set out in paragraph 3.6, with more detailed instructions in paragraph 3.7. Paragraph 3.6 provides:

> "Each Valuation Expert shall exercise its independent professional judgment in arriving at a determination of the Call Option Fair Market Value (which shall be expressed in Euro) of the Shares by:
>
> (a) assessing the historical and projected financial performance of the Group;
>
> (b) applying generally accepted methodologies for valuing the Group, including discounted cash flow analysis, comparisons with any similar companies whose shares are traded on any stock exchange and comparisons with any publicly disclosed sales of similar companies or significant pools of similar assets; and/or

(c) such other valuation methods as the Valuation Expert shall consider to be appropriate in the circumstances."

71. The focus of the argument was on paragraph 3.7 (b) (vi).

72. Mr Handyside, argues that these two paragraphs require a two-stage process. The first stage, essentially contained in paragraph 3.7 (b) (ii) and paragraph 3.7 (b) (vi), consists of what he called "data inputs". The judge accepted the existence of those two stages at [100].

73. Mr Handyside goes on to argue that those data inputs are based on the Group's actual performance to date, and its expected future performance. Both are concerned with the Group as it is, not what it might become if Regulation K ceases to apply. Armed with those data inputs, the experts may go on to consider stage 2, essentially contained in paragraph 3.6. At that stage the experts, using their independent professional judgment, are entitled to attribute to Viva whatever additional value (if any) they consider to be appropriate to reflect Viva's untapped potential to pursue activities (whether in the US or elsewhere) which it cannot undertake while under the ownership of WRL and JPM.

74. Mr Weekes argues the contrary. He points out that if WRL (or any other entity which is not an Edge Act Corporation) were to purchase JPM's shares, Regulation K would not be relevant. Likewise, if JPM were to purchase WRL's shares, JPM itself could escape Regulation K by transferring its shareholding in Viva either to a different JPM entity which is not an Edge Act Corporation or to a third party. It follows, therefore, that it would make no sense for Viva to be valued on the assumption that Regulation K would continue to apply indirectly to Viva. The reality principle, he said, meant that the reality in the present case was that there was a sale in the open market; and that in order to comply with that overriding instruction, it was necessary to depart from the position that Viva was (indirectly) subject to Regulation K.

75. In my judgment Mr Weekes' submission confuses a number of different elements. In the first place it confuses what the asset is and what the measure of value of the asset is. The asset is the Group as it was on the valuation date. The measure of value is its open market value on that date in the state in which it was.

76. Second, the reality was not that there was an open market sale. On the contrary the reality was that there was no open market sale, but a sale under the terms of Schedule 1 by one shareholder to another. The open market sale is the hypothesis by which the actual sale price is to be determined. It does no more than to lay down the measure of value for the asset to be sold.

77. Third, JPM's argument does not require any *assumptions* to be made about the future applicability of Regulation K. It may or may not apply depending on what kind of hypothetical buyer is assumed to buy the shares. The likelihood of Regulation K continuing to apply is a matter for the valuers' professional judgment.

78. In my judgment, the judge (who was not referred to the reality principle) unfortunately made the same error. The judge placed particular emphasis on paragraph 3.7 (a), (b) and (d). What she said was this:

> "[53] In my view the clearest indications on the language that in determining the market value, the Valuation Expert should ignore the restrictions which currently apply to JPM by virtue of Regulation K are in sub paragraphs (a), (c) and (d) of paragraph 3.7.
>
> [54] Paragraph 3.7(a) requires the valuer to value the Group "on a going concern basis" for "an arm's length sale between a willing buyer and a willing seller" and on the assumption that the shares are being sold "in an open market".
>
> [55] It was submitted for JPM that this sub paragraph does not affect what it termed the "data inputs" under sub paragraph 3.7(b) and that this paragraph meant that the value was not distorted by any discount or premium by virtue of the buyer being JPM or WRL. It was further submitted that the term "going concern" suggested that it was the "actual business" that was being valued.
>
> [56] Sub paragraphs (c) and (d) expressly address the point that any financial impact from JPM being the buyer is to be disregarded so that it is unlikely in this sophisticated and professionally drafted contract to be the objective meaning of sub paragraph (a) as taken in context it would be duplicative."

79. The first two instructions given to the valuers (paragraphs 3.7 (a) and (b) (i)) are that the Group is to be valued as a going concern for an arms' length sale between a willing buyer and a willing seller, and that it is to be valued as a whole. The Group on the valuation date was a going concern. But the only concern that was "going" was the business of the Group as it actually was on that date. The judge said that the phrase "going concern" simply meant that the Group was not to be valued on a break-up basis. That, no doubt, is true; but it does not alter the nature or identification of the asset to be valued. Second, the hypothesis of the arms' length sale in the open market likewise does not identify the asset to be valued. It merely prescribes the measure of value to be ascribed to that asset once properly identified. But what those paragraphs do not do is to *require* assumptions to be made about the future.

80. The next instruction (paragraph 3.7 (b) (ii)) is that the valuers must take into account the Group's "current and reasonably expected operational capabilities under the ownership of WRL and JPM". To the extent that this instruction requires it to be assumed that the Group remains under the ownership of WRL and JPM (which it plainly does) I cannot see how this permits the valuers to disregard the effect of Regulation K on Viva's current and reasonably expected operational capabilities while under that ownership. Its reasonably expected operational capabilities are its future capabilities, still under the same ownership. To disregard the actual effect of Regulation K on Viva would, again, be a counter-factual assumption not directed to be made by the SHA. The judge dealt with this sub-paragraph at [65] to [68]. At [65] she said:

> "Thus the objective meaning of the language in sub paragraph (b)(ii) indicates that the valuer is required, in carrying out his assessment of the value of the Shares, to take into account both

> the present and the future operational capabilities of the Group, subject to the qualification that the anticipated future capabilities must be "*reasonably*" anticipated or expected "*under the ownership of WRL and JPM"* ."

