Neutral Citation Number: [2024] EWHC 3040 (Ch)

Case Nos: BL-2024-000559 and CR-2024-003936

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
AND INSOLVENCY AND COMPANIES LIST

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

Date: 28 November 2024

Before :

THE HONOURABLE MR JUSTICE TROWER

Between :

(1) PETER WADDELL HOLDCO LIMITED
(2) PETER WADDELL

Claimants

- and –

(1) BLUEBELL CARS HOLDING LIMITED
(2) BLUEBELL CARS TOPCO LIMITED
(12) BLUEBELL CARS MIDCO LIMITED
(13) BLUEBELL CARS BIDCO LIMITED
(14) BAPCHILD MOTORING WORLD (KENT) LIMITED

Defendants

AND

IN THE MATTER OF BLUEBELL CARS TOPCO LIMITED
AND IN THE MATTER OF THE COMPANIES ACT 2006

Between :

PETER WADDELL HOLDCO LIMITED

Petitioner

- and –

(1) BLUEBELL CARS HOLDING LIMITED
(2) BLUEBELL CARS TOPCO LIMITED
(3) REZA FARDAD
(4) LAURENCE VAUGHAN

Respondents

Mr DANIEL OUDKERK KC, Mr DANIEL LIGHTMAN KC, Mr THOMAS ELIAS and **Mr WEI JIAN CHAN** (instructed by **Quinn Emanuel Urquhart & Sullivan UK LLP**) for **Peter Waddell Holdco Limited and Mr Peter Waddell**
Mr GEORGE SPALTON KC and **Mr MARK WRAITH** (instructed by **Wilkie Farr & Gallagher UK LLP**) for **Bluebell Cars Holding Limited** and **Mr Reza Fardad**
Mr EDWARD DAVIES KC and **Mr BEN GRIFFITHS** (instructed by **Stephenson Harwood LLP**) for **Bluebell Cars TopCo Limited, Bluebell Cars MidCo Limited, Bluebell Cars BidCo Limited, Bapchild Motoring World (Kent) Limited** and **Mr Laurence Vaughan**

Hearing date: **20 November 2024**
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Approved Judgment

This judgment was handed down remotely at 10.30am on 28th November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE TROWER

Mr Justice Trower:

1. This judgment is concerned with a number of applications made in two separate but intimately interlinked sets of proceedings relating to the control of a business called "Big Motoring World", which is one of the UK's largest second-hand car dealerships. The business was founded over 40 years ago by Mr Peter Waddell and the principal trading entity conducting the business of the group is Bapchild Motoring World (Kent) Limited ("BMW").

2. The applications raise a number of issues which have been agreed by the parties. However, there are three matters which remain contentious. One seeks a stay of a Part 7 claim, the second is concerned with disputed amendments to the points of claim in an unfair prejudice petition and the third seeks orders relating to the role which the company to which that unfair prejudice petition relates should play in the petition.

3. It is convenient at the outset to describe as shortly as I can the procedural progress of the proceedings to date and the underlying matters out of which they arise.

4. The Part 7 claim was commenced in the Business List on 12 April 2024 by Peter Waddell Holdco Limited ("PWHL") and Mr Waddell. PWHL is an investment vehicle wholly owned and controlled by Mr Waddell. Initially there were 14 defendants, but the claims against all but five of them have now been discontinued or dismissed.

5. The five surviving Part 7 defendants are Bluebell Cars Holding Limited ("Investor"), Bluebell Cars TopCo Limited ("TopCo") and three of its subsidiaries: BMW and two intermediate holding companies within the relevant corporate structure, Bluebell Cars MidCo Limited ("MidCo") and Bluebell Cars BidCo Limited (" BidCo"). TopCo and its subsidiaries are referred to collectively as the Group. Since September 2022, Investor has held 37% of the shares in TopCo a company in which PWHL continues to hold a majority shareholding. Investor is ultimately owned or controlled by a company in a private equity group called Freshstream.

6. The Part 7 claim is concerned with the validity of certain notices which were served by Investor pursuant to the terms of a securityholders deed (the "SHD") entered into by PWHL, Mr Waddell, Investor, TopCo, MidCo, BidCo and BMW at the time that Investor acquired its initial stake in the Group. The SHD granted Investor rights to appoint directors and the chairman to the board of any Group company. It also gave Investor a number of other rights to give certain notices to take control of TopCo and the Group in the event of (a) underperformance and (b) certain categories of conduct which were reasonably likely to have an adverse effect on the reputation of the Group or Investor.

7. The first notice (the "March SIRE Notice") was served by Investor on TopCo on 7 March 2024 and sought to exercise step-in rights granted to Investor in the event that certain EBITDA targets were missed over a period of two consecutive quarters. A second SIRE notice was served by Investor on TopCo on 23 April 2024.

8. At the time the March SIRE Notice was served, Investor served TopCo with an investigation notice pursuant to the terms of the SHD requiring it to commission an investigation into Mr Waddell's conduct. He was then suspended as an employee of BidCo. An independent investigation was carried out by Mr Nicholas Siddall KC,

which led to a further notice served by Investor on TopCo on 10 April 2024 (the "MDE Notice"). The grounds for the MDE Notice were that Mr Waddell's behaviour amounted to a material default event under the SHD. This led to the termination of his directorships of all Group companies. Shortly after service of the MDE Notice, there was a disciplinary hearing, which in the event Mr Waddell did not attend. He was summarily dismissed as an employee of BidCo on 16 April 2024.

9. Between the time of the termination of his directorships of all Group companies and his dismissal as an employee of BidCo, Mr Waddell and PWHL had commenced the Part 7 claim and issued an application for an interim injunction. The substantive relief sought in the Part 7 claim included declarations alleging the invalidity of the SIRE Notices and the MDE Notice. The claim form also sought injunctive relief restraining the defendants from acting pursuant to those notices together with a range of further orders to which PWHL and Mr Waddell claimed to be entitled as a result of the steps taken by the various defendants pursuant to and in consequence of the service of the SIRE and MDE Notices. They included an order for Mr Waddell's reinstatement.

10. A defence to the Part 7 claim was served by TopCo, MidCo, BidCo and BMW on 21 May 2024. This included a counterclaim against Mr Waddell for his failure to return company property and documents following the termination of his employment and for breach of the restrictive covenants in his service contract.

11. The defence was served immediately before the commencement of a two-day hearing of the application for interim injunctive relief, which included applications for orders reinstating Mr Waddell as a director of Group companies. These applications came before Mr Murray Rosen KC on 22 May 2024 at a hearing which was described in the evidence as hard fought. The core of the complaint was that Investor's aim had been to exclude Mr Waddell from TopCo's business and that its conduct to that effect was in breach of the SHD. In a judgment handed down on 25 June 2024, in which he recorded that PWHL had reserved its rights to issue proceedings pursuant to section 994 of the Companies Act 2006 ("section 994"), Mr Rosen dismissed the applications ([2024] EWHC 1627 (Ch)).

12. Mr Rosen's first conclusion was that, while the claims faced an uphill task he was not prepared to hold that there was no serious issue to be tried. However, he refused the application on the grounds that the defendants' case on adequacy of damages and the balance of convenience was overwhelming.

13. In reaching his conclusions, Mr Rosen expressed his views of Mr Waddell's conduct in strong terms, making findings which underpin some of the arguments made by Investor and TopCo on the current applications. He said that the risk of irreversible harm to the Group companies and to Investor if Mr Waddell were to be restored to any involvement in or influence on management beyond his remaining shareholder rights was glaring. He said that Mr Waddell was highly disruptive, hostile and offensive to many others involved in the Group and its business. He also described Mr Waddell as set on a course of attrition and revenge against those within or related to the Group, to its and their serious detriment.

14. TopCo has filed evidence in the current applications in support of its submission that this type of conduct continues. While PWHL and Mr Waddell have not adduced witness statements to contradict what has been said on the basis that it is not relevant

to the current applications, the correspondence makes clear that TopCo's evidence (together with Mr Rosen's findings) is contested. However, based on what I have seen, TopCo has established a serious case that Mr Waddell has continued to seek to publicise these proceedings, taking steps which have had the effect of undermining the management and morale of Group employees by trying to turn these proceedings into a public spectacle. This supports a submission that there is a pressing need in the interests of TopCo and its subsidiaries for an expeditious determination of the claims being advanced by PWHL and Mr Waddell.

15. Shortly after Mr Rosen handed down his judgment, PWHL did what it had reserved the right to do, and presented a petition under section 994. It alleged that the affairs of TopCo, including its subsidiaries and in particular BidCo, have been conducted or are being conducted and are likely to continue to be conducted in a manner prejudicial to the interests of PWHL as a member of TopCo. The relief sought included not just orders for the sale and purchase of shares at a fair value, but also orders for the restoration of Mr Waddell's rights pursuant to the SHD and the provision of information and documentation to which he claims to be entitled under the SHD. The petition was presented in the Insolvency and Companies List on 4 July 2024 and named Investor and TopCo as respondents.

16. The allegations made in the petition and points of claim are very similar to those made in the particulars of claim in the Part 7 claim. There were a number of additional allegations relating to the way in which TopCo's business has been conducted since Mr Waddell's removal which are not made in the Part 7 claim, but subject to that and to the pleas relating to a relationship of trust and confidence between Freshstream, Investor, Mr Waddell and PWHL, the focus of the petition remained on allegations that the SIRE Notices and the MDE Notice were invalid and that the independent investigation was flawed. It is said that what occurred amounted to unfairly prejudicial conduct of the affairs of TopCo by Investor.

17. In accordance with the court's standard practice, automatic directions were given by the ICC judge at the time the petition was issued. They included, so far as material for present purposes, a direction for the petition to stand as points of claim and for the filing and service of points of defence by 15 August 2024 by Investor, but not by TopCo.

18. Unsurprisingly, given the similarity between the allegations made in the Part 7 claim and the allegations made in the petition, paragraph 1 of the petition specifically pleaded that the extent of the overlapping factual matters and legal issues meant that it would be just and proportionate for the Part 7 claim and the petition to be consolidated and tried together. This was emphasised in the covering letter in which the solicitors for PWHL and Mr Waddell, at that stage CMS Cameron McKenna ("CMS"), reiterated the desirability of consolidation and said that the two sets of proceedings should be case managed together. The petition also pleaded (by paragraph 2) that in the usual way TopCo was joined to the proceedings as a respondent "so that it is subject to any orders and for the purposes of disclosure but it is expected to take a neutral position in the proceedings".

19. On 12 July 2024, the solicitors for TopCo (Stephenson Harwood LLP ("SH")) wrote to CMS agreeing that the Part 7 claim and the petition should be tried together. In response to paragraph 2 of the petition, they said that, in the particular circumstances of the case, TopCo ought to be permitted to file and serve points of defence. They

proposed that the automatic directions given by the ICC judge be varied to permit that to be done. SH gave detailed reasons for TopCo's position and, in light of the way the argument developed at the hearing, it is important to give a reasonably full summary of what they were.

20. It was said that the basis for TopCo's proposal was that, in contrast to the position in many unfair prejudice petitions, it was plain on the face of the petition that PWHL was raising serious allegations regarding TopCo's conduct and knowledge, some of which appeared to be directed solely against TopCo, rather than Investor. SH also pointed out that PWHL was advancing claims for substantive relief against TopCo in the petition, including an order that Mr Waddell be provided with information and documentation pursuant to the SHD, which was in substance relief against TopCo in respect of obligations owed by TopCo, not Investor.

21. It was said that the application in the petition for the restoration of Mr Waddell's rights appeared to extend to his employment by and directorships of TopCo and its subsidiaries. In particular, SH said that BidCo had an independent right to terminate Mr Waddell's employment, which was not the subject of challenge in the petition. The restoration of Mr Waddell's rights presented serious personal risks to the employees of the Group (in the circumstances explained in Mr Rosen's judgment), which TopCo would wish to protect. The clear implication was that the directors knew that their duties to TopCo meant that they needed to have regard to the interest of TopCo's employees when determining how to proceed. In this regard BidCo had an independent right to terminate Mr Waddell's employment which should not be prejudiced by the petition.

22. Furthermore, unlike a typical unfair prejudice petition, the shareholders were not the only directors of the company with which the petition was concerned and so TopCo was in a position to take an objective view in relation to the issues which directly concerned it. There would therefore be no question of TopCo being used by one or other shareholder as a vehicle to promote their own personal positions in the litigation. I pause to note that Mr Daniel Lightman KC (instructed by PWHL and Mr Waddell) contended that what was said by SH amounted to an assurance that TopCo would not be used by any of the shareholders simply as a vehicle to promote their own personal positions in the litigation. But, despite the impression given in some of the papers, he did not submit that what was said amounted to an agreement by TopCo that any points of defence it served would adopt a position of neutrality.

23. In this regard, SH continued by making the point that the Group is a very significant enterprise with a turnover of at least £800 million employing 1,200 employees and conducting business on a day-to-day basis with a large number of third parties and customers. It therefore followed that there were substantial interests beyond merely those of the shareholders which were relevant. This was an obvious reference not just to the directors' duties to have regard to the interests of TopCo's employees, but also to their other obligations under section 172 of Companies Act 2006 ("section 172") to foster its business relationships with suppliers, customers and others and to the desirability of TopCo maintaining high standards of business conduct. This was said to underscore the fact that TopCo has a real interest in the petition proceedings and should not be shut out from taking appropriate steps to protect its interests and present its own position to the court.

24. Finally, SH prayed in aid the significant overlap between the allegations made in the petition and the allegations being advanced in the existing Part 7 claim in which TopCo was an active party, having served a defence and successfully opposed the claimants' application for interim injunctive relief. It was said that there had never been any suggestion that it was improper or inappropriate for TopCo to participate actively in the Part 7 claim and file a defence, and that it would be bizarre if TopCo were now to be precluded from advancing its case on those same or similar allegations in the petition proceedings, a point which applied with even greater force in circumstances in which PWHL and Mr Waddell were proposing that the two sets of proceedings should be tried together. SH therefore enclosed a draft consent order and asked PWHL to articulate any basis on which it considered that TopCo should be shut out from defending the petition.

25. Four days later, on 16th July 2024, CMS responded as follows:

> "Mr Waddell is keen to progress this litigation and to set out his position at trial. With this in mind, we confirm our clients are prepared to agree TopCo's request that TopCo be permitted to file and serve Points of Defence in order to avoid any delays in the litigation. This agreement has been given reluctantly as our client is already concerned that the costs being incurred are inappropriate. However, this agreement is strictly on the basis that our clients' position regarding the costs of and incurred by TopCo preparing Points of Defence and in respect of the Petition proceedings generally (and ultimately the party that should bear liability for those costs) are reserved."

26. CMS then went on to make clear that, if the ultimate outcome of the petition was for an order for the valuation of TopCo at fair value, PWHL would seek a form of order that the legal costs incurred by TopCo should properly be accounted for in the valuation such that no party paid a price which is either unfairly lowered or inflated by TopCo's participation in the proceedings. They also sought to emphasise that Investor was not entitled to use TopCo funds (or the funds of any of TopCo's subsidiaries) to fund its own costs in respect of the petition.