81. So far so good. But what is missing in the remainder of her treatment of this sub-paragraph is any discussion of the effect of the qualification that those capabilities are to be assessed while Viva is owned by WRL and JPM. At [66] she distinguished between "operational capabilities" and "legal or regulatory constraints". But to my mind, this distinction is illusory, because it is the very existence of regulatory constraints which affects Viva's operational capabilities. It is true that, as the judge found, those constraints would (or at least might) disappear if JPM ceased to be a shareholder, but sub-paragraph (b) (ii) requires the assumption that JPM continues to be a shareholder. At [67] the judge said that it was commercial common sense to take into account future business even if it involves operational capabilities which the Group does not currently have. But under paragraph 3.7 (b) (ii) the operational capabilities must be capabilities that the Group may have on the basis that JPM remains a shareholder. Future business may be taken into account in the valuation under paragraph 3.6 to the extent that, in the valuers' professional opinion, a hypothetical purchaser would pay an enhanced price based on their perception of untapped additional value which could be realised in the future. But that potential does not alter the asset to be valued.

82. At [60] the judge supported her conclusion by reference to the instructions in paragraphs 3.7 (c) and 3.7 (d). These paragraphs require the valuer to disregard "any financial impact that may be expected to be realised or derived as a result of WRL or JPM exercising any Call Option" or that "may be expected to be realised or derived as a result of JPM acquiring a majority stake in the Company." The major difficulty with this reasoning is that, on the judge's findings, Viva was already (indirectly) constrained by Regulation K. In the event that JPM exercises its Call Option (thereby acquiring a majority stake in the company) the very same constraints remain in place. So on that hypothesis there is no financial impact to be disregarded. Moreover, if WRL were to acquire JPM's shares, it may well be the case that the fact of that acquisition would remove any possible constraint imposed by Regulation K, yet the valuer would be required to disregard it. In addition, even assuming that the judge was right as regards these sub-paragraphs, I cannot see how that overrides sub-paragraphs 3.7 (a), 3.7 (b) (ii) or the detailed financial information required by sub-paragraph 3.7 (b) (vi).

83. Paragraph 3.7 (b) (vi) requires the valuers to value the Group by reference to:

> "(vi) financial projections to be prepared by the Company, approved by the Board and Shareholders, and provided to the Valuation Expert, which shall include but not be limited to:
>
> (A) the Group's actual financial performance in the then-current calendar year on a quarterly basis and projected financial performance in the subsequent three full calendar years;
>
> (B) the year-to-date actual financial performance of the Group for the then-current period;

> (C) the Group's financial performance in the prior three full calendar years;
>
> (D) detailed income statements, balance sheets and cash flow statements for the time periods listed in sub-paragraphs (A), (B) and (C)"

84. Thus, paragraph 3.7 (b) (vi) requires a number of financial documents to be prepared. These include "the Group's actual performance in the then current calendar year"; the "year-to-date actual financial performance of the Group for the then current period" and "the Group's financial performance in the prior three full calendar years". Since these documents relate to the Group's actual financial performance they must necessarily be prepared on the basis of what the Group actually did at a time when it was (indirectly) subject to the constraints in Regulation K. I cannot see anything in this paragraph which authorises, let alone requires, preparation of counter-factual historical data ignoring the impact on the Group of Regulation K.

85. If, as I think, and as I think Mr Weekes accepted, the historical data relate to what the Group actually did, it would be very surprising if the "projected financial performance" were to be assessed on a wholly different basis by reference to a business that the Group had not carried on and could not carry on. The detailed financial inputs required by paragraph 3.7 (b) (vi) must be read consistently with the more general instruction in paragraph 3.7 (b) (ii). In my judgment those inputs are designed to be complementary to that more general instruction: not to override it. That is all the more so since all the projections made under paragraph 3.7 (b) (vi) must be approved by both shareholders. The further away from reality the projections are, the less likely it is that the shareholders will be able to agree them. The judge tried to solve this conundrum in two ways. First, she recorded that JPM accepted that it had to act reasonably in approving financial projections prepared under paragraph 3.7 (b) (vi). But she went further and held that it was an implied term of the agreement that JPM were not entitled to withhold consent to the financial projections on the basis that they included/reflected activities limited or excluded by Regulation K. This sits ill with Mr Weekes' submission that the contract was so clear that there was no need to resort to anything outside the words of the contract. The judge's acceptance of the implied term was, in my judgment, predicated on her conclusion that Regulation K had to be disregarded. But the question at this stage is *whether* Regulation K must be disregarded; and whether paragraph 3.7 (b) (vi) sheds any light on that question.

86. Moreover, the implied terms that the judge held to exist do not solve the problem. Accepting for the sake of argument, that JPM must act reasonably, and that it cannot withhold consent (however reasonably) on the ground that a financial projection relates to activities that Viva cannot carry on at the date of the projections, what happens if there is a reasonable disagreement between the shareholders about the accuracy or validity of the projection in question? Mr Weekes' response was that if there was such a disagreement then both parties' projections could be presented to the valuation experts under paragraph 3.7 (b) (vi). But that would be a direct contradiction of the requirement in that paragraph that the financial projections must be agreed by the shareholders.

87. There is a further objection both to the judge's conclusion that there was an implied term to the effect that JPM would not withhold consent to a financial projection on grounds connected with Regulation K and also to Mr Weekes' submission that the

parties could present unagreed financial projections to the valuation experts under paragraph 3.7 (b) (vi). That is because paragraph 3.8 provides:

> "The Call Option Fair Market Value of the Shares may also reflect any other factors suggested by a Shareholder or the Group which either Valuation Expert reasonably believes should be taken into account."

88. This paragraph, which is in very wide terms, permits either shareholder to place before the expert any other material that it considers relevant. It is then for the valuation expert, exercising independent professional judgment as required by paragraph 3.6, to decide what weight, if any, to give to it. This would apply both to hypothetical future projections of a business unconstrained by Regulation K, and also to unagreed financial projections. So it is open to WRL, for example, to place material before the valuer which reflects the value that Viva would have if unconstrained by Regulation K. If the valuer reasonably believes that that material should be taken into account, then it will be. Paragraph 3.6 makes it clear that each valuation expert must exercise its independent professional judgment; and that instruction would apply to any material put before the expert under paragraph 3.8. Thus the implied term found by the judge was not necessary. The judge took the view at [108] that reliance on paragraph 3.8 would contradict the express terms of the contract. I cannot see why that is so. First, paragraph 3.8 is itself one the express terms of the contract. Second paragraph 3.8 does not contradict any of the other terms of the contract. It complements or expands them.

89. I consider that part of the confusion stemmed from a perception that JPM was advancing an argument that differed from the argument that it was in fact advancing. As I have said, JPM did not suggest that it should be *assumed* that that Regulation K will continue to apply.

90. No *assumptions* may be made about the future, but the experts are of course entitled to consider and evaluate future possibilities. The potential pool of hypothetical buyers may comprise a variety of institutions, some of which may be Edge Act Corporations and others of which may not be. The valuation will reflect the fact that one buyer (or group of buyers) had a particular reason for paying a higher price than others, but taking into account, if appropriate, the possibility that through accident or whim it might not actually have bought. The assumption which the judge found would have committed the valuation to a sale to an institution which was not an Edge Act Corporation or (most improbably) to an Edge Act Corporation which was not restricted by Regulation K.

91. As I have said, when they come to exercise their professional judgment in valuing the shares, the experts are *entitled* to take into account the future prospect that, on a hypothetical sale of the Group, the Group would free itself from any restraint imposed by Regulation K.

92. But that is very different from saying that the valuers are *required* to ignore the actual constraints imposed by Regulation K (either on Viva itself or on prospective purchasers which are Edge Corporations) when working on the basis of paragraph 3.7.

93. The judge concluded at [90]:

> "I therefore find that as a matter of construction of paragraph 3 of Schedule 1, in determining the Call Option Fair Market Value, the Valuation Experts are required to disregard any obligations, restrictions, and/or limitations under Regulation K, Regulation Y or the Bank Holding Company Act (the "BHC Act") that are in fact applicable to WRL, JPM or Viva by reason of JPM having a shareholding in Viva."

94. That conclusion was transposed into the first declaration that the judge made. For the reasons I have given, I disagree, and would discharge that declaration. To that extent I would allow JPM's appeal on that ground.

When is the third valuation expert to be appointed?

95. Mr Handyside argues that under the terms of the SHA the third valuation expert must be appointed at the outset of the process; and before the parties' respective valuers make their own valuations. Mr Weekes by contrast supports the judge's conclusion that the third expert is not to be appointed until after the parties' respective valuers have made their own valuations, and then only if the parties' own valuers are more than 15 per cent apart.

96. The appointment of the third expert is dealt with by paragraph 3.10 of Schedule 1. The problem arises because of a possible contradiction between two of its constituent parts. The relevant parts of paragraph 3.10 read as follows:

> "If the Call Option Fair Market Value of the Shares as determined by one Valuation Expert is:
>
> …
>
> (b) more than 15% apart from the value determined by the other Valuation Expert …then the parties shall appoint:
>
> (i) any one of the firms of accountants listed in paragraph 3.2 as the Shareholders may agree…; or
>
> (ii) if agreement is not reached pursuant to subparagraph (i) within 10 Business Days of the Effective Date, such internationally recognised firm of accountants, independent of the Shareholders, as the International Centre for Expertise of the International Chamber of Commerce shall appoint at the request of either Shareholder
>
> (in either case, the Third Valuation Expert) and the Third Valuation Expert shall be requested to determine the Call Option Fair Market Value of the Shares within 15 days of its appointment and follow the process as set out in this paragraph 3."

97. The problem is that "Effective Date" is defined by clause 1.2 of the SHA as "Closing".

98. The judge's discussion of this issue begins at [219]. She said:

> " Looking first at the language of the paragraph it seems to me correct, as WRL submitted, that the language provides that if the condition set out in 3.10(b) is satisfied, namely that the Call Option Fair Market Value determined by one valuer is more than 15% apart from the value determined by the other valuer, the condition in paragraph 3.10(b) is satisfied and the sub paragraph provides "*then*" the parties shall appoint the persons identified in sub paragraphs (b)(i) or (b)(ii)."

99. I agree. That is the natural (and logical) reading of a sentence with the elements "if… then". In grammatical terms the "if" part of the sentence which expresses the condition is called the protasis, and the "then" part of the sentence which expresses the consequence of the condition being satisfied is called the apodosis. That part of the sentence beginning with "then" is not reached until the condition introduced by "if" has been satisfied. In my view that reading is supported by one's expectations of what reasonable people would do. It would be surprising if the parties had agreed that a third expert would be on stand-by duty for a period of many years just in case a dispute arose. In addition, as the judge pointed out at [233], the third expert must be requested to determine the Call Option Fair Market Value within 15 days of its "appointment". But "appointment" in that part of the clause cannot relate back to the Effective Date, at which point no Measurement Date had arrived and no option had arisen; or to option periods in which no option had been exercised.