27. PWHL submitted, and I agree, that CMS thereby expressly reserved the right to argue that the purchase or sale price of the shares in TopCo following trial of the petition should be adjusted to take account of the sum spent by TopCo in participating in the petition. It is plain from the correspondence that this was intended to relate to the appropriate relief if the petition were to succeed. There was no suggestion that PWHL considered that service of points of defence taking broadly the same position as the position in the Part 7 claim might itself amount to unfairly prejudicial conduct, and there was no suggestion that TopCo would be neutral in responding to allegations in the petition in respect of which it took the view that it had its own interests to protect. Indeed, the very nature of the agreement was that, in the particular circumstances of this case, there could be no expectation that TopCo would not take a position in the petition which supported the position of one or other of the shareholders, and more especially that of Investor.

28. On 18 July 2024, SH responded, thanking CMS for its confirmation of PWHL's agreement that TopCo could serve points of defence and asking them to sign and return the enclosed consent order so that work could start on the pleading. SH also confirmed that neither TopCo nor any other Group company would be making any payment in

respect of fees incurred by Investor in relation to the petition. They also said the following:

> "In relation to what you say about accounting for legal costs in valuing TopCo, it seems to us this is a matter for the Judge at trial. The court has a broad discretion on the remedy in proceedings such as this and we do not consider it appropriate to pre-empt this. In any case, we anticipate that TopCo is likely to adopt a neutral position in relation to this issue, as it is properly a matter between the shareholders."

29. This was a clear indication that TopCo would be likely to adopt a neutral position in relation to the particular issue of how the court might account for legal costs in valuing TopCo at the conclusion of the trial. But PWHL was wrong to suggest (as it did in the evidence, although not in oral submissions made by Mr Lightman) that this amounted to any form of indication that TopCo would adopt a position of neutrality in its defence in relation to all of the allegations that were made. In light of the reasons SH had put forward for TopCo's ability to participate substantively in the proceedings, and in particular an indication that it would be adopting the same position in the petition as it had in the Part 7 claim, the contrary is not arguable.

30. On 26 July 2024, Dr Baister sitting as an ICC judge in retirement made a consent order, which by paragraph 2 directed TopCo to file and serve points of defence by 15 August 2024. This amounted to the court's approval of the clear agreement which had been reached between PWHL and TopCo for the service by TopCo of points of defence. At no stage in the correspondence was it suggested that, having served points of defence, TopCo would not be entitled to advance its case based on that pleading, although of course it would always have remained open to the court to ensure that there was no duplication at the trial (or indeed during the course of its preparation) of any arguments or evidence as between Investor and TopCo. There was then further correspondence between the parties' solicitors in relation to the joint case management and trial of the Part 7 claim and the petition, including in relation to matters such as disclosure and expedition.

31. On 2 August 2024, notice of change was served on behalf of PWHL and Mr Waddell, notifying the court and the parties to both the Part 7 claim and the petition that CMS had been replaced by Quinn Emanuel Urquhart & Sullivan UK LLP ("QE") as their legal representatives. One week or so after they had been instructed, QE wrote to SH dealing with a number of case management issues, including their clients' agreement that it remained desirable to case manage the Part 7 claim and the petition together. They also acknowledged that TopCo was filing points of defence in the petition because they gave warning that PWHL might require more time to file its points of reply. At this stage, there was no suggestion that PWHL might be reconsidering the terms of the consent order approving the parties' agreement to TopCo's service of points of defence.

32. TopCo then served its points of defence on 15 August 2024, which QE said in a letter dated 21 August 2024 that they were carefully reviewing. In that letter they also said that, in light of the stances adopted and issues raised by Investor and TopCo in their respective points of defence and the active role which it is apparent that both of them were proposing to take in the petition, it was necessary for their clients carefully to consider with the benefit of advice from leading counsel how the Part 7 claim and the petition could best be case managed going forwards.

33. After QE's instruction the parties continued to correspond about disclosure of documents and the fixing of a CMC. It continued to be the position of all parties, including PWHL and Mr Waddell, that the Part 7 claim and the petition be tried together. In their letter to the court dated 5 September 2024, almost three weeks after TopCo had served its points of defence, QE said that their clients consented to Investor's application to that effect. On the face of it, this agreement is difficult to reconcile with their subsequent application for a stay.

34. The next material event was the issue by PWHL on 19 September 2024 of the first of the application notices with which I am concerned (the "Petition Application"). It seeks a number of heads of relief, including the joinder of Mr Reza Fardad and Mr Laurence Vaughan as respondents to the Petition. Mr Fardad is a partner in Freshstream and has been a director of both Investor and TopCo since the time of Investor's investment. Mr Vaughan had no prior relationship with Investor or Freshstream, but, since January 2023, has been a director of TopCo and since April 2022, a director of BMW. He was appointed CEO of TopCo and the Group the day after service of the March SIRE Notice. This head of relief is not opposed.

35. The Petition Application also seeks permission to amend the petition and points of claim with consequential directions for amended points of defence and points of reply. Most of the amendments sought by PWHL are not opposed by any of Investor, TopCo, Mr Fardad or Mr Vaughan, but there are a number of amendments relating to the service and contents of TopCo's points of defence (the "TopCo Defence Allegations") which are. In broad terms the TopCo Defence Allegations plead as additional heads of unfair prejudice that the directors of TopCo breached their duty to TopCo and unfairly prejudiced PWHL by causing TopCo to file substantive points of defence to the petition. TopCo, Mr Fardad and Mr Vaughan contend that these amendments should not be allowed because it is clear that they have no real prospect of success.

36. The Petition Application also made clear that the consequential directions for service of amended points of defence should not include or apply to TopCo. In the evidence in support, it was said not just that TopCo should not be permitted to file amended points of defence, but also that it should not be permitted to take any further active role in the proceedings. This last point was not spelt out in the Petition Application itself. However, it was foreshadowed in the evidence in support and, during the course of oral argument, Mr Lightman specifically confirmed that his clients were seeking a case management order (but not an injunction) to that effect.

37. The basis for the TopCo Defence Allegations was said to be that the preparation and filing of points of defence by TopCo (on which PWHL and Mr Waddell contend that considerable sums of TopCo's money had been spent) was improper because, in causing TopCo to adopt a stance which was openly partial in favour of Investor, Mr Vaughan and Mr Fardad had acted in breach of duty to TopCo. This was said to amount to a breach of the general principle summarised by Hoffmann J in *Re Crossmore Electrical and Civil Engineering Ltd* [1989] BCLC 137 ("*Crossmore*"), at 138e–f, that "The company is a nominal party to the [section 994 petition], but in substance the dispute is between the two shareholders. It is a general principle of company law that the company's money should not be expended on disputes between the shareholders".

38. PWHL's position in relation to this part of the application was developed in a letter from QE on 19 September 2024. This letter set out its objections to TopCo's filing of points

of defence on the basis that it ran to 61 pages, supported certain positions taken by Investor and denied that PWHL should be granted relief because it did not come to court with clean hands in the light of Mr Waddell's serious wrongdoing and misconduct. It said that, in filing its points of defence, TopCo had breached the general principle referred to by Hoffmann J and that, by causing it to do so, Mr Vaughan and Mr Fardad had misused company funds. In their skeleton argument for this hearing the way that these points were expressed was that the form of the points of defence was improper because it did not put forward TopCo's position in a neutral way but supported the position of Investor. Furthermore it did not confine itself to pleading only TopCo's separate and independent position but put forward a lengthy and wide ranging defence, even though TopCo's position could be expected to be covered by Investor's points of defence.

39. On 25 September 2024, PWHL and Mr Waddell issued the second of the application notices with which I am concerned (the "Part 7 Application"). It seeks orders that they may file and serve re-amended particulars of claim (with consequential directions for the service of amended defences and replies) and that the Part 7 claim be stayed until after resolution of the petition. The amendments are not opposed, but the application for a stay is. The application also sought to set aside the order for expedition made by Mr Rosen, but that part of the application has now been resolved.