100. At [236] the judge quoted part of the judgment of Lord Hodge in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173 at [10]:

> "The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning."

101. Applying that approach, she concluded at [237]:

> "In my view the language of paragraph 3.10 does not allow for a literal interpretation of the wording of the paragraph but weighing the language against the wider context and the competing arguments as to business common sense, for the reasons discussed above, I find that the objective meaning of the language is that is it a condition precedent to the appointment of a Third Valuation Expert by the ICC that the Valuation Experts have produced determinations of the Call Option Fair Market Value that are more than 15% apart."

102. JPM stressed the importance of knowing what the purchase price would be before committing itself to the acquisition of the shares. In the case of party valuations more than 15 per cent apart, that would not be known until the Third Valuation Expert had

performed their assigned task of valuation. The timetable is a tight one; and the Third Valuation Expert must be in a position to carry out the valuation within 15 days if the price is to be ascertained before JPM decides whether or not to serve an Option Exercise Notice. In order to give effect to that concern the direction that the parties must "appoint" one of the listed firms of accountants means that the firm is appointed to a *role*; whereas the use of the word "appointment" in the request to the Third Valuation Expert to produce a valuation within 15 days refers to an appointment to perform a particular *task*.

103. I do not find this argument persuasive. In the first place, the grant of an option to purchase property (whether shares or land) for its open market value is commonplace. Such an option is often exercised by the service of a notice, with the resolution of any dispute about value following later. Second, in the case of the WRL Call Option, it is plain that it is exercised on the service of a notice. So if and when WRL exercises its own option, it will not necessarily know what the ultimate purchase price will be. There is no warrant for treating the parties unequally in this respect. Third, by the time JPM serves its notice, it will already have had the two party valuations, so it will know the parameters of any dispute. Mr Handyside suggested that the Third Valuation Expert might produce a valuation that was even higher than the two party valuations. Although that is a theoretical possibility, in practice it is most unlikely to happen. Fourth, although on this interpretation there is a timetable for the appointment of a firm to a *role*, there is no timetable for the appointment of a person to a *task*. Fifth, if the use of the word "appointment" is intended to refer to the internal assignment within the appointed firm to a person (or team) to carry out the valuation, "appointment" is a very odd word to choose. Sixth, one would expect the same word or concept to be consistently used in the same paragraph.

104. As I have said, the SHA is a long and complex document, plainly drafted by sophisticated professionals. But even sophisticated professionals can make slips.

105. The use of "Effective Date" in paragraph 3.10 is precisely such slip. In short, I agree with the judge on this issue for the reasons that she gave.

Is there a further condition precedent to appointment of a third expert by the ICC?

106. The issue under this head is whether the ICC may appoint a Third Valuation Expert where one or more of the valuations produced by the parties' own valuers contains (or is alleged to contain) a manifest error. The judge held that it was a condition precedent to the making of an appointment by the ICC that there was no manifest error in either of the parties' own valuations (albeit that a mere assertion of manifest error would not preclude the appointment of a Third Valuation Expert).

107. She reasoned that each of the parties' experts was required to produce the "Call Option Fair Market Value" determined in accordance with paragraph 3. Paragraph 3 includes paragraph 3.5 which relevantly provides:

> "Neither Valuation Expert's decision shall be subject to appeal…; and save in the case of fraud or manifest error, its decision shall be final and binding on the Shareholders and the Parties who must proceed with the Valuation Experts' decisions."

108. She considered that the phrase "save in the case of … manifest error" qualified the phrase "the Parties … must proceed with the Valuation Experts' decisions". It followed that if there was a manifest error in one or more of the valuations the parties were no longer obliged to proceed with the Valuation Experts' decisions. That, in turn, meant that the process for the appointment of a Third Valuation Expert by the ICC did not arise. She concluded at [246]:

> "For the reasons discussed above, I find that the objective meaning of the language in paragraph 3.10 is that it is a condition precedent to the appointment of a Third Valuation Expert by the ICC that the determinations of both of the Valuation Experts are not subject to any manifest error but that it is not a condition precedent to such an appointment that there should be no unresolved allegation of manifest error."

109. I consider, with respect, that there is a non-sequitur in this reasoning. If a mere allegation of manifest error does not preclude the appointment of the Third Valuation Expert, and a manifest error is alleged (but not established) the appointment will proceed. On that basis the appointment of the Third Valuation Expert will be valid. If, *subsequently*, it is established that there is a manifest error, it is difficult to see how that could be a condition *precedent* to that appointment. On the other hand, if a manifest error *is* established before the appointment, then the manifest error can be corrected. It would, in my judgment, be extraordinary if a determination by the Third Valuation Expert could be subsequently undone because one of the parties' valuation experts made an error, particularly if the erroneous valuation had no bearing on the ultimate purchase price. There may, as Mr Handyside accepted, be questions arising about how the parties are to proceed, but since paragraph 3.10 makes no mention of any condition precedent (other than a 15 per cent gap between the party's own experts) I agree with him that no further condition precedent exists.

110. I would therefore allow JPM's appeal on this ground and discharge the declaration in paragraph 3.1 (ii) of the judge's order.

Is WRL in breach of an obligation to appoint a third valuer?

111. JPM argues under this head that WRL is in breach of the SHA by failing to agree to the appointment of a Third Valuation Expert; and by objecting to the ICC's appointment of a Third Valuation Expert. Because the judge considered that the conditions precedent for the appointment of a Third Valuation Expert had not been met, this issue did not need further discussion in her judgment.

112. I have set out the relevant parts of paragraph 3.10 above. The first step is for the parties to appoint an expert from one of the listed firms as they may agree. If they do not agree, then either Shareholder has the right to ask the ICC to make the appointment.

113. I fail to see how that procedure gives rise to any enforceable obligation. The first part of the process is an agreement to agree. But the second part of the process explicitly contemplates a failure to agree, in which event either shareholder may ask the ICC to make the appointment. Thus JPM has a remedy, namely to apply to the ICC for the appointment of a third expert. That is precisely what it has done, and the ICC has confirmed its willingness to make the appointment.

114. That, to my mind, disposes of the further argument that if the appointment of a third expert is delayed by a breach by WRL of its own obligations, there is an implied term extending the Option Exercise Period. In the first place, there is no breach by WRL because the contractual process envisages a unilateral application by one shareholder to the ICC for the appointment of a third expert. In the second place, that is what JPM did, and the ICC agreed to make the appointment. Third, all that needs to be done during a particular Option Exercise Period is to serve the Option Exercise Notice. Paragraph 2.5 makes it clear that the date of exercise of the option is the date on which the notice was sent; so there is no need to extend the option period.

115. It may well be that the ICC is slow in making the appointment. But that simply reflects the choice of appointing body. The ICC is the appointing body that the parties have chosen for good or ill.

Was the judge wrong to make a declaration embodying her conclusion on US law?

116. WRL does not challenge any of the judge's findings of fact about the substantive elements of US law that were raised before her. The only challenge is her decision to embody one of those findings in a declaration. The only declaration that the judge made was:

> "Viva is a subsidiary of JPM for the purposes of Regulation K."

117. Although over half a day of court time was devoted to arguing this issue, I struggled to see why it matters. The judge has made findings of fact about US law based on the expert evidence she heard, and those findings bind JPM and WRL whether embodied in a declaration or not. Conversely, none of those findings bind Viva, the Federal Reserve or any other regulator.

118. The judge directed herself in accordance with the principles enunciated by Aikens LJ in *Rolls-Royce plc v Unite the Union* [2009] EWCA Civ 387, [2010] 1 WLR 318. Whether to grant a declaration is a discretionary decision. The primary considerations are whether a declaration serves a useful purpose and whether it is the most effective way of disposing of the dispute that has arisen. It is also important for the court to be satisfied that all those affected by the declaration are either before or will have their arguments put before the court. There was no complaint about the judge's self-direction.

119. The exercise of that discretion is itself based on two evaluative judgments namely whether it is useful and whether it is the most effective way of disposing of the dispute. So the question is not whether we would have made the declaration that the judge made; but whether we should interfere with her evaluative and discretionary decisions.

120. Mr Lissack KC presented this part of WRL's appeal. The first point advanced in the skeleton argument on this issue was that the declaration was unnecessary given the judge's conclusion that the valuers were required to disregard any effect of Regulation K. Since I have disagreed with the judge on that question, this particular argument falls away. Nevertheless, Mr Lissack argued that even if JPM succeeded on that point (which in my judgment it does), the declaration was still unnecessary and of no practical use.

His point was that JPM's interpretation of paragraph 3.7 (b) (vi) required the financial inputs to be based either upon Viva's agreed business plan or financial projections limited to a business that Viva was capable of carrying on as things stand. On neither basis are operations in the USA within the relevant inputs; and therefore whether Viva is or is not a subsidiary of JPM for the purposes of Regulation K does not matter. In addition the declaration does not answer the question: what can Viva do in the USA? That is a matter for the Federal Reserve as regulator.

121. It is true that the declaration as framed does not answer the question: what can Viva do in the USA? But it may be of some utility for the valuers to know that Viva is (as things stand) constrained by Regulation K. That would (at least potentially) enable them to consider whether there would be a different price paid for the shares by the hypothetical buyer depending on whether that buyer was or was not an Edge Act Corporation. It may also be of some utility for the valuers to know why Regulation K applies to Viva as things stand.

122. Moreover, this question was fully pleaded out in the statements of case and was the subject of detailed expert evidence. It was therefore the subject of a live dispute.

123. I do not consider that we should interfere with the judge's evaluative decision on the question whether the declaration served a useful purpose; and was the most effective way of resolving the dispute raised by the statements of case.

124. The second argument was that Viva was not a party to the action. Therefore, since the declaration made directly concerned Viva's status, it ought not to have been made in its absence. Mr Lissack relied on the statement of principle in *London Passenger Transport Board v Moscrop* [1942] AC 332, 345:

> "[T]he courts have always recognised that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their rights is made."