40. Not all of the proposed amendments to the Part 7 particulars of claim are of relevance to the applications with which I am now concerned, but some are. Thus, much of what is now pleaded is directly aimed at TopCo and BidCo and much of it affects them in a manner that is different to the manner in which it affects Investor. They include a new claim for wrongful dismissal and a significant allegation that in the context of Mr Waddell's suspension and ultimate dismissal, Investor, TopCo and BidCo all acted with the intention of forcing him out of the business without Investor having to pay PWHL a substantial amount of money on exercise of a call option. This option is not identified in the particulars of claim, but it is apparent from the proposed amended petition that it is a reference to a call option acquired by Investor at the time that Freshstream took its stake in the Group. PWHL says in the proposed amended petition that there is a minimum option price of £71 million and that Investor was seeking to avoid having to pay that price when it chose to take control of the business without exercising the rights it had under the option agreement.

41. It has never been suggested that TopCo is not a necessary party to the Part 7 claim or that it is disabled in any way from full participation in it. The form which the particulars of claim will now take in light of the amendments which all parties accept can be made, make it clear that this remains the case. I should add that Mr Waddell has also issued employment tribunal proceedings against a number of defendants, including TopCo, Investor, BidCo, Mr Vaughan and Mr Fardad, which have now been stayed. The basis for the stay, anyway in part, is that there are active proceedings before this court, viz. the Part 7 claim, which do, or will when amended, allege that Mr Waddell was wrongfully dismissed.

42. PWHL submitted that the proper role of a company in an unfair prejudice petition is material both to whether the TopCo Defence Allegations have a real prospect of success and to the nature of the role (if any) which TopCo should play in the petition from this point forward. In principle, I agree.

43. Mr Lightman made detailed submissions on the authorities applicable to the proper role of a company in an unfair prejudice petition. I think that I can summarise the principles quite shortly, not least because all parties accepted that in general a company should not expend its own funds on substantive participation in an unfair prejudice petition, because that would be to spend money on a dispute between its shareholders. However, it has always been the case that there are circumstances in which the fact that a particular proceeding is in substance part of a dispute between shareholders does not of itself mean that the company cannot expend any part of its resources in defending or advancing its own interests. On the basis of my understanding of the authorities, the view I expressed in *Koza Ltd v Koza Altin Isletmeteri AS* [2021] EWHC 786 (Ch) at [66] was that the litmus test was whether the aspects of the dispute on which expenditure is to be incurred were those in respect of which the company has its own independent interest to protect.

44. This is well illustrated by *Crossmore* where there were obvious indications that a creditor's petition presented by a company controlled by the individual who had also presented an unfair prejudice petition were all part of the same shareholder's dispute. Nonetheless, Hoffmann J held that the company's costs of defending the creditor's petition were to be treated as they would have been if the petition had been presented by a wholly unrelated creditor. In that case the right order, and how much the company would end up bearing in due course, was left until after the final resolution of the petition.

45. One of the clearest expositions of the law on this subject is to be found in the often-cited judgment of Lindsay J in *Re a Company (No 001126 of 1992)* [1993] BCC 325 in which he summarised the position at p.333A-D as follows:

> "Those then were the authorities to which I was referred. As a body they suggest to me the following
>
> Firstly, that there may be cases (although it is unlikely nowadays when wide objects clauses are the norm) where a company's active participation in or payment of its own costs in respect of active participation in a sec. 459 petition as to its own affairs is ultra vires in the strict sense.
>
> Secondly, leaving aside that possible class, there is no rule that necessarily and in all cases such active participation and such expenditure is improper.
>
> Thirdly, that the test of whether such participation and expenditure is proper is whether it is necessary or expedient in the interests of the company as a whole (to borrow from Harman J in *ex parte Johnson*).
>
> Fourthly, that in considering that test the court's starting point is a sort of rebuttable distaste for such participation and expenditure, initial scepticism as to its necessity or expediency. The chorus of disapproval in the cases puts a heavy onus on a company which has actively participated or has so incurred costs to satisfy the court with evidence of the necessity or expedience in the particular case. What will be necessary to discharge that onus will obviously vary greatly from case to case.

> Fifthly, if a company seeks approval by the court of such participation or expenditure in advance then, in the absence of the most compelling circumstances proven by cogent evidence, such advance approval is very unlikely."

46. The point which is made very clearly by Lindsay J is that the underlying test is whether it is necessary or expedient in the interests of the company concerned for the participation and the expenditure to be incurred. This reflects the duties of a director (when acting as such whether by giving instructions to its lawyers or by causing it to incur expenses in relation to litigation) to act only in the best interests of the company. It will be a misfeasance for them to cause the company to participate in what is in substance a shareholders' dispute, unless they can discharge the heavy onus of showing that such participation (whether by the expenditure of resources or otherwise) is necessary or expedient. Any misapplication of the company's funds to that end is of itself capable of constituting an act of unfair prejudice (*Re Hydrosan Ltd* [1991] BCLC 418 at p.420e per Harman J).

47. The authorities also support the proposition that, in discharging the heavy onus referred to by Lindsay J, it is not sufficient for the company to show that the directors concerned have their own strong feelings as to the person whom they would like to see in control of the company (*Re Kenyon Swansea Limited* [1987] BCLC 514 at p.521e per Vinelott J), nor that its directors are independent of the shareholders with whose position they are aligned (*Arrow Trading & Investments Est. 1920 v Edwardian Group Ltd* [2003] EWHC 2863 (Ch) at [16] per Sir Francis Ferris). What is required is that there is in fact a separate and independent position from the other respondents which is sufficient to justify the company's directors in causing it to participate and incur expense in doing so. In assessing whether that is the case, a helpful test is whether the company is being "touched in its corporate capacity" or "affected in its commercial character" by the relief sought in the unfair prejudice petition. If it is, it could be proper for the company to participate in what would otherwise be a mere dispute between its shareholders (whether a section 994 petition or otherwise): *Re Neath Rugby Limited, Hawkes v Cuddy* [2007] EWHC 1789 (Ch) at [59] applying Lindsay J's analysis in *Re a Company (No 001126 of 1992)* at p.333.

48. In such a case the test of necessity and expedience will then have been satisfied, and it may even be that in some instances the directors are duty bound to procure the company to participate, so as to ensure that they comply with their duties under section 172(1) to act in such manner as they consider in good faith would be most likely to promote the success of the company for the benefit of its members as a whole. However, the position will be very fact specific, not least because in considering what is most likely to promote the success of the company for the benefit of the members as a whole, the directors must have regard amongst other matters to the need to act fairly as between those members (section 172(1)(f)).

49. The question which then arises is whether, in these circumstances, PWHL should be granted permission to amend its petition and points of claim so as to plead the TopCo Defence Allegations, which are opposed by TopCo, Mr Fardad and Mr Vaughan (but not by Investor). It is common ground that the answer to this question will depend on whether the amendments have a real prospect of success, which means a prospect which is realistic as opposed to a fanciful. For these purposes realistic means that it must carry some degree of conviction (for a recent review of the law see *The Front Door (UK) Ltd v The Lower Mill Estate Ltd* [2021] EWHC 2324 (TCC) at [29] per O'Farrell J).

50. The TopCo Defence Allegations appear in a number of parts of the petition. I can summarise what is said in the disputed paragraphs as follows:

i) In paragraph 1B, it is pleaded as part of the introductory section to the petition that there has become institutionalised in the board of TopCo an approach of promoting and supporting the interests of Investor at the expense of PWHL. The pleading then goes on to give as an example of this alleged approach "the decision that TopCo, most unusually, file Points of Defence in these proceedings, the contents of which were calculated to assist the Investor in defending the Petition." There is a clear distinction between the general allegation of an institutionalised approach to promote and support the interests of Investor on the one hand, and the specific example that is given on the other.

ii) In paragraph 2, it is pleaded that the directors of TopCo have in breach of duty "not only caused it to file Points of Defence in these proceedings, but have caused it to side with the Investor against PWHL" and then there is a reference down to paragraphs 137Aff below. Here again, it seems to me that there is a distinction between the filing of points of defence and the more general allegation of causing TopCo to side with Investor against PWHL.

iii) In paragraphs 137A to 137C, there are a series of propositions pleaded relating to the general principles of company law summarised in *Crossmore*, which cannot in and of themselves be contentious, but which add nothing if permission to amend to plead the proposed paragraphs 137D to 137F and 137G(4) is not granted.

iv) Paragraph 137D describes three aspects of the way in which the points of defence are pleaded. They are (a) that it was drafted by leading and junior counsel and ran to 61 pages, (b) that in all material respects it supported the stance of the Investor and (c) that it denied that PWHL should be granted relief in the petition, including as against Investor, and made a positive assertion that PWHL does not come to the court with clean hands because of Mr Waddell's serious wrongdoing and misconduct. It relies on the fact that this is an allegation not made by Investor in its points of defence.

v) In paragraph 137E, it is pleaded that, by taking the unusual step of filing the points of defence and causing TopCo to adopt the stance that it did, the directors of TopCo including Mr Fardad and Mr Vaughan caused it to breach the principle referred to by Hoffmann J in *Crossmore* as well as what was described as "the specific prohibition on the use of company monies to defend the section 994 petition". These acts were said to constitute improper use of TopCo's resources on a dispute between its shareholders, misfeasance by its directors and in and of itself unfairly prejudicial conduct. This paragraph contained two quite separate allegations: relating on the one hand to the filing of the defence and on the other hand the stance taken in drafting the defence.

vi) In paragraph 137F, there is a forward-looking plea that, if the directors of TopCo cause it to take or seek to take any further steps by way of active participation in the petition, that too would amount to improper use of TopCo's resources, a misfeasance and unfairly prejudicial conduct.

vii) Paragraph 137G(4) makes a very similar plea to the one made in paragraph 137E because it alleges that since the exclusion of Mr Waddell from TopCo, Mr Fardad and Mr Vaughan have acted in further breach of the duties they owed to TopCo and BidCo by causing authorising and permitting TopCo to file its points of defence, which sought to advance the interests of Investor. It is also said that they caused TopCo to spend its money "for the benefit of one shareholder and for the disbenefit of the other and accordingly failed to act in the best interests of TopCo … and acted in breach of duty by preferring the interests of the Investor over the interests of TopCo". An almost identical allegation is then made in paragraph 141, which appears to formulate the same facts as giving rise to unfairly prejudicial conduct by Investor, Mr Fardad and Mr Vaughan rather than breaches of duty by the directors of TopCo and BidCo.

51. In my view, it is plain that the allegations that the directors of TopCo misapplied TopCo's monies or otherwise acted in breach of duty to TopCo merely by filing substantive points of defence to the petition falls well short of having a real prospect of success. The ability of TopCo to do so was the subject of explicit agreement by PWHL and Mr Waddell which was formalised in the consent order made by Dr Baister. There is no evidence that the directors of TopCo did not consider that it was in the best interests of TopCo to file points of defence in accordance with the consent order, and in my judgment any allegation that in doing so, they committed acts of misfeasance or unfair prejudice is fanciful.

52. The question of whether PWHL and Mr Waddell should have permission to amend in order to plead that any of the averments made in TopCo's points of defence constituted breaches of duty or unfairly prejudicial conduct on the basis that the form they took was in breach of what Hoffmann J in *Crossmore* referred to as the general principle, is not so clear cut. The way that this part of the case is pleaded boils down to an allegation that the directors of TopCo acted in breach of duty to TopCo by causing it to adopt in its points of defence the stance that it did, namely one which in all material respects supported the stance of Investor.

53. The first problem with this plea is that it was at the heart of SH's expressed reasons for requesting PWHL to agree that TopCo should serve points of defence that it would be bizarre if TopCo were now to be precluded from advancing the case it had made in the Part 7 claim in response to the same or similar allegations made in the petition, more specifically where it had its own independent interest to protect. As PWHL was well aware, Topco's position in the Part 7 claim had included a very clear rebuttal of PWHL's case on the central issue of the validity of the SIRE and MDE Notices, which reflected the stance taken by Investor, although also advancing its own interest where it was appropriate to do so. This was more particularly the case as all parties had by then agreed in principle that both sets of proceedings should be tried together. In these circumstances, the proper construction of the agreement reflected in the consent order was not just that TopCo be permitted to serve points of defence, but that it was to be expected that those points of defence would adopt the line TopCo had taken in the Part 7 claim, even where that was supportive of the stance taken by Investor.

54. In paragraph 68 of the skeleton argument served on behalf of PWHL, a number of examples were given of instances in which TopCo's points of defence were said not to be neutral and to make pleas which positively supported the position of Investor. Most of these were reflections of the position which had already been taken in the Part 7

claim and were focused on the separate interests of TopCo as compared to Investor. In my view, the making of those allegations cannot possibly be stigmatised as misfeasant or unfair in the light of the agreement confirmed by the consent order.

55. Thus one example of an allegation in respect of which PWHL has adopted what I consider to be the wrong approach is its criticism of TopCo for pleading its case on the invalidity of service of the SIRE Notices and the MDE Notice. It is said that TopCo should not have done so because that constituted support of Investor's position as to valid service. I do not agree that the fact that both it and Investor arrived at the same end-point means that TopCo did not have its own independent position to present. TopCo was the recipient of the notices served by Investor, and in that regard had a quite independent position from Investor as to whether or not they had been validly served so as to impose on TopCo the obligations which arose as a result of their service. This is to be distinguished from the real gravamen of the complaint on which TopCo (quite correctly) does not engage and to which it does not plead, i.e., the issue of whether the service of the Notices amounted to a breach of a common understanding between Freshstream, Investor, PWHL and Mr Waddell. This latter aspect of service of the Notices is not a matter with which TopCo should be concerned in light of the fact that there is no allegation that it was a party to that understanding, but in my view the former is.

56. Nonetheless, there was at least one allegation in the points of defence which arguably extended beyond the approach by TopCo in the Part 7 claim. This was the allegation in the points of defence that PWHL did not petition with clean hands. It is specifically referred to in paragraph 137D of the proposed amended petition as an example of a breach of Hoffmann J's general rule, which Mr Lightman said was particularly striking. The argument was new and he said that, if anyone were to make it, it should have been Investor not Topco. In support of this submission, he cited a decision of Barma J (sitting in the Hong King Court of First Instance) in *Core Pacific Yamaichi International (HK) Ltd v Yuanta Securities Asia Financial Services Ltd* (Unrep 17 October 2003) at [52]. I do not doubt that, as Barma J said, in the ordinary course this is a point which goes to the merits of the petition and as such is properly to be made by the respondent shareholder rather than the company. There was no suggestion, however, that that will always be the case. Whether or not it is, may depend on whether the allegation is part of the company's own independent explanation of why its own best interests will not be served by the grant of the relief sought by the petitioner.