125. That statement of principle was very recently reaffirmed by the Supreme Court in *National Union of Rail, Maritime and Transport Workers v Tyne and Wear Passenger Transport Executive (t/a Nexus)* [2024] UKSC 37. Nexus brought a claim against two independent trade unions recognised as entitled to conduct collective bargaining on behalf of its employees. The claim sought rectification of collective agreements (which were not themselves contractually enforceable). No employees were joined in the claim. Having referred to *Rolls-Royce plc v Unite the Union* Lord Leggatt and Lady Simler said:

> "[66] … It makes no sense to refer to a dispute between Rolls-Royce and the union about the lawfulness of the length of service criterion in their collective agreements, as provisions of an agreement which has no legal effect cannot be unlawful. The only potential dispute about legal rights was a dispute about whether, in terminating the employment contracts of individual employees on grounds of redundancy, it would be lawful for

> Rolls-Royce to apply the length of service criterion provided for in the collective agreements. *We cannot see how it could be said that the union had any legal interest in the determination of that dispute.*
>
> [67] For these reasons the procedure adopted by the parties and acquiesced in by the courts in the *Rolls-Royce* case is one which, in our view, is illegitimate and ought not to be followed. At all events, no support can be derived from that case for the course taken by Nexus of bringing this claim against the unions rather than any of its employees. This is not to adopt an "unduly purist" or formalistic approach as Nexus suggests. *As a matter of basic principle, the proper parties to an action are those whose legal rights will be determined by the court.* In this case those parties are the employees into whose employment contracts the letter agreement was incorporated and whose legal rights will therefore be altered by any order to rectify it. If Nexus wishes to establish its obligations to those employees by taking legal action, it must bring a claim against them (or representatives of them) and not against the unions, to whom Nexus has no relevant legal obligations and who have no relevant legal rights." (Emphasis added)

126. Both *Moscrop* and *Nexus* were cases in which the party seeking the declaration did not do so in pursuit of any legal rights of its own. By contrast, in the present case the legal rights of both WRL and JPM under the SHA were in issue. It is, however, plain that neither Viva nor the foreign regulator is bound by the judge's declaration. It binds only JPM and WRL who are parties to the valuation dispute. Moreover, in correspondence Viva has never disputed that it is a subsidiary of JPM for the purposes of Regulation K; and its internal policy documents reflect that position. So it is difficult to see what argument could have been advanced on its behalf disputing the proposition that it was a subsidiary of JPM for the purpose of Regulation K; and none has been identified.

127. WRL's third objection was that the judge ought not to have made declarations about matters of foreign law which were within the exclusive competence of a foreign regulator. We were not shown any material from which it could be said that to determine the legal question whether Viva was or was not a subsidiary of JPM as defined by the US statute was within the exclusive competence of the regulator. That declaration concerned the interpretation of a definition contained in a federal statute. I cannot accept that the interpretation of a statutory definition in a US federal law is non-justiciable (in the sense that only the regulator could interpret it). The interpretation of the law (as opposed to its application) is a matter for the court. The practical implications of the finding that Viva was a subsidiary of JPM for the purposes of Regulation K are, indeed, within the competence of the Federal Reserve, as the judge recognised; but she wisely declined to make any declaration about what the Federal Reserve might or might not do.

128. I would reject this ground of appeal.

Result:

129. I would:

i) Allow WRL's appeal on Ground A (the One-Shot issue);

ii) Dismiss WRL's appeal on Ground B (the declaration issue);

iii) Allow JPM's appeal on Grounds 1.3 and 2 (the Regulation K issue);

iv) Dismiss JPM's appeal on Ground 3 (time of appointment of Third Valuation Expert);

v) Allow JPM's appeal on Ground 4 (condition precedent to appointment of Third Valuation Expert);

vi) Dismiss JPM's appeal on Ground 5 (whether WRL in breach)

vii) Dismiss JPM's appeal on Grounds 6 and 7 (extension of JPM Option Exercise Period).

Lord Justice Snowden:

130. I agree.

Sir Julian Flaux, Chancellor of the High Court:

131. I also agree.

APPENDIX
RELEVANT TERMS OF THE SHA

1. Definitions

Call Option Fair Market Value	The fair market value of the Shares as determined in accordance with paragraph 3 of this Schedule 1
Exit Proceeds	An amount equal to: (a) the Call Option Fair Market Value of the Shares multiplied by the Relevant Percentage …
First Measurement Date	The date that is 12 months after the Effective Date
JPM Call Option	The call option in respect of the WRL Company Shares granted by WRL to JPM pursuant to paragraph 2.1 of this Schedule 1
JPM Exercise Notice	Has the meaning given to it by paragraph 2.12 of this Schedule 1
Option Exercise Date	The JPM First Option Exercise Date, the JPM Second Option Exercise Date…. and/or any WRL Option Exercise Date or any of them (as applicable)
Reference Valuation	€5,000,000,000
Relevant Percentage	A figure (expressed as a percentage) equal to the Equity proportion of WRL (in the case of JPM exercising the JPM Call Option) or JPM (in the case of WRL exercising the WRL Call Option)
WRL Option Exercise Date	The date that is 31 days after the: a) JPM First Option Exercise Date, if JPM does not elect to exercise the JPM Call Option in accordance with paragraph 2.3 (a) of this Part A of this Schedule 1 b) JPM Second Option Exercise Date, if JPM does not elect to exercise the JPM Call Option in accordance with paragraph 2.3 (b) of this Part A of this Schedule 1…

2.1 In consideration of the grant by JPM of the option in paragraph 2.2 below, WRL grants to JPM an option to purchase the WRL Company Shares for the Exit Proceeds on the terms set out in this Schedule 1.
2.2 In consideration of the grant by WRL of the option in paragraph 2.1 above, JPM grants to WRL an option to purchase the JPM Company Shares for the Exit Proceeds on the terms set out in this Schedule 1.