57. Furthermore there are allegations tied up in paragraphs 137D, 137E and 137G(4) which carry with them averments that the directors of TopCo were driven by the interests of Investor rather than the interests of TopCo alone when determining the form which the points of defence should take. Although I accept that, in broad terms the pleaders have taken care to deal only with allegations which reflect TopCo's own independent interest, some of the instances of what are said in PWHL's skeleton to be examples of an inappropriate positive support of Investor's position are capable of particularising its underlying allegation. One example is the complaint described in paragraph 66.5 of its skeleton that a pleading by TopCo that PWHL's allegation of a common assumption is itself inadequately pleaded, when TopCo is not alleged to have been a party to the common assumption. Another is TopCo's plea that an allegation that Investor was in material breach of the SHD was embarrassing for want of particularity. This is

described in paragraph 66.8 of PWHL's skeleton and here as well I think it is arguable that TopCo may have descended too far into the fray.

58. While I am firmly of the view that the amendment to plead that the mere filing of a defence was a misfeasant act has no realistic prospect of success, I am not persuaded that PWHL has no realistic prospect of showing that TopCo overstepped the mark in the way it approached every aspect of the form of its points of defence. Whether the manner in which it did so gives rise to an arguable case of unfair or misfeasant conduct is much more questionable, but I have reached the conclusion that PWHL has a prospect which is more than fanciful of establishing that TopCo's approach to the form of its defence to the petition is capable of being stigmatised as conduct amounting to unfairness or breach of duty by its directors.

59. However, I am not satisfied that the manner in which the arguable allegations are pleaded in the existing draft of the proposed amended points of claim is adequate nor that permission can properly be granted for the amendments in their current form. This is partly because it is difficult to disentangle the allegations in relation to the mere filing of the points of defence, which I do not consider to be arguable, from those which relate to particular aspects of the form which the points of defence took, which I consider may be. It follows that I will not give permission for the amendments to those paragraphs in the points of claim which are opposed by TopCo at this stage. What is required is for PWHL to reconsider the form which they might take having regard to the view and conclusions I have expressed in this judgment. It is to be hoped that the parties will then be able to agree an acceptable form for an amended pleading, but, if they cannot, the matter will have to be restored to me for a further hearing in due course.

60. In reaching that conclusion, I should stress that I am not deciding either that the proposed amendments in relation to the form of the points of defence have anything more than a realistic prospect of success, or indeed that TopCo has what Mr Lightman called carte blanche basically to support Investor. In other words, TopCo proceeds at its own risk (c.f. the fifth consideration referred to in the passage from Lindsay J's judgment in *Re a Company (No 001126 of 1992)* cited above). It may be that in due course PWHL will be able to establish that, as a result of what it does during the course of the petition, TopCo has taken a stance beyond that which is an acceptable reflection of its own independent position in the dispute. If that were to occur, the court would have a number of options open to it, including reflecting the economic consequences of this conduct on any substantive orders, or orders for costs, it makes at the end of the trial. It might even consider it appropriate to grant injunctive relief if the balance of convenience were to come down in favour of it doing so, although that would only be the case if the discretionary factors supported that course of action, which has neither been alluded to nor argued on the current applications.

61. The next question, therefore, is whether, in the light of the principles to be derived from *Crossmore* and other cases to the same effect, TopCo should be permitted to participate in the proceedings further, i.e., beyond the generally accepted ability of a company to participate in a section 994 petition for the purposes of giving disclosure and making submissions on the precise form of relief once PWHL has made out its case that its interests as a member have been unfairly prejudiced.

62. As Mr Edward Davies KC for TopCo submitted, this is not a case in which PWHL is seeking an injunction to restrain particular acts of conduct such as the use of TopCo's

funds. Nor is it a case in which the proposal that TopCo should not be permitted "to participate fully in the Petition proceedings" or " to take a further active role in the Petition (save for giving disclosure and, possibly, attending judgment / consequentials)" as it was variously put in the skeleton argument on behalf of PWHL is advanced on the basis of some recognised juridical principle.

63. This deficiency is of some significance because, having agreed to the filing and service of points of defence which reflected and were consistent with the stance taken by TopCo in the Part 7 claim, I do not think it is open to PWHL to suggest that TopCo cannot advance and support by way of defence to the petition the case which the consent order permitted it to plead. For similar reasons I do not think that TopCo should be denied the opportunity to amend its points of defence in response to the new claims advanced by PWHL. Any such restriction from the normal course of events would be misleading and an obvious recipe for confusion. I am satisfied that any such restrictions would not be justified in the present case.

64. I accept what Lindsay J said in *Re a Company (No 001126 of 1992)* about the court's rebuttable distaste for a company's active participation in an unfair prejudice petition and the height of the bar to be overcome, but he also said that what will be necessary to discharge the onus will obviously vary greatly from case to case. In my view there are three overarching reasons why TopCo's participation in the petition should not be subject to any specific restrictions in the present case, anyway on the basis of the current evidence as to the manner in which TopCo's board intends to proceed. Taken together, they support this conclusion whether or not PWHL had agreed to TopCo serving points of defence to the petition in the first place, although its agreement to that effect is further confirmation that this is the right answer.

65. The first reason is that there is good evidence that the directors of TopCo have had proper regard to the interests of TopCo itself, and the very substantial businesses of its own subsidiaries, in determining the appropriate manner in which to defend the petition. It may be the case that PWHL will establish that the interests of Investor were enhanced by the approach they took, but that does not of itself mean that TopCo should not be permitted to argue that the complaints made as to their conduct were unjustified. What matters is whether, in the context of a substantial trading business being managed independently from the respondent shareholder, the board's decision is driven by the protection of TopCo's own best interests, even though those interests may coincide with the interests of that shareholder.

66. I do not accept that the evidence establishes that the challenge made by PWHL and Mr Waddell to the ability of the present board of directors to cause TopCo to adopt a position in its own interests which is independent from that of Investor is made out. In my view, this remains unaffected by the fact that PWHL has now chosen to join Mr Fardad and Mr Vaughan as respondents to the petition, nor is it affected to any material extent by the fact that in a small number of instances PWHL has established a more than fanciful case for advancing the TopCo Defence Allegations in its points of claim.

67. The second reason flows from the first, and relates to the types of issue on which TopCo has been focused in presenting its own independent defence in both the Part 7 claim and the petition. This remains the case, notwithstanding that in a very small number of respects TopCo might have overstepped the mark in its support for Investor's position. They are not just issues on which TopCo had its own position to present. They were

also issues on which Investor said that it was not in a position to plead a positive case in answer to some of the allegations made by PWHL, while TopCo is. For present purposes, a short description of two of them suffices to explain the point.

68. The first related to the manner in which the investigation into Mr Waddell's conduct which led to the service of the MDE Notice was carried out. This is said to have been unfairly prejudicial conduct of the affairs of TopCo and BidCo by Investor. It is the position of Investor that nobody on its behalf was involved in the investigation and that neither it nor Mr Fardad knew what was going on. For that reason it did not plead to many of the detailed matters alleged against it because, on its case, they were both outside its knowledge and amounted to acts or omissions for which it was not responsible. It is not yet possible to say that this will prove to have been the case, but there is no reason to consider that Investor and TopCo do not have a realistic prospect of establishing that whatever occurred was the responsibility of TopCo and BidCo and was something of which Investor was wholly or largely ignorant and for which it cannot be held responsible.

69. Likewise, PWHL has made a number of complaints in the petition and the points of claim that information to which Mr Waddell is entitled under the SHD has been refused or only partially answered. It is Investor's case that, although it has encouraged TopCo to respond positively, this has always been TopCo's responsibility. For this reason, it does not raise any substantive defence to what PWHL and Mr Waddell have pleaded, whether in the context of the allegations made against it in the Part 7 claim or in the context of similar allegations made against it in the petition.

70. In both these instances, I accept the submission that it must be open to TopCo to plead its case independently from that of Investor. Apart from anything else the allegations to which TopCo wishes to respond are directly linked to heads of relief in which orders are sought against it (the restoration of Mr Waddell's rights pursuant to the SHD and the provision of information and documentation to which he claims to be entitled under the SHD). The fact that its position is more likely to chime with the position of Investor than it is with the position of PWHL does not affect the answer. Whatever may turn out to be the position at the trial, I accept that in a number of respects which are central to the allegations made by PWHL in the petition, Investor and TopCo have a realistic chance of showing that TopCo has an independent interest to protect. As I have already intimated, if that proves not to be the case, appropriate relief at the end of the trial should be able to compensate PWHL for any loss it sustains as a result of TopCo's defence to the petition not being conducted in a manner which had sufficient regard to its own best interests and/or its directors' duties under section 172.

71. The final reason why I do not think that TopCo should be prevented from participating further in a defence of the petition is driven in large part by pragmatic considerations. Given the allegations that PWHL and Mr Waddell have chosen to make, it is necessary for TopCo to be an active defendant to the Part 7 claim in any event, and the contrary is not suggested by PWHL. It is also accepted that, subject to the argument on a stay of the Part 7 claim, both sets of proceedings should be case managed and tried together. If the circumstances point to a stay being refused, it would be close to unworkable (TopCo's phrase with which I agree) for TopCo to participate in the defence of the Part 7 claim but not to participate in the defence of the petition. Any attempt to delineate between the defence of the two proceedings in that manner would be difficult, time

consuming, wasteful of resources and lead to a very inefficient means of resolving the dispute.

72. I agree with TopCo that the position is even more stark if a stay of the Part 7 claim is granted, anyway to the extent that it is arguable that the parties will be bound by the findings of fact made in the petition, which is the only real basis on which a stay might be justified. In my judgment any such result would be unjust, if TopCo had not had the opportunity to participate in the defence of the petition. It is no answer to say that TopCo's defence can safely be left in the hands of Investor when, as I have sought to illustrate by the two examples I have identified above, it has an independent position to maintain, in respect of which Investor says that it has neither the knowledge nor the responsibility to advance TopCo's defence on its behalf. Indeed it is even possible to envisage circumstances in which it may not be in its interests to do so.

73. Turning next to the application for a stay of the Part 7 claim, it is put on the basis that a stay would be the most proportionate and procedurally expedient way forward. This was a reference to the court's general powers of case management, which include a power to stay the whole or part of any proceedings either generally or until a specified date or event (CPR 3.1(2)(f)).

74. In opposing the application, Mr Davies made much of the fact that PWHL and Mr Waddell are now seeking a stay of proceedings, which they themselves started, which have been in progress for more than five months at considerable cost, in which they have initiated and lost a hard-fought application for interim injunctive relief and in respect of which they have sought and obtained an order for expedition from Mr Rosen. It was submitted on behalf of both TopCo and Investor that, having chosen to bring both claims and to vex them twice with the same or similar factual allegations in two separate sets of proceedings, it should not be open to PWHL and Mr Waddell to seek to warehouse the Part 7 claim now that it no longer suits them to pursue it.

75. I agree that these considerations point against the grant of a stay, more particularly where there are other appropriate means of case managing the two sets of proceedings. I also think it is relevant that for 2½ months after it had issued its petition, and for many weeks after it had changed solicitors, PWHL and Mr Waddell continued to accept and positively assert that the Part 7 claim and the petition should be case managed and tried together, an approach that is flatly inconsistent with their current application for a stay. They did so while corresponding about the need for an expedited trial of both sets of proceedings and they even agreed to use this hearing as a joint CCMC. I am not prepared to say that, in the light of the history, the application which is now made is an abuse of process, but it is one of the circumstances which gives rise to a powerful inference that PWHL and Mr Waddell are not doing enough to help the court to further the overriding objective in accordance with their duty under CPR 1.3.

76. This all causes the court to view with some scepticism, the submissions made on behalf of PWHL and Mr Waddell that a stay can now be seen to be the most proportionate and procedurally expedient way forward, when set against the alternative of the two sets of proceedings being case managed and heard together. Nonetheless, it remains the case that what ultimately matters is the right way forward so as to enable the court to deal with both sets of proceedings as expeditiously as practicable so long as it does so justly and at proportionate cost.

77. It was submitted by Mr George Spalton KC on behalf of Investor that a case management stay should only be granted in rare and compelling circumstances. In support of that proposition, he cited *Jefferies International v Cantor Fitzgerald* [2020] EWHC 1381 (QB), at [48], applying amongst other authorities *Reichhold Norway ASA and another v Goldman Sachs International* [2000] 1 WLR 173. These were both cases in which stays of English proceedings were sought on case management grounds pending the final determination of foreign arbitration proceedings. In that category of case, it is not unusual for a case management stay to be sought as an alternative to a stay on forum grounds. As Males LJ said in *Athena Fund v Secretariat of State for the Holy See* [2022] EWCA Civ 1051, [2022] 1 WLR 4570 ("*Athena*") at [59], having reviewed a number of cases in which the test of rare and compelling circumstances was applied where a stay was sought pending the outcome of foreign process:

> "There is, as it seems to me, no reason to doubt that it is only in rare and compelling cases that it will be in the interests of justice to grant a stay on case management grounds in order to await the outcome of proceedings abroad."

78. However, I was not referred to any cases in which this language had been used where the case management stay was sought in respect of concurrent English proceedings, more particularly where both actions are proceeding in the same court, and I do not think it is helpful to do so. There are a number of reasons for this, not least the fact that the tools which are available to the court in this context are more varied and flexible and crucially can be applied to both sets of proceedings. As well as the power to grant a limited or temporary stay, they include powers to consolidate proceedings (CPR 3.1(2)(g)), to try two or more claims on the same occasion (CPR 3.1(2)(h)) and to give directions as to the order in which issues are to be tried (CPR 3.1(2)(j)).

79. It was also recognised by Males LJ in *Athena* (at [59]) that the particular context in which an application for a case management stay is sought will inform the approach the court should take. Although the usual function of a court is to decide cases and not to decline to do so, and although access to justice is a fundamental principle which means that the court will therefore need a powerful reason to depart from its usual course, the single test remains whether it is in the interests of justice for a case management stay to be granted. It follows from this that the particular circumstances in which the power is sought to be exercised may mean that the test of rare and compelling case is inappropriate.

80. In my view it follows that, where the particular circumstances in which a stay is sought are concurrent English proceedings in the same court, the language of rare and compelling circumstances is a distraction from the real question and gives the impression that the flexibility of the court's case management powers are in some way restricted. It is certainly the case that parties should not be delayed in the determination of their dispute without good cause (see e.g., the authorities discussed in a similar but slightly different context by Mann J in *Scottish Ministers v Servier* [2013] EWHC 2955 (Ch) at [14]), but the power to stay the Part 7 claim is just one of the many case management powers which must be exercised in both sets of proceedings in furtherance of the overriding objective.

81. As to that, CPR 1.1(2) does of course require the court to deal with cases justly and at proportionate cost, including so far as practicable (i) ensuring that the parties are on an equal footing and can participate fully in proceedings, and that parties and witnesses

can give their best evidence, (ii) saving expense and (iii) ensuring that the case is dealt with expeditiously and fairly. To that end the court is required to manage the case in a manner which deals with as many aspects as it can on the same occasion (CPR 1.4(2)(i)) and to ensure that the trial proceeds quickly and efficiently (CPR 1.4(2)(l)). It will often be the case that these and the other elements of the overriding objective point to the refusal of a stay, but whether that or some other case management direction is the appropriate way forward will depend on all the circumstances of the case.