2.3 JPM may elect to exercise the JPM Call Option at the following times by sending the JPM Exercise Notice in accordance with paragraph 2.12 below:
(a) during the Option Exercise Period commencing on the JPM First Option Exercise Date; or
(b) during the Option Exercise Period commencing on the JPM Second Option Exercise Date, provided neither the JPM Call Option nor the WRL Call Option has been previously exercised in accordance with this Schedule 1; or
(c) during the Option Exercise Period commencing on the JPM Third Option Exercise Date, provided neither the JPM Call Option nor the WRL Call Option has been previously exercised in accordance with this Schedule 1;
(d) during the Option Exercise Period commencing on the JPM Fourth Option Exercise Date, provided neither the JPM Call Option nor the WRL Call Option has been previously exercised in accordance with this Schedule 1; or
(e) during the Option Exercise Period commencing on the JPM Discretionary Option Exercise Date, provided neither the JPM Call Option nor the WRL Call Option has been previously exercised in accordance with this Schedule 1.
…
2.5 The date of exercise of the JPM Call Option is the date on which the JPM Exercise Notice is sent in accordance with paragraphs 2.3 and 2.12.
…
2.6 Save with respect to any JPM Exercise Notice served after the JPM Fourth Option Exercise Date in accordance with paragraph 2.3(d) for which paragraph 2.7 applies, if the JPM Call Option Price during the applicable Option Exercise Period during which a JPM Exercise Notice is sent is:
(a) less than the Reference Valuation [i.e. €5 billion], then WRL shall not be required to (but may at its discretion) accept the JPM Call Option and sell the WRL Company Shares to JPM (provided that, unless WRL rejects the JPM Call Option by written notice to JPM within 10 Business Days of receipt of the JPM Exercise Notice, WRL shall be deemed to have accepted the JPM Call Option and shall be required to sell the WRL Company Shares to JPM for the Exit Proceeds on the terms set out in this Schedule 1, and, for the avoidance of doubt, if WRL issues such notice to JPM, the Parties shall proceed to the next Option Exercise Date); or
(b) equal to or greater than the Reference Valuation [i.e. €5 billion], then WRL shall be automatically deemed to accept the JPM Call Option and shall be required to sell the WRL Company Shares to JPM for the Exit Proceeds on the terms set out in this Schedule 1.
…
2.9 WRL may elect to exercise the WRL Call Option during the Option Exercise Period commencing on the relevant WRL Option Exercise Date by sending the WRL Exercise Notice in accordance with paragraph 2.13 below. WRL may only exercise the WRL Call Option if JPM has not already exercised the JPM Call Option in the relevant Option Exercise Period.
2.10 If the WRL Call Option is not exercised during the Option Exercise Period following the last applicable WRL Option Exercise Date, it shall lapse.
2.11 The date of exercise of the WRL Call Option is the date on which the WRL Exercise Notice is sent in accordance with paragraphs 2.9 and 2.13.

2.12 The JPM Call Option shall be exercised by JPM sending WRL an irrevocable written exercise notice in accordance with Clause 29, which shall include:
(a) the date on which the notice is given;
(b) a statement to the effect that JPM is exercising the JPM Call Option;
(c) JPM's reasonable and good faith estimate of the Exit Proceeds due to WRL (including any amounts to be set-off against the Exit Proceeds in accordance with Clause 22); and
(d) a signature by or on behalf of JPM,

(the JPM Exercise Notice).
2.13 The WRL Call Option shall be exercised by WRL sending JPM an irrevocable written exercise notice …which shall include:
(a) the date on which the notice is given;
(b) a statement to the effect that WRL is exercising the WRL Call Option;
(c) WRL's reasonable and good faith estimate of the Exit proceeds due to JPM…
(d) a signature by or on behalf of WRL
(the WRL Exercise Notice)…
3.5 Each Valuation Expert shall act as an expert and not as an arbitrator. Neither Valuation Expert's decision shall be subject to appeal to any court or tribunal on any basis whatsoever; and save in the case of fraud or manifest error, its decision shall be final and binding on the Shareholders and the Parties who must proceed with the Valuation Experts' decisions.
3.6 Each Valuation Expert shall exercise its independent professional judgment in arriving at a determination of the Call Option Fair Market Value (which shall be expressed in Euro) of the Shares by:
(a) assessing the historical and projected financial performance of the Group;
(b) applying generally accepted methodologies for valuing the Group, including discounted cash flow analysis, comparisons with any similar companies whose shares are traded on any stock exchange and comparisons with any publicly disclosed sales of similar companies or significant pools of similar assets; and/or
(c) such other valuation methods as the Valuation Expert shall consider to be appropriate in the circumstances.
3.7 Each Valuation Expert shall determine the Call Option Fair Market Value of the Shares on the following basis:
(a) by valuing the Group on a going concern basis for an arm's length sale between a willing buyer and a willing seller and on the assumption that the WRL Company Shares or JPM Company Shares (as applicable) are being sold in an open market;
(b) by valuing the Shares by reference to:
(i) the value of the Group as a whole (and therefore without regard to the size of any relevant holding such that no premium shall apply to any majority or controlling stake and no discount shall apply to any minority stake);
(ii) the Group's current and reasonably expected operational capabilities under the ownership of WRL and JPM;
(iii) any investments which JPM is required to make in accordance with the terms of this Agreement, any other investments in the Company which JPM agrees to make and subsequently funds, and the financial impact of any such investment;
(iv) any partnerships between the Company and third parties which, at the relevant time, either already exist or are reasonably expected to occur;
(v) International Financial Reporting Standards, excluding any management adjustment items;
(vi) financial projections to be prepared by the Company, approved by the Board and Shareholders, and provided to the Valuation Expert, which shall include but not be limited to:
(A) the Group's actual financial performance in the then-current calendar year on a quarterly basis and projected financial performance in the subsequent three full calendar years;
(B) the year-to-date actual financial performance of the Group for the then-current period;
(C) the Group's financial performance in the prior three full calendar years;
(D) detailed income statements, balance sheets and cash flow statements for the time periods listed in sub-paragraphs (A), (B) and (C), specifically including all financial detail required for the Valuation Expert to prepare an unlevered discounted cash flow analysis;
(E) detailed revenue projections by country and by segment (Micro, Small, Medium, Large), including but not limited to:

(I) projections of revenue by revenue type and by country, including at least the following revenue type categories: Acquiring; Issuing; Merchant lending / Cash advance; Instant settlement; POS devices; and Other; and
(II) key assumptions supporting the projected revenue detail, including the assumed number of merchants, volume and headcount by country and by segment;
(F) details of expenses including but not limited to:
(I) headcount expenses and the key assumptions supporting headcount expenses, including headcount detail broken out by function and corporate title;
(II) marketing expenses and the key assumptions used to derive marketing expenses; and
(III) other expense items, including infrastructure and occupancy (including but not limited to detailed projections of depreciation, amortisation, interest expense, cash taxes, changes in net working capital, capital expenditures);
(G) other financial deliverables to be prepared by the Company and provided to the Valuation Expert, together with the financial projections, including but not limited to:
(I) a qualitative summary of the Group's current capabilities, including but not limited to: (1) a detailed summary of the Group's footprint by country and operational capabilities in each country, including the status of the connection to local clearing and payment systems and the acceptance of local and alternate methods of payments; and (2) a detailed summary of the status of the Group's value added services and capabilities, including Cash Advance, Instant Settlement, Expense Management, Tap on Device; and
(II) three years' audited financial statements for each Group Member;
(c) making no allowances for and disregarding any financial impact that may be expected to be realised or derived as a result of WRL or JPM exercising any Call Option (or otherwise acquiring the WRL Company Shares or JPM Company Shares (as applicable)) in accordance with the terms of this Agreement;
(d) making no allowances for and disregarding any financial impact or any financial synergy that may be expected to be realised or derived as a result of JPM acquiring a majority stake in the Company;
3.8 The Call Option Fair Market Value of the Shares may also reflect any other factors suggested by a Shareholder or the Group which either Valuation Expert reasonably believes should be taken into account.
3.9 The Parties shall procure that both Valuation Experts shall have access to all financial and accounting records or other relevant documents of the Group (together with such information as either Shareholder may wish to provide to them) which either Valuation Expert may reasonably request for the purposes of its determination (such information to be provided on a confidential basis) provided that if any party provides any information to one of the Valuation Experts pursuant to this paragraph 3, it shall, at the same time: (a) notify the other Valuation Expert and each Shareholder and the Company in writing that it has provided such information to the Valuation Expert; and (b) provide the other Valuation Expert and each Shareholder and the Company with copies of such information, as provided to the Valuation Expert.
3.10 If the Call Option Fair Market Value of the Shares as determined by one Valuation Expert is:
(a) within 15% of the value determined by the other Valuation Expert (with the lower of the two valuations provided by the Valuation Experts being the base for these purposes), then the Call Option Fair Market Value of the Shares shall be the average of the value determined by both Valuation Experts; and
(b) more than 15% apart from the value determined by the other Valuation Expert (with the lower of the two valuations provided by the Valuation Experts being the base for these purposes), then the parties shall appoint:

(i) any one of the firms of accountants listed in paragraph 3.2 as the Shareholders may agree (provided that the Shareholders shall not appoint any firm already appointed by any Shareholder for the purposes of and in accordance with this Schedule 1); or
(ii) if agreement is not reached pursuant to subparagraph (i) within 10 Business Days of the Effective Date, such internationally recognised firm of accountants, independent of the Shareholders, as the International Centre for Expertise of the International Chamber of Commerce shall appoint at the request of either Shareholder,
(in either case, the Third Valuation Expert) and the Third Valuation Expert shall be requested to determine the Call Option Fair Market Value of the Shares within 15 days of its appointment and follow the process as set out in this paragraph 3.
3.11 If paragraph 3.10(b) applies, then the Call Option Fair Market Value of the Shares shall be the average of the value determined by the Third Valuation Expert and the value of such Valuation Expert as is nearest the value of the Third Valuation Expert.
…
4.2 Subject to paragraph 4.3, if either the JPM Call Option or WRL Call Option is exercised (and, if applicable, accepted) in accordance with this Schedule 1, each Party shall use all reasonable endeavours to: (i) enter into the Transfer Agreement as soon as reasonably practicable and in any event no later than 10 Business Days following the date on which the JPM Exercise Notice or WRL Exercise Notice (as applicable) is delivered by JPM or WRL (as applicable); and (ii) complete the Transfer as soon as reasonably practicable. Following the satisfaction of any Mandatory Consents required for the Transfer (the Unconditional Date), the following shall apply:(a) WRL, where the JPM Call Option has been exercised, and JPM, where the WRL Call Option has been exercised, may (but is not obliged to) elect (within a period of five Business Days of the Unconditional Date) to require the Valuation Experts to prepare updated valuation reports in order to determine an updated Call Option Fair Market Value (Updated Valuation Process) in which case:
(i) the Updated Valuation Process shall be carried out in accordance with the provisions of paragraph 3 of this Schedule 1; and
(ii) the price payable by JPM for the WRL Company Shares or by WRL for the JPM Company Shares (as applicable) shall be the lower of:
(A) the updated Call Option Fair Market Value as determined following the Updated Valuation Process; and
(B) the Call Option Fair Market Value multiplied by 1.2;
(the Alternative Exit Proceeds); and
(iii) …
(b)….”