82. Turning to the reasons advanced by PWHL and Mr Waddell for staying the Part 7 claim, it was submitted on their behalf that it is or should be common ground that the petition is now the primary set of proceedings between the parties. That may be the case in the sense that the matters complained of by PWHL are examples of conduct capable of amounting to unfair prejudice and that the breadth of the relief that can be granted by the court is extremely wide, but it has little bearing on the question of whether the Part 7 claim should be stayed rather than tried at the same time as the petition. Indeed, the combination of the similarity of many of the underlying facts and the circumstance that Mr Waddell, MidCo, BidCo and BMW are parties to the Part 7 claim, but are not parties to the petition, all point to joint case management and a joint trial, rather than a stay of one set of proceedings, as the right way forward.

83. The second and third reasons advanced by PWHL and Mr Waddell amount to different aspects of essentially the same point. First they point out that both Investor and TopCo assert that the Part 7 claim has been rendered largely otiose by the petition and contend that if there is no possibility that, after trial of the petition there will be any outstanding issues to be determined in the Part 7 claim, PWHL and Mr Waddell can safely discontinue, because the entirety of the dispute will have been determined in the petition. That is right so far as it goes, but it does not take matters very much further unless the court can be satisfied that the underlying assumption is correct.

84. The assumption will be incorrect if there are any Part 7 issues left outstanding as between any of the parties once the petition has been determined or resolved. In that situation, a stay will have cut across the principle that disputes should be resolved as expeditiously as possible. It will have the undesirable consequence of proceedings between the parties taking longer and costing more than would have been the case if the Part 7 claim and the petition had been tried together. As to this, QE accepted, and indeed asserted in the correspondence, that if a stay of the Part 7 claim were to be granted there may still be outstanding matters to be resolved in the Part 7 claim and gave examples of the circumstances in which that might be the case, whether or not PWHL is successful in the petition. In my view, it is clear that there is at least a material risk that judgment in the petition will not finally resolve the issues in the Part 7 claim as well.

85. Taking a slightly different tack, PWHL and Mr Waddell then submitted that, once the petition has been determined or resolved, it is inevitable in practical terms that anything outstanding on the Part 7 claim will be agreed. I certainly accept that once that stage has been reached, there is a reasonable possibility that agreement of all outstanding issues will be achieved, even though the causes of action are not the same, the parties are not the same and the facts are very similar but not identical. However, I do not accept that agreement of the outstanding Part 7 issues as between the parties to those proceedings is inevitable or even very likely once the petition has been determined or resolved. One of the reasons for this is the inconsistent and unpredictable conduct of

which Mr Waddell has shown himself to be capable, some of which gives all the signs of having little regard to the best interests of TopCo and the Group as a whole.

86. Investor also submitted that this conduct emphasises the need for an expeditious resolution of the totality of the dispute, because of the potential for it having an adverse and disrupting impact on the interests of the Group as a whole. Of course, it is often desirable for as much of a dispute as possible to be resolved as early as possible, but I agree with Investor that this case is a paradigm for the need to achieve finality in relation to all issues at the earliest opportunity so as to minimise the damage which its continued existence does to the value of the Group and its underlying business.

87. It is also relevant that, in circumstances in which the court cannot be satisfied that pragmatism is bound to prevail, it is impossible to say that findings made in the petition will bind the parties to the Part 7 claim. In part this is because the court cannot at this stage be satisfied either that all of the findings of fact made in the petition will have been necessary to the decision, or that all of the parties in the Part 7 claim were either parties to the petition or privies to a party so as to be bound by the decisions made at the trial of the petition. In part it is also because there are issues which arise in the Part 7 claim which do not arise in the petition.

88. The next reason for a stay advanced by PWHL and Mr Waddell is based on the general principle summarised by Hoffmann J in the *Crossmore* case. It is said that, on a proper application of this principle, TopCo should not be actively involved in the trial of the petition. If listing the Part 7 claim to be heard at the same time as the petition would reintroduce TopCo as an active party at the trial it would have the effect of undermining that principle and increasing costs.

89. In light of the conclusion I have reached on TopCo's ability to participate in the conduct of the petition, this point does not arise. However, TopCo said that, this was not in any event a good reason for granting a stay. In part this was because the principle considered by Hoffmann J in *Crossmore* should not be applied so as to prohibit TopCo from all participation in the petition. But, even if that were not to be the case, TopCo submitted that it would be unjust for it to be bound in the Part 7 claim when it had not been permitted to participate in the trial of the petition.

90. Mr Daniel Oudkerk KC for PWHL and Mr Waddell said that this submission should be rejected because, although it is true that TopCo is a separate legal entity, the reality is that it had no independent submissions of its own to make, separate to those to be made by Investor and PWHL, being its two controlling shareholders. He also submitted that there was nothing unjust in TopCo being bound once Investor, PWHL, and two of TopCo's three directors (Mr Fardad and Mr Vaughan) were already represented in the petition. I do not consider that is correct, for very similar reason to those which counted against restricting TopCo from participating in the defence of the petition. The circumstances which surrounded the core complaints made by Mr Waddell make clear that TopCo has its own independent interests to protect, which in the case of a substantial trading business such as that conducted by BMW (itself a wholly owned sub-subsidiary of TopCo) cannot be directly equated with the interests of one or other of its shareholders.

91. PWHL and Mr Waddell also submitted that a stay of the Part 7 claim would be likely to save costs both for TopCo and the public purse by limiting the amount of court time

required to resolve the dispute overall. This would include the substantial costs of instructing counsel to represent TopCo at trial, making submissions, cross examining witnesses and incurring additional solicitors' work. They point to the significant amounts that have already been spent.

92. This is of course a highly material factor, which must go into the balance when assessing the right way forward. However, it can be over-played as a point, unless proper account is taken of the ability of the court to take steps through appropriate case management directions to minimise the duplication of evidence and the repetition of submissions by the various respondents to the petition and the defendants to the Part 7 claim. My present view on this aspect of the case is that this consideration is likely to be largely illusory in the sense that, while it may have a marginal impact on the costs and timing of the trial of a petition alone, it will have no impact on the costs of resolving the overall dispute.

93. Mr Davies also submitted that TopCo's counterclaim against Mr Waddell for the return of valuable vehicles and the company's papers, together with claims for breaches of the restrictive covenants in his contract of employment, all of which flowed from the termination of his employment, also pointed against the grant of stay. He posed the question: why should Topco and BidCo be required to await the lifting of any stay of the Part 7 claim, when they are entitled to have that counterclaim determined expeditiously and efficiently, not in several years' time? I think that there is some substance in this point.

94. Having regard to all of these considerations, I am satisfied that the original proposal acceded to by all parties, i.e., that the proceedings should be tried and case managed together, is a significantly more appropriate way for the Part 7 claim and the petition to proceed. This is not just because it involves holding the parties to the agreement which they had reached on and shortly after the issue of the petition, it is also because it remains the best way of enabling a just and expeditious resolution of the whole dispute. To assist in that process, the Part 7 claim will be transferred from the court's Business List to the Insolvency and Companies List so that both proceedings can more easily be case managed together by a single ICC judge.

95. The final matter which was not agreed, but on which the parties did not address the court at the hearing, related to costs. The skeleton arguments prepared on behalf of both Investor and TopCo made submissions on the correct approach. The skeleton argument on behalf of PWHL and Mr Waddell did not, although it recorded that these issues had not been resolved and evidence filed on their behalf indicated the position they took. At the hearing itself, Mr Oudkerk said that his client would wish to address the question of costs in the light of the court's decision on the substantive issues.

96. In those circumstances, I will deal with costs after this judgment has been handed down. The parties should take steps to attempt to agree the right order to make, both as to costs and as to the further case management issues which are reflected in the draft directions included in the bundle for the hearing. If they cannot do so, it may be necessary to have a short further hearing (which can be conducted remotely) or for the matter to be dealt with on the papers